

turns first to the allegation of disloyalty on the part of the grievant.

**Did the Grievant Speak Out On a Matter of Public Concern when he met with the Mayor?**

To counter the accusation of disloyalty, the Union argues strenuously that when the grievant met with the Mayor, he did so for the purpose of discussing matters of "public safety and protection" which rose to the level of "significant public concern" This purpose, according to the Union, reflected the highest standard of loyalty to the public and to the Department. The Union accuses the Chief of Police of a lack of understanding of what loyalty meant in the context of the grievant's meeting with the Mayor. As a result, discipline was not only unwarranted but represented an act of retaliation against grievant by the Chief of Police in direct response to the fact that the grievant raised matters of significant public concern in his meeting with the Mayor.

The question for the Arbitrator is the standard to be applied to the claim of the grievant that he spoke out on matters of public concern. In *Posey v. Lake Pend Oreille School District*, No 84 (9<sup>th</sup> Cir. Oct 15, 2008), the 9<sup>th</sup> Circuit Court of Appeals offers fresh and relevant guidance on this issue. Posey involved a public employee who met with his school principal to discuss his concerns over the adequacy of school safety and emergency policies. He later wrote to the chief administrative officer on personal grievances and safety and security policies at his school. Later the district made the decision to combine his position with those of 3 other employees. Grievant was not selected for the position. He filed an unsuccessful grievance and later sued, claiming that he was retaliated against for engaging in constitutionally protected speech.

The 9<sup>th</sup> Circuit held that to sustain a showing of retaliation in violation of the 1<sup>st</sup> and 14<sup>th</sup> Amendments, a public employee had to show that (1.) They were engaged in protected speech. (2) The employer took adverse action against the employee, and (3). The speech of the employee was a "substantial motivating factor" in the adverse action. The first element of the test requires a court to determine, as a matter of law, whether the speech "touched on a matter of public concern", precisely the claim raised in this case. If a court finds that the speech did touch on a matter of public concern, it should then determine whether "the interests of the public employee as a citizen, in commenting upon matters of public concern outweigh the interests of the employer, in promoting the efficiency of the public services it performs through its employees." Should the court find that this is not the case; the inquiry is halted at this stage because the plaintiff cannot establish that the speech in question was protected by the 1<sup>st</sup> Amendment, the first element of the claim of retaliation.

The 9<sup>th</sup> Circuit also observed that in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the Supreme Court added a "third stage" to the first element needed to establish retaliation. This third stage requires a determination of whether the plaintiff spoke out as a public employee or instead as a private citizen. In *Garcetti*, supra, the court held that because an investigative memorandum prepared by the plaintiff had been prepared in his capacity as an employee performing an official duty and not as a citizen, the memorandum fell outside 1<sup>st</sup> Amendment protections. In light of the *Lake Pend Oreille-Garcetti* formulation, the threshold question for this arbitrator is whether the grievant acted as a public employee speaking to the Mayor pursuant to his official duties. If so, he was not speaking as a citizen for purposes of First Amendment protection and his comments to the Mayor were not insulated from discipline.

The arbitrator regards this as a very close question not subject to a straightforward resolution. In *Garcetti*, supra, the employee was acting as a public employee pursuant to his official duties

because he was assigned to and did prepare an investigative memorandum reviewing the actions of the office of the District Attorney in obtaining a search warrant. In the case at hand, the grievant met with the Mayor in his capacity as a public employee, namely a law enforcement officer, to discuss the "state of affairs" within the police department. However, the meeting was confidential, outside of the normal chain of command to the Mayor, and, under the *Lake Pend Oreille-Garcetti* formulation, it was not part of the grievant's regular official duties to speak with the Mayor at a confidential, off the record meeting. Does the fact that grievant was not acting pursuant to his official duties automatically invoke his status as a public citizen when he spoke, so as to trigger First Amendment protections?

