AMERICAN ARBITRATION ASSOCIATION
LABOR ARBITRATION TRIBUNAL

In the Matter of the Arbitration Between: **Case No. 01-15-0005-0495**

FLORIDA POLICE BENEVOLENT ASSOCIATION, INC.
UNION

Grievants: RICHARD BOBLITT
ANTHONY KAISER
(Termination)

And

CITY OF DEFUNIAK SPRINGS
EMPLOYER

APPEARANCES

For the Grievants:
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For the Employer:
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OPINION AND AWARD

INTRODUCTION

Pursuant to the Master Contract or collective bargaining agreement ("CBA") between the Florida Police Benevolent Association ("Union" or "PBA") and the City of Defuniak Springs, Florida ("Employer" or "City") the parties have designated Jeanne Charles Wood to hear and to decide certain disputes arising between them. The parties presented evidence and arguments on

October 26 and 27, 2016 and January 9, 2017, in DeFuniak Springs, Florida. The record contains over 800 pages of transcript and over 40 exhibits. The parties were provided with a full opportunity to examine and cross-examine witnesses. The hearing was closed upon the receipt by the Arbitrator of post-hearing briefs, the last of which was received on March 14, 2017. The parties agreed to issuance of this Award by June 19, 2017.

ISSUE

Was there just cause for the discharge of Grievants and if not, what is the remedy?

BACKGROUND

The grievance concerns whether the City had just cause to terminate the employment of Richard Boblitt and Anthony Kaiser, collectively referred to as "Grievants." DeFuniak Springs is a city with a population of about five thousand residents located in northern Florida. The DeFuniak Springs Police Department ("DSPD" or "Department") employs about twenty sworn officers. The Department is run by a City Marshal (also known as the Police Chief) who is elected by the citizens of DeFuniak Springs every four (4) years. The current Chief, Mark Weeks, has been in office since 2009. On August 30, 2010, the Florida PBA was certified as the exclusive bargaining representative for the employees of the City. The three (3) individuals involved in this grievance, Chuwan Boros ("Boros"), Richard Boblitt ("Boblitt") and Anthony Kaiser ("Kaiser") were sworn staff of the DSPD and served as executive board members together during the events giving rise to the grievance. Kaiser supervised both Boros and Boblitt.

In January 2015, Kaiser's squad was moved to the midnight shift. In February 2015, Boros requested a transfer from Kaiser's squad, which was granted in March 2015. Chief Weeks was up for re-election in April 2015. The PBA endorsed his opponent (Mike Howell) on March 25, 2015,

making a $1000 donation to Howell's campaign. On April 2, 2015, a letter was published in the local newspaper that was submitted by several DSPD employees denouncing the support of Howell. These employees were Paul Lewis, Phillip Jones, Austin Arnold, Chuwan Boros, Waidene Bayne, Chick White, Jonathan Rockett, Pete Balkom, Michael Lolley, Amber Cook and Debbie Gillman. Also on April 2, 2015, Boros filed a complaint against Boblitt and Kaiser alleging racial harassment. The Internal Affairs (IA) investigation concerning the complaint was initiated on April 8, 2015. Grievants were notified on April 13, that they were under investigation concerning the Boros complaint. Beginning April 14, several DSPD employees were notified that they were required to answer questions relating to the Boros complaint. The re-election of Chief Weeks took place on April 14. The IA investigation was closed on June 1, 2015.

On June 2, 2015, the Department issued a final agency action letter to Grievants notifying them that their employment would be terminated effective the next day. The Employer claims that Boblitt racially harassed Boros and that Kaiser, as Boblitt's supervisor and who Boros claimed was aware of the harassment, failed to take corrective action. Boros is of Asian descent and was born in South Korea. Boblitt and Kaiser are Caucasian. On June 9, 2015, Grievants submitted a grievance challenging their termination citing various procedural and contractual violations. A second notice of final agency action letter was issued by the Employer on August 31, 2015. On September 4, 2015, Grievants submitted amended grievances. Summarized below is the relevant testimony of the witnesses sufficient to understand the facts. Additional facts or testimony may appear in the Findings and Opinion section below.

The City's Case

Chuwan Boros, police officer with DSPD, testified that there was some light teasing upon meeting Boblitt in 2007, but that he was used to that type of humor. Boros testified that he believed

the nature of the communication between himself and Boblitt changed when Boblitt was demoted.[1] Although Boros was Boblitt's supervisor, Boros testified that he tried to be Boblitt's "companion." Eventually, Boros was demoted in 2012 and Kaiser became the supervisor for both he and Boblitt. Boros further testified that Boblitt continued to tease him about his Asian descent and he could not take it anymore. According to Boros, he was guarded when speaking to Kaiser about the teasing because he knew Boblitt and Kaiser were friends. In January 2015, Boros requested a transfer from Kaiser's shift but fabricated the reason for the request so he would avoid upsetting Grievants. Boros explained that he waited until April 2, 2015, to file a complaint because he feared retaliation and was trying to be a team player.