To answer this question, the arbitrator believes that it is important to understand the policy reasons that underscore the First Amendment protections accorded to public employees. Put simply, why is it, from time to time, that First Amendment protection is required? The constitutional principles applied to this question tell us that it is important for public employees in certain circumstances to speak as a citizen addressing matters of public concern. The First Amendment enshrines and protects this public policy preference, *Pickering v. Board of Ed. Township High School Dist. 205, Will Cty.*, 391 U.S.563(1968) [Citing the interest of public employees in contributing to public debate]., *Garcetti*, supra, [Citing the importance of promoting the public interest in receiving well-informed views of governmental employees engaged in civic discussion], *San Diego v. Roe.*, 543 U.S. 77,82(2004) [Citing the need to protect against the risk of depriving the community of informed opinions on public issues.], *United States v. Treasury Employees.*, 513 U.S. 454,466 (1995), [Citing the necessity to avoid placing a burden on the public's right to read and hear about what employees would otherwise have written or said], See also, *Pickering*, supra, [Citing the need to protect the right of the employee to contribute to public debate and the necessity for informed vibrant dialogue in a democratic society].

The common thread in these policy pronouncements is the necessity to protect the ability of public employees to participate in public debate in the public arena of ideas. It is when such employees seek to do so that First Amendment protections are implicated. Therefore, the question becomes whether the grievant was seeking to participate in public debate or discourse in the public arena of ideas when he met with the Mayor. The facts in this case lead the arbitrator to conclude that although grievant met with the Mayor in his capacity as a police officer; a public employee, he was not seeking to participate in public debate in the public arena of ideas. First, the meeting and the ideas expressed at the meeting were confidential and not intended to be aired in the public arena. Second, the matters raised were matters internal to the police department operations and intended for the ear of the Mayor and not for the general public as a subject of public debate.

Finally, although the motivation of the grievant in meeting with the Mayor is not the touchstone of this analysis, it is important from the public policy perspective to understand whether grievant's motivation aligns with the public debate in the public arena test that warrants First Amendment protection. Here the grievant was animated by private, personal concerns that related directly to his non selection for the Investigations position. Absent invidious discriminatory or public corruption motivation on the part of city officials, not evident in this case at all, a personal discontent over the outcome of a selection process does not implicate the important public policy preference for protecting the right of public employees to participate in a public debate in the public arena. For all of the above reasons, the arbitrator finds that the expressions or "speech" uttered by the grievant to the Mayor did not enjoy First Amendment protection under *Lake Pend Oreille*, and *Garcetti*, supra.

It is true that at the outset of this controversy, Al Hutton, a police officer who arranged the

private meeting between grievant and the Mayor, threatened to go "public" to the media if these matters were not resolved. The arbitrator regards this "threat" as a tactical attempt to use the "perception" of an impending public scandal to gain leverage over the city to accede to demands for internal remedies to alleged departmental inadequacies. Had this matter ultimately moved into the light of public debate, a different question would face the arbitrator. As outlined earlier, this matter never reached the level of public debate in a public arena. Moreover, it appears that the "inadequacies" had more to do with Hutton and the grievant's personal dissatisfaction about advancing internally within the department as opposed to genuine dissatisfaction over departmental inadequacies and a desire to bring them to the attention of the public for debate.

For all of the foregoing reasons, the arbitrator finds that grievant cannot satisfy the first element of the retaliation test outlined in *Posey* and *Garcetti*, supra. Grievant was not speaking out on a matter of public concern when he met with the Mayor. The matters raised by the grievant were a disguise, a subterfuge for his private concern over not being selected for a position that he strongly believed should have been his. It is not the duty or role of the arbitrator to approve or disapprove of these strong feelings. It is, however, the duty of the arbitrator to place these strong feelings in their proper context for the purpose of arriving at conclusions about the issues presented. These feelings are the concerns of a police officer dissatisfied over his career and not the concerns of a citizen seeking to engage in public debate. In reaching this conclusion, this arbitrator recognizes that there are no bright line standards for such a determination and that each case is unique and must be decided solely on the established facts of the particular controversy.

The arbitrator also recognizes that workplace matters that arise from a purely private concern may contain a public nuance notwithstanding the private origin of the concern. However, here, the internal character of the issues such as deficient personal protective equipment including radios, OSHA complaints, an alleged unjust and unfair alliance between the Chief and the Deputy Chief and a questioned trip do not rise to the public concern level of matters as might allegations of police corruption or invidious gender or race based discrimination within the police department. Additionally, when these matters are examined in the context of how they came to be raised<sup>17</sup>, where they came to be raised<sup>18</sup>, and the motivation for raising them<sup>19</sup>, the dominant private and personal nature of the concerns that motivated the grievant are clear. The question remains whether the meeting with the Mayor constituted an act of disloyalty.

**Was the grievant disloyal to the Police Department when he met with the Mayor on January 31, 2008?**

First, un rebutted testimony in the record established that Al Hutton, a police sergeant and grievance representative for the Union, met with the Mayor before the meeting with the grievant occurred. Hutton informed the Mayor that "things" in the police department were "not good". He further informed the Mayor that the Police Chief and the Deputy Chief were "joined at the hip", an apparent reference to a close alliance between the Chief and the Deputy Chief to the detriment of other members of the Department. Hutton told the Mayor that the grievant could corroborate the fact that things were "not good".

Second, the meeting with the Mayor and grievant took place as a direct aftermath of the

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<sup>17</sup> In the aftermath of the failure to select grievant for the position of Lieutenant of Investigations.

<sup>18</sup> To a new mayor, "naïve" by her own admission and not the Chief of Police.

<sup>19</sup> The purely private concern and anger of the grievant over his loss of the position of Lieutenant of Investigations.

selection of Dan Wellborn for the position of Lieutenant in charge of Investigations. The evidence in the record, including testimony relating to post selections meetings between the grievant, the Deputy Chief, the Chief and the confrontational email communication between the grievant and Dan Wellborn over Wellborn's refusal to withdraw from consideration for the position paint a clear picture. The grievant felt strongly that he had a right to the position since Wellborn and the remaining candidate had initially expressed disinterest in the position. Grievant was angry with the Chief of Police, the Deputy Chief and Dan Wellborn over the roles that he felt they played in thwarting his desires to take the position.

For the arbitrator, these contextual facts serve to illuminate the motives of the grievant when he met with the Mayor. Based on the record evidence, the arbitrator concludes that the primary motivation of the grievant was to obtain a measure of personal justice for what he saw as an unfair denial of the position that he sought. To obtain this "personal" justice, grievant sought to raise matters that cast doubt on the internal leadership of the Chief and the Deputy Chief in the eyes of a new, and, in her own words, "naïve" Mayor. There are additional facts which bear on the determination of the grievant's loyalty to the Department.

Gary Yamamoto, a police officer and a member of the bargaining unit, testified that he was summoned into the evidence room at the department by the grievant and Al Hutton after a union meeting. Yamamoto testified that he was told that Hutton and the grievant were "going to the Mayor" about the Chief or Deputy Chief. They inquired of Yamamoto whether he had any complaints against the department leadership that they could take to the Mayor. Yamamoto replied that he had no such complaints. Subsequently, Hutton did go to the Mayor and make the earlier recited allegation that things were not "good" at the Department and that the Grievant would corroborate that fact. It is difficult to avoid the conclusion that the grievant and Hutton embarked on a course of action to weaken the leadership of the Police Department by planting seeds of doubt about that leadership in the mind of the new Mayor. In fact, grievant lobbied the Mayor to remove the Police Chief from office and to remove the Deputy Chief from the union bargaining unit. Hutton's statements to the Mayor combined with grievant's representations to the Mayor at the meeting are part and parcel of what appeared to be a common scheme that was disloyal to the Department leadership.

The arbitrator examined City Exhibit 17, the document that formally charged the grievant with disloyalty and recommended his demotion. It recites general assertions and minimal specific acts committed by the Grievant. It describes the "conduct of the grievant in a conclusory fashion that reflects the Chief's view of the attitude and posture of the grievant; an attitude which the Chief found regrettable. The Chief accuses the grievant of inserting himself into a subordinate employee's grievance, failing to exercise appropriate supervisory judgment and discretion, conscious disregard of the chain of command and attempting to discredit fellow members of the Police Department. Only the allegation of an attempt to discredit fellow police officers contains a specific allegation that the grievant did so by making comments to the Mayor and the outside investigator.