When asked why he attended Boblitt's birthday party in December 2014, Boros testified that he felt the harassment would have been worse if he did not show. He stated that he consumed less than one fruity alcoholic beverage during the party. Further, he stated that he was invited back to Boblitt's home just two (2) days later to eat pizza and watch something on TV, but could not remember much else about the day.

Boros testified that he was employed with the Pensacola Police Department in 1996 and left voluntarily, and when shown a letter discussing his termination from the Pensacola PD, Boros denied having any recollection of the report. When asked why he did not list his employment with the Pensacola PD on his application to DSPD, Boros could not recall the reason. Boros ultimately agreed that in June of 2012, he was demoted from sergeant to patrol officer for not being competent as a supervisor.

Michael Lolley ("Lolley"), Captain with DSPD, testified that he conducted the IA investigation in this case. After reviewing the written complaint, Lolley met with Boros to discuss

[1] Based on his performance evaluations, Boblitt was demoted some time during 2010. At that time, Boros was promoted to sergeant and became Boblitt's supervisor.

the facts of the complaint. He testified that he interviewed all current employees of DSPD and concluded that Boblitt caused a hostile working environment and that Kaiser failed to supervise and enforce the policies. Lolley further testified that Grievants received training on dealing with people of various ethnic backgrounds.

Mark Weeks ("Weeks"), Chief of Police with DSPD, testified that Boros contributed to his campaign in 2015, but not in 2011. He understood that Grievants were opposed to his re-election. He denied that his political campaign had anything to do with Grievants' termination. He stated that he understood the timing of the complaint so close to the election looked bad. He also admitted that he was upset by the manner in which the PBA handled the endorsement of his opponent. He heard that not all members were allowed to vote and Kaiser did not count all the votes.

Charles White ("White"), detective with DSPD for three and a half years, testified that he observed Boblitt bending over like he was picking rice and stating "picking the rice." However, Boros was not present at the time and Boblitt never mentioned Boros' name. In sum, White denied having ever observed Boblitt harass Boros.

Debbie Gillman ("Gillman"), a DSPD employee who works at the dispatch center, testified that she heard Boblitt making comments about picking rice paddies and eating dog, and mocking Boros' accent. She stated that she witnessed this behavior four or five times and that Kaiser was present a few of the times. On cross-examination, Gillman admitted that she could not recall what was said when Kaiser was present and had no idea of when the comments were made in her presence. She also stated that she had no idea that Boros was offended and thought that he and Boblitt were joking with each other on the occasions she heard the exchanges near her office.

Austin Arnold ("Arnold"), DSPD detective, testified that he recalled Boblitt doing an impersonation of what he assumed to be Boros picking rice, but neither Boros or Kaiser were

present at the time. Arnold also agreed that Boblitt's pattern of humor was consistent with the kind of rough jokes that go on at the Department among officers.

Amber Cook ("Cook"), DSPD dispatcher, testified that she heard Boblitt make comments about eating cats and dogs and mocking Boros' voice. However, when shown her testimony from the IA investigation denying having witnessed any harassment of Boros, Cook stated that she remembered more information after the investigation. Cook did not believe that the behavior she witnessed would have required her to file a report for harassment. She did not recall Kaiser being present when Boblitt mocked Boros.

Tesha Johnson Chambler ("Chambler"), another DSPD dispatcher, testified that she observed "stupid little comments" Boblitt made about Boros. She recalled about five incidents. Kaiser was not present for any of them. She stated that she observed Boblitt make comments about Boros' tiny Asian penis and other comments about Boros eating cats and dogs. Chambler also confirmed that people through the Department and community routinely referred to the Chinese restaurant serving cat and dog.

Waidene Bayne ("Bayne") has been employed with DSPD since 2012. She was promoted to the rank of sergeant in 2012. Bayne initially testified that she observed Boblitt making racial comments directed toward Boros. She stated that she heard references to "We beat your tail [at war] before, and we'll do it again," "chopsticks" and "the rice." She also testified that Boros complained to her a couple times about the comments and stated that he didn't want to work there anymore because he was being put in a bad light and "everything was upsetting him."[2] She advised him to start documenting the incidents to include what was said; who said it; when it was said; and who was around.

[2] Tr. at 492.