This document is vague as a charging document, and, in large part, does not give the grievant specific notice of facts upon which the decision to demote was based. Standing alone, it makes minimal factual allegations of wrongdoing. In the main, it assumes wrongdoing without stating precisely the factual basis for the alleged wrongdoing. There is, however, no actual prejudice to the grievant based on this document. The recommendation does make the specific allegation that the grievant made comments to the Mayor that the Chief considered to be disloyal. By the time of the Loudermill hearing, the grievant was aware of these specific charges of disloyalty that confronted him. This defect is also not fatal to the demotion allegation. As a matter of proof at the arbitration, The City established by testimony of the

Chief that he was responsible to establish the vision of the Department and he relied on his lieutenants, one of whom was the grievant, to execute that leadership vision. According to the Chief, the accusations against him and the Deputy Police Chief, advanced by a member of his leadership team to the Mayor, was outside of, and contrary to the chain of command within the Department.

Moreover, the Chief testified that based on departmental training he conducted with grievant, he was aware of the chain of command and the need to remain inside that command structure when addressing departmental matters. Indeed, the arbitrator finds as a fact that when called by the Mayor, the grievant expressed hesitation about the implications for the chain of command for a meeting with the Mayor, thereby demonstrating his knowledge of, and awareness of the implications for the chain of command. When combined with City Exhibit 17 these are precise and reviewable facts outlining the claim of disloyalty. Moreover, the Mayor testified that the grievant recommended she get rid of the Police Chief and remove the Deputy Police Chief from the bargaining unit. One could not make such a suggestion to the Mayor and yet claim not to be disloyal to departmental leadership within the meaning of Article 17, Section 3 of the Agreement.

The testimony of the Mayor and the Chief of Police, when combined with that of Gary Yamamoto paint a picture of a campaign whose objective was to undermine the leadership of the Police Department. This testimony was not rebutted. Clear and convincing evidence existed from which the City could reach a reasonable conclusion that the grievant committed an act of disloyalty when he met with the Mayor to complain about the leadership of the Police Department. Based on this evidence the arbitrator concludes that the City could find that just cause for demotion existed within the meaning of Article 6 and Article 17.3 of the Agreement.

#### **Was the grievant untruthful to the Mayor at the Pre-Disciplinary meeting of March 6, 2008?**

As to this accusation, the union casts the central issue as who made first contact, the Mayor or the Grievant. The Union argues that there is no dispute that the Mayor made first contact with the grievant and that the assertion of the City that the grievant contacted the Mayor is in error. The arbitrator regards this as a good faith argument. It nevertheless, miscasts the core allegation. The core allegation and issue is whether the grievant was truthful when he expressed to the Mayor that he had not expected a phone call from her. Was that a truthful assertion? A review of the facts in the record is required.

Based on the testimony of the Mayor and Amber Courtney, her assistant, the following facts were established. Al Hutton sought out the Mayor and informed her that the grievant would corroborate his representation to her that things were not good at the police department. This began the controversy. Hutton then urges the Mayor to call the grievant and gives the Mayor the grievant's telephone number. The Mayor did not call immediately. According to the Mayor and Amber Courtney, Hutton returns at a later day to the Mayor's office in a "panic" and states that the grievant was expecting a call from the Mayor. During the course of the internal investigation into whether the grievant was untruthful, Officer Hutton testified that he called the grievant and told him that the Mayor "may" call him.<sup>20</sup> In that same investigation, the grievant testified that he received such phone message and called Hutton to say that he must be kidding.<sup>21</sup>

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<sup>20</sup> See City Exhibit 25 at PP 5 of 19.

<sup>21</sup> Ibid, at Pp 8 of 19

This evidence conclusively establishes that the grievant did indeed expect a telephone call from the Mayor. The grievant was warned by Sergeant Hutton to expect a call. Grievant called Hutton and gave him his reaction to the prospect of the call. Therefore, when the grievant told the Mayor that he did not expect her call he was untruthful. That act of untruthfulness violated Article VI of the Department Code of Conduct which requires that officers be truthful at all times. This act did not result in additional discipline beyond the demotion for disloyalty. Nevertheless, the proof of this charge of untruthfulness, taken together with the proof of disloyalty provided just cause for the act of demotion.