When asked about the sworn statement she gave to IA about not witnessing Boblitt's racial comments firsthand, Bayne stated she could not recall giving her answer, but admitted that she must have answered that way. She stated that her testimony at the arbitration hearing was the truth. Bayne admitted that Boros had just been demoted from sergeant at the time he approached her about being upset. Bayne also testified that Boros presented an arrogant demeanor around citizens and that she made a financial donation to the Weeks campaign fund.

William Cody Adkinson ("Adkinson"), DSPD officer, testified that he heard Boblitt ask Boros if they should eat dog or cat for lunch, because he wanted Chinese food. Boros responded that he had already eaten at Boblitt's mother's house. Adkinson testified that the comments were made in a joking manner. He also stated that during this incident, Kaiser made offensive comments about his religion inquiring about the number of wives Adkinson could have. Adkinson is a Mormon. Adkinson denies that Boros ever made any comments about his religion, although Boros testified that he inquired about the number of wives he could have in his religion. Adkinson testified that he believed that such comments and questions are *per se* offensive since it is commonly known that polygamy is illegal in Florida.

The Union's Case

Kyle Kohler ("Kohler") worked as a DSPD police officer from 2011-2014. He testified that prior to Boros' demotion, Boros had supervised Boblitt and treated him like a "lapdog." According to Kohler, Boros was not intimidated by Boblitt and the two seemed to joke back and forth with each other in a friendly manner. He acknowledged that Boblitt made references to Jackie Chan and karate, while Boros called Boblitt names such as redneck. Kohler further testified that humor among police officers can be intense and vulgar, but that Boros did not endure any teasing

that went beyond what normally occurs in a police department. Kohler went on to say that Boros joked with Boblitt on equal par with what he received.

Frank Geillory ("Geillory"), DSPD officer, testified that he believed DSPD management was intent on undermining the solidarity between the officers and lower ranks, which seemed to flow from animosity toward the Union. According to Geillory, Weeks was very vocal about his animosity towards the PBA. Geillory stated that the majority of Weeks' animosity was directed toward Boblitt and another sergeant, who Weeks blamed for bringing the PBA to DSPD. Geillory further testified that Boros and Boblitt were friends and constantly teased each other.

David Louis Krika ("Krika"), former lieutenant commander with DSPD, testified that issues and complaints surrounding Boros' performance as an officer were commonly discussed during staff meetings. Krika also discussed a false arrest made by Boros, which caused the Department to want to clean up his report. Krika stated that Weeks boasted during a meeting that no one (i.e. the PBA) would tell him how to run his department. Krika noted that Boblitt and Kaiser, among others, were the main proponents for bringing the PBA into the DSPD, none of which are still employed with the City. Krika confirmed that it was very common within the DSPD for people to refer to the Jin-Jin Chinese Restaurant as "cat and dog." Finally, Krika testified that, in his opinion, Boros' file supported the conclusion that Weeks had been protecting Boros the entire time that Boros worked for DSPD.

David J. Bennett ("Bennett") is a former DSPD officer and worked with Kaiser in Valparaiso before coming to the DSPD. He testified that Boros was a poor supervisor and police officer. Bennett stated that Boros disrespected the public, especially members of the black community. Bennett also testified that making harsh jokes is a natural response to the destruction officers confront on a daily basis. He denied that Boros ever expressed hurt feelings with Boblitt

and that Boros regularly called Boblitt a redneck and old cracker and referred to himself as Jackie Chan. Bennett also testified that Boblitt and Kaiser were of good character. He stated that he never saw them mistreat anyone and that they would go out of their way to try to help people.

Bennett acknowledged that most of the Department was present when Boblitt and Boros were joking with each other. He testified that on numerous occasions, higher ranking officers were present including Chief Weeks. In his opinion, Boros would use the "race card" when it was convenient, explaining how Boros would emphasize his Asian accent during times of frustration. He admitted that he is friends with Kaiser outside of the workplace.

Willie Lewis Caldwell ("Caldwell"), a 65-year old citizen and life-long resident of DeFuniak Springs, testified that his son was in the bathroom of a bar when Boros shoved him against a wall and arrested him for no reason. Caldwell stated that he received a call from DSPD, offering to dismiss the charges against his son if they would not pursue charges for wrongful arrest. He also testified that Boblitt and Kaiser are held in high regard, making particular note that Boblitt has a reputation in the community for being fair and respectful.

John Edward Paul ("Paul"), who attended Boblitt's birthday party, testified that during the party he expressed his concern that Grievants would be terminated as a result of their decision to support a candidate other than Weeks. He stated that he asked Boros if he was concerned that his association with Grievants might jeopardize his future with DSPD, and Boros said he wasn't worried about it and could play the "race card." Finally, Paul testified that Grievants and Boros were intoxicated by the end of Boblitt's birthday party and he thought they "were the best of friends."

Dominick Gabriel Maestre ("Maestre"), employee with the DeFuniak Springs Fire Department, testified that he was having lunch shortly after Weeks was re-elected, and that

Lieutenant Jerry Hall and Lieutenant Powers sat across from him. Maestre heard Powers tell Hall that the hammer was coming down and that you should not vote against your boss.

Tilman Frank Mears ("Mears"), interim City Manager, testified that while working as a lieutenant with DSPD, Boros referred to him as a redneck. He further testified that Lieutenant Powers was alleged to have executed an unlawful arrest and using excessive force. In addition, he was aware that Powell had been arrested and prosecuted criminally. However, he was not aware of any IA investigation into any matter concerning Powell. Means took issue with the fact that Chief Weeks had not briefed him on the criminal case of a DSPD officer and believed that City officials deserve such a briefing.

John David Powers ("Powers"), lieutenant with DSPD, testified that Maestre's testimony was incorrect and that the only thing he said about the hammer dropping was that people were going to be disappointed if the Chief did not win. Finally, Powers denied having been arrested in the summer of 2016 even though Chief Weeks released a statement to the press that indicated that he had been arrested. Powers testified that the Chief's statement was false.

Grievant Kaiser testified that after leaving the Navy, he worked for the Okaloosa County Sheriff before beginning his employment with the DSPD in 2011. Kaiser explained that he relocated his family to Anchorage, Alaska after his employment was terminated. He now works as a delivery driver for Lowe's.

Kaiser testified that Boros was a substandard supervisor. He also stated that he felt a bond of friendship with Boros and Boblitt and they were a tight-knit group while working together. When asked about Boros' demeanor as an officer, Kaiser testified that Boros had a reputation for being heavy-handed and that he was known to embellish facts. Kaiser further stated that Boblitt and Boros would make joking comments back and forth, but that Boros did not seem to take them

seriously or display distress over the remarks. Kaiser testified that Boros would joke about sleeping with Boblitt's wife and that Boblitt would respond, "Ok hamchuck." Kaiser also testified that Boros consumed a large quantity of liquor on the night of Boblitt's party and that he made some remarks about playing his "race card."

Kaiser testified that he served as the PBA representative and that it was well known that Weeks did not like the PBA. Kaiser stated that Weeks actively challenged matters during the contract negotiations between the PBA and the City. Kaiser noted that the collective fear of Weeks was well founded in the PBA. Kaiser also confirmed that Boros is documented as having contributed to Weeks' 2015 campaign. Kaiser confirmed that in February of 2015 both he and Boblitt voted to endorse Howell over Weeks. In March of 2015, Kaiser met with the acting City Manager to express his fear that Weeks would retaliate against him for his endorsement of Weeks' opponent. Kaiser went on to testify that he was confused about the failure to conduct internal investigations into both Boros' and Powers' unlawful arrests. Kaiser claims he has been defamed as a racist and that he has been blacklisted from working in law enforcement. He testified that his children were also harassed and he moved his family 6,000 miles away to start anew.

Gregory Earl Chrishon ("Chrishon"), citizen of DeFuniak Springs and construction worker, testified that Boros threatened to shoot him when he wouldn't leave his (Chrishon's) worksite. Boros claimed a suspect traveled through Chrishon's worksite but Chrishon had been there several hours and saw nobody. Chrishon claims he reported the incident to Weeks but Weeks took no action. Further, Chrishon testified about another incident where he called to report some criminal activity near his property and Boros interrogated him rather than investigating the criminal activity. And finally, Chrishon testified that Grievants worked well with people in the community to include

feeding homeless people. He believed that the Grievants lived up to the expectation "to serve and protect."

Grievant Boblitt joined the DSPD on January 18, 1999. Boblitt testified that he was instrumental in bringing the PBA to the DSPD. He recounted a day when Chief Weeks asked him if he was wearing a recording device; drove him around town; and discussed Boblitt's family, noting that Boblitt's wife had been sick. He took this discussion as the message that he would be fired if the Chief desired that he be gone. Boblitt also testified that Boros misled the PBA Board by falsely denying that he had made a contribution to any of the candidates for City Marshal. Boblitt went to the City Manager's office in March 2015, to voice his concerns of retaliation by Weeks.

Boblitt stated that he was flabbergasted by Boros' complaint and denied having any intention to hurt Boros, who he considered a good friend. Boblitt testified that he was normally a private person and Boros was one of three or four officers in his 16-year career in who he confided. He stated that they joked regularly but denied having racially harassed Boros.