The Union makes a final claim which must be examined closely. It argues that the grievant was denied progressive discipline under Article 17, Section 1 of the Agreement. The Union also argues that even where severe disciplinary action is justified, the ultimate penalty under this section should turn on an examination of the seriousness of the incident taken together with an examination of the employment record of the employee as evidenced by the personnel file. As the arbitrator examines this provision of the Agreement, the actions of the grievant rise to the level of "specific incidents" that "may justify severe disciplinary action in and of itself". Under Article 17, Section 1 of the Agreement, progressive discipline does not apply to such specific incidents. However, the discipline to be taken for such specific incidents does depend upon the "seriousness of the incident" and the "records contained in the employee's personnel file". The arbitrator interprets this provision to require the city to undertake a mitigation review of the employee's record and to measure that review against the gravity of the offense committed before taking action to discipline.

Article 17, Section 1 of the Agreement is a codification of this mitigation principle into the agreement between the parties. It is a binding obligation on the City to make a mitigation determination before the imposition of discipline. The arbitrator examined the charging document, City Exhibit 17. This is the written recommendation that led to the demotion of the grievant.

There is no indication that a mitigation evaluation was conducted by the Chief of Police before he recommended the demotion of the grievant. In his oral testimony, the Chief testified that he did not check the grievant's file and saw no need to do so. According to the Chief, the actions of the grievant required the "drastic action" of demotion even though the grievant was a good employee. The Chief regarded his recommendation for demotion as lenient in light of his feeling that other Chief's would have fired the grievant.

Notwithstanding the feelings of the Chief, the arbitrator finds that the City violated Article 17, Section 1 of the Agreement by failing to conduct a mitigation evaluation of the grievant before deciding on the penalty of demotion. The testimony by the Chief that the grievant was a good employee is an afterthought that cannot cure the violation which occurred before the Mayor received and reviewed the demotion recommendation from the Chief of Police. As to the issues raised in this controversy, the arbitrator finds the following:

1. The Grievant, in concert with Sergeant Al Hutton, committed an act of disloyalty within the meaning of Article 17, Section 3 of the Agreement by colluding to arrange and take a meeting with the Mayor to raise allegations attacking the Police Department leadership and suggesting the removal of the Chief and Deputy Police Chief from office.
2. The Grievant was untruthful to the Mayor when he informed her that he had not expected a telephone call from her, when, in reality, the grievant, along with the assistance of Sergeant Al Hutton, lobbied the Mayor for the purpose of having the Mayor contact the grievant and was told by Sergeant Hutton of the pending call.

3. As to the allegations of disloyalty and untruthfulness, the arbitrator finds that just cause existed for the penalty of demotion.

4. The City violated Article 17, Section 1 of the Agreement when the Police Department failed to conduct a mitigation review to evaluate the seriousness of the actions of the grievant in comparison to his previous employment record before arriving at a decision on the level and severity of discipline.

**What Shall the Remedy Be?**

The arbitrator finds that the actions of the grievant were grave in nature and in their consequences for Police leadership and the Mayor. They cannot be excused.<sup>22</sup> However, the gravity of these actions did not release the City from the obligation to remain in compliance with the written mitigation obligation contained in the agreement. A restoration of the grievant to his former position as a remedy for the violation would ignore the gravity of his actions and would be an unwarranted invasion of the inherent management authority of the City. Nevertheless, it would be unjust and inequitable to allow the violation by the City to go without a remedy. To sanction the violation, the grievant is awarded back pay and consequent benefits based on his former position from the effective date of the demotion to the date that the Union filed its official demand for arbitration in this matter. The penalty of demotion is AFFIRMED AND THE CITY IS THE PREVAILING PARTY IN THIS GRIEVANCE.

IT IS SO ORDERED



Richard M. Humphreys  
Labor-Management Arbitrator-Mediator

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<sup>22</sup> The arbitrator recognizes that instances may arise where the pursuit of complaints through the established chain of command is rendered futile. The arbitrator makes no finding on this issue. The Opinion and Award does not stand for the proposition that leadership is insulated from challenge or questioning simply by virtue of leadership. Each example of this type of controversy must be decided on its unique facts and this decision carries no precedential weight on the issues raised.