Boblitt also explained Boros' allegations about the rice picking, "ching chang," and railroad comments. He said that he was looking for spent shell casings on a wet range and commented that finding the brass was like picking rice. He testified that a citizen called Boros "ching chang" and Boblitt repeated it, but denied ever having referred to Boros as such. And finally, he admitted that he made comments to Boros about working on a railroad, but stated that it was in response to a jest made at him by Boros and that it was a joke.

Boblitt then explained his prior discipline over his 16-year career. He said that he was disciplined for lingering too long at a convenience store, and explained that he had walking pneumonia at the time. He also received a reprimand for asking to see a citizen's license, but

explained that he was just checking to make sure the driver did not get in trouble for driving on a suspended license. And finally, Boblitt was suspended for "conduct unbecoming," and explained that his chief was screaming at him for questioning a policy, so he told him to treat him with respect because there was no guarantee who would be chief in one year's time. Boblitt testified that the allegations in Boros' complaint have made him fearful of leaving the house and have made it difficult for him to find new employment.

Ralph Lee Johnson ("Johnson"), retired law enforcement officer for Walton County, testified that Boros was terminated from the Walton County Sheriff's Office for a false arrest. Johnson believes Boros should have been criminally prosecuted in order to prevent him from working in law enforcement again.

POSITION OF THE PARTIES

The Employer argues that:

- Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to discriminate against an individual because of his race, color, religion, sex, or national origin. Boblitt verbally harassed Boros based on his national origin. Without a policy prohibiting discrimination or steps taken to enforce the policy, the City could face vicarious liability for a Title VII violation by its employees.

- Downplaying of racial comments by a supervisor is also a Title VII violation. There is ample evidence in the record establishing Kaiser's knowledge of Boblitt's comments towards Boros. The City relies on its supervisors to watch for racist comments and take immediate action to stop the comments and discipline the offending employees.

- Based on the evidence collected by the City through its investigation, the City concluded that Boblitt created a hostile work environment for Boros. Boblitt was terminated for a pattern of behavior that extended over several years and involved numerous witness accounts, and although there was less testimony directed toward Kaiser, his offense requires much less testimony to establish.

- Boros and Grievants' friendship is irrelevant to a determination of whether discrimination is unlawful. Equally irrelevant is Boblitt's intent in making his comments to Boros.

- Not one witness or piece of evidence suggests Boros had any pressure to file his complaint when he did, and therefore the Union cannot claim a conspiracy between Boros and employees with an agenda for the election of Town Marshal.

- Boros' employee record has no bearing on this case.

- The City's termination of Grievants meets the seven tests of just cause. Accordingly, the City requests that the terminations be sustained and the grievances denied.

The Union argues that:

- The Employer has failed to prove that Grievants violated policy. Just cause does not exist to support termination. The alleged "offensive behavior" was permitted by Weeks and Lolley and was therefore condoned as appropriate work place humor. Their denials of having knowledge of the alleged harassment are legally insignificant under the small-shop doctrine.

- Grievants have been deprived of due process due to the City's failure to specify the times when the alleged harassment occurred. The City also failed to provide requisite notice within the final agency action letter and failed to introduce specific testimony regarding the alleged harassment.

- Even if the allegations were sufficiently specific, the record does not support a finding that Boblitt harassed Boros. The testimony in this case was unreliable and each witness in support of the alleged harassment was impeached.

- The failure to promptly report the alleged harassment has eliminated any meaningful opportunity to recreate the context in which the alleged harassment occurred.

- Even if the City proved by clear and convincing evidence that Boblitt harassed Boros, the alleged harassment was condoned within DSPD.

- Grievants have been treated differently than other agency members who have engaged in similar misconduct. Further, if Kaiser failed to take corrective action, then every other employee that claimed to have observed the alleged harassment is likewise guilty for failing to report the conduct.

- Grievants were targeted for discipline due to their engagement in protected First Amendment conduct.

- The Union requests that the terminations be overturned and that Grievants be reinstated with full back-pay and benefits.

FINDINGS AND OPINION

The issue to be resolved here is whether the Grievants were terminated for just cause. The terminations were based on violations of the Employer's anti-harassment policy which is premised upon Title VII of the Civil Rights Act of 1964. More specifically, Boblitt was terminated for violating the anti-harassment policy by allegedly using derogatory comments and racial slurs toward Boros. Kaiser was terminated because he was alleged to have been aware of the misconduct and acted in an unbecoming and negligent manner by failing to take action, as a supervisor, to address the inappropriate behavior.

The Employer has the burden of proving that the terminations were for just cause. Just cause requires the arbitrator to first determine whether there is sufficient evidence in the record to substantiate the charges as set forth in the notice of disciplinary action, and second, the arbitrator must make a determination as to the appropriateness of the penalty that was imposed.

Inherent in the concept of just cause are the principles of due process and progressive discipline. Due process requires that employees are treated fairly during the disciplinary process including having adequate notice of the charges against them. "Progressive discipline is a system of addressing employee behavior over time, through escalating penalties. The purpose of progressive discipline is to correct the employee's unacceptable behavior."[3] If, after taking these factors into consideration, the arbitrator finds that the employee's conduct did not warrant the particular discipline imposed, the arbitrator may reduce the discipline to a more appropriate level.

In this case, if there is sufficient evidence that Grievant Boblitt violated the Employer's anti-harassment policy and that Grievant Kaiser failed to act regarding known harassing behavior,

[3] Norman Brand, et. al., Discipline and Discharge in Arbitration, (BNA, Second Edition 2008) at 65.

then the first element of the just cause standard has been met. Then, it must be determined whether termination was the appropriate penalty to impose in each case.

I. Is there Sufficient Evidence of that Grievants Created a Hostile Work Environment in violation of Title VII of the Civil Rights Act of 1964?

Grievant Boblitt was charged with committing "on-going racial harassment" or creating a hostile work environment for Boros. The rules and policy concerning this case are set forth in the Employer's personnel policies and the law. The Employer argues in its brief that it was required by law to quickly investigate Boros' accusations of a hostile or abusive work environment that could potentially violate Title VII of the Civil Rights Act of 1964. To determine whether there is sufficient evidence in the record before the undersigned to conclude that Boblitt engaged in racial harassment which created a hostile work environment for Boros, a careful analysis of the legal standard of review concerning unlawful harassment is necessary.

Both Title VII and the Employer's personnel policies prohibit unwelcome comments regarding race and/or national origin that a reasonable person would find intimidating, hostile or abusive and which alter the victim's conditions of employment given the totality of the circumstances. The following sections will analyze the Grievants' conduct first, under Title VII. Next, the conduct will be analyzed pursuant to the Employer's policies.

Hostile Work Environment Defined Under Title VII

In its Compliance Manual, the Equal Employment Opportunity Commission ("EEOC") defines and provides guidance about, among other things, race-based hostile work environments.

The EEOC defines two (2) types of unlawful harassment. Harassment becomes *unlawful* where 1) enduring the offensive conduct becomes a condition of continued employment, **or** 2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive. The second type of harassment is at issue in this case. The guidance clarifies that "petty slights, annoyances, and isolated incidents (unless extremely serious) will not rise to the level of illegality. To be unlawful, the conduct must create a work environment that would be intimidating, hostile, or offensive to reasonable people."[4]

The EEOC continues by explaining that offensive conduct may include, but is not limited to, offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, offensive objects or pictures, and interference with work performance. Unlawful harassment may occur without economic injury to, or discharge of, the victim. In determining whether a work environment is hostile, "all of the circumstances should be considered." Two (2) requirements exist for finding unlawful harassment:

> 1) the conduct must be unwelcome; *and*
>
> 2) the conduct must be sufficiently severe or pervasive to alter the terms and conditions of employment in the mind of the victim and from the perspective of a reasonable person in the victim's position.

See Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) and *Harris v. Forklift Systems, Inc*., 510 U.S. 17 (1993) (Reaffirming the standard in *Meritor*). It must be determined whether Boblitt's conduct met the legal test for unlawful harassment and, if so, whether Kaiser's alleged condonation was also improper under the law.

[4]EEOC Compliance Manual (2006, April 19). Types of Harassment. Retrieved June 1, 2017, from https://www.eeoc.gov/laws/types/harassment.cfm

Racial Nature of the Comments

First it is important to examine what comments were made regarding Boros. In Boros' written complaint he alleged that Grievant Boblitt had created a hostile work environment by using racial slurs and harassing him regarding his race and dating preferences. In the complaint, Boros claimed that from August 2012 through December 2015, Grievant Boblitt referred to him by various names in reference to his Asian descent. The names or comments include calling Boros Kung Fu Panda; stacking dead gooks while in the war; Boros looking like Kato; calling Boros Hamchuck (referring to an Asian character in the movie Green Beret starring John Wayne); ching chang and chink. Boros complained that Kaiser was present during the references to Hamchuck, gooks, and chinks.

There was no corroborating evidence to substantiate Boros claim that Boblitt called him a gook or chink. Witnesses confirmed that Boblitt imitated the act of picking rice; stated Boros had a tiny Asian penis; referred to eating cat and dog at a Chinese restaurant; and referred to Boros as Jackie Chan and Hamchuck. Individually, these references may seem benign. However, because they occurred on many occasions over the years, they clearly indicate a propensity by Boblitt to make unappealing references to Boros' Asian descent. It is also clear from the record that Boblitt made these comments in a joking context and not with animosity. Through the testimony elicited at hearing, it is concluded that Grievant Boblitt made racially insensitive comments regarding Boros at the workplace. The comments are more in line with being petty slights and annoyances as opposed to outright racial epithets or insults. Nevertheless, such references are clearly racial in nature and were repeated. Whether this conduct rose to the level of unlawful racial harassment is premised upon whether the conduct was 1) unwelcome and 2) sufficiently severe or pervasive to

alter the terms and conditions of employment in the mind of the victim and from the perspective of a reasonable person in the victim's position.

Does the Evidence Establish That the Conduct Was Unwelcomed?

A defense that the conduct in question was not unwelcomed because it was playful banter and the alleged victim was an active participant (as argued here by the Union), requires careful scrutiny to determine whether the alleged victim was, in fact, a willing participant.[5] The Union argues that the comments made by Boblitt were not unwelcomed primarily because Boros was engaged in the same off-colored banter with Boblitt who was a friend. The City argues that Boros and Grievants' friendship is irrelevant to a determination of whether discrimination is unlawful and equally irrelevant is Boblitt's intent in making his comments to Boros. In large part, the City is correct.

The EEOC guidance explains that the "conduct must be unwelcome in the sense that the alleged victim did not solicit or incite the conduct and regarded it as undesirable or offensive."[6] When the conduct is racially derogatory in nature, in general, whether the conduct is unwelcome is not an issue. Here, the conduct was unwelcomed in the sense that Boros did not solicit or incite the conduct and made it known that he regarded it as undesirable or offensive upon filing the April 2, 2015 complaint.

Because Boros did not solicit or incite the racial comments, even though he did engage in derogatory banter with Boblitt, the comments were of such a nature and duration that a reasonable

[5] *Vaughn v. Pool Offshore Co*., 683 F.2d 922, 924-25 (5th Cir. 1982). (trial court did not err in finding for employer where plaintiff used racial slurs along with his co-employees, other employees were subjected to the same obnoxious treatment as plaintiff, his co-workers expressed amicable feelings towards him, and plaintiff testified at trial that he did not believe that pranks against him were racially motivated or that he was singled out for abusive treatment).
[6] *Id*.

person would be offended and Boblitt's intent would not eliminate the possibility that the comments were offensive. And, although it took Boros years to claim the offense, he did document his feeling of unwelcomeness in his April 2015 complaint. Therefore, it is concluded that the comments were unwelcomed. The first element of establishing a hostile work environment under Title VII has been met. The next inquiry is whether the conduct was severe or pervasive enough to alter Boros' terms and conditions of employment.

Was the Offensive Conduct Sufficiently Severe or Pervasive to Alter the Terms and Conditions of Employment?

In determining the severity and pervasiveness of any conduct, the EEOC advises that "conduct is not illegal just because it is uncomfortable, or inappropriate…. Harassment must be analyzed on a case-by-case basis, by looking at all the circumstances and the context."[7] In *Harris v. Forklift Systems, Inc.*, the Court held that "whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff found the environment abusive. But, while psychological harm, like any other relevant factor, may be taken into account, no single factor is required."[8]

Given the EEOC guidance and the Supreme Court's rulings, essential to the determination of a hostile work environment is reaching a conclusion as to whether Boros felt the conduct was abusive. In other words, was Boblitt's conduct severe enough to humiliate or unreasonably

[7] EEOC Compliance Manual (2006, April 19) at 36. Retrieved June 5, 2017, from https://www.eeoc.gov/policy/docs/race-color.html
[8] *Harris v. Forklift Systems, Inc*. 510 U.S. 17 (1993), pp.5-6.

interfere with Boros' work performance based on what a reasonable person would find hostile or abusive, as well as, Boros' subjective perception that the environment was abusive?[9]

Outside of the uncorroborated allegation by Boros that Boblitt called him a "gook" and a "chink," the other references like Jackie Chan, Hamchuck, ching chang and picking rice were not objectively harsh or severe. They were references to Boros' Asian descent, but not racial epithets that generate immediate feelings of degradation. The comments about eating cat or dog in reference to a Chinese restaurant were commonly made throughout the Department. Boros did not complain about any of those references. Nor were Boblitt's comments of such a frequency that it rose to the level of abusiveness. Witnesses testified that, at most, they heard Boblitt's comments four or five times over the course of the 3-year period at issue. None of the witnesses felt that the comments were of such a nature that they needed to report it. And, there was an overwhelming amount of evidence that Boblitt and Boros were laughing and joking with each other during the exchanges. Boblitt's statement about Boros having a "tiny Asian penis" was clearly immature and inappropriate. However, Boros referred to having his penis in Boblitt's wife's mouth which was equally immature and inappropriate. These facts would lead a reasonable person to conclude that while the comments were likely uncomfortable and clearly inappropriate for the workplace, Boros was not being treated in a hostile manner due to his race or national origin.

Boros' credibility is essential to evaluating whether he felt abused by Boblitt's comments. Boros claimed that the racial comments occurred on a routine and almost daily basis. If proven, this would certainly tend to establish a hostile environment. However, this claim was uncorroborated by other evidence and the undersigned must rely on Boros' credibility to conclude that Boblitt's comments were made with the frequency Boros claims. For the reasons explained in

[9] Id pp. 3-5.

detail below, I conclude that Boros is not very credible and his testimony concerning the hostility is unreliable.

The record establishes that Boros has had a significant amount of employment issues concerning his judgment as a police officer and former supervisor. He claimed that he could not recall being terminated for a false arrest from the Walton County Sheriff's office. He testified that he left employment with the Pensacola Police Department to attend college when, in fact, it was determined that he should be terminated during his training period for inadequate performance. He could not recall who demoted him in 2012 at the DSPD, but recalled that he paid $27.99 for a bottle of Johnnie Walker given to Boblitt at his birthday party. On many points, Boros' testimony was evasive and unclear. There was various testimony about him being excessively forceful with citizens and even aggressive when he needed to be when communicating with citizens. He even admitted that he would go toe-to-toe with Boblitt by telling him to shut his "fat ass mouth" and calling him a "fat bastard." But at the hearing, he portrayed himself as a meek and damaged individual who was barely able to speak above a whisper. His demeanor at the hearing is completely inconsistent with the litany of testimony about his prior conduct and character.

Another inconsistency in his testimony pertains to the timing of his written complaint. Boros testified that he complained to "every sergeant…above us to get him [Boblitt] to stop" but, he also stated that he did not report anything sooner because of the "brotherhood."[10] He either reported it or he did not. The record demonstrates that he did not. The fact that he did not report it sooner also undermines his claim that the conduct was hostile and abusive.

Witness Waidene Bayne testified that Boros complained to her about comments made by Boblitt. However, she provided sworn testimony during the IA interview that she never heard any

[10] Tr. at 45.

racial comments directly from Boblitt while later testifying at the arbitration hearing that she did hear him make such comments. Given this inconsistency on a central point in the case, her testimony is not reliable. Because her recall is not reliable, it is also unclear whether Boros complained specifically about racial slurs or something else, considering that he had just been demoted from sergeant around the time that he claimed he spoke to her about it.

Boros testified that he started documenting the incidents in 2012 because he "could not handle it anymore. [He] could not live with it anymore, not another day."[11] He also stated that he did not like his job anymore. This was also the year that he was demoted from sergeant to patrol officer. Even if he did not want to make the complaint immediately after his demotion in 2012 (for fear that it would appear to be retaliatory), he had more than two (2) years to address the alleged on-going abuse. But, despite his claimed anguish, he documented the torment for 3.5 years before addressing it with someone in a position to do something about it.

As an example, Boros testified that Boblitt made a derogatory comment in front of Chief Weeks in September 2014, but instead of registering a complaint about it, he simply exclaimed that "Boblitt is stupid."[12] It simply makes no sense that Boros would wait such a long time to register a complaint about unwelcomed and hostile conduct that affected him to the point that he did not want to do his job any longer.

Yet another factor that indicates that Boros was not experiencing hostility was his willing participation in racial banter and maintenance of a social relationship with Boblitt. The record reflects that Boros repeatedly called Boblitt a redneck and made other derogatory comments to Boblitt, as referenced above. He chose to socialize with Boblitt and Kaiser, inquiring whether strippers would be at Boblitt's surprise birthday party while racing to get there on time. He engaged

[11] Tr. at 43.
[12] City Exhibit D. *See* Boros Complaint.

in the event by drinking alcoholic beverages to the point that he was intoxicated (although he claimed that he only had one "fruity" drink at the hearing). Even after the party, he went to Boblitt's home with Kaiser present to watch a movie. Significantly, he allowed Boblitt's wife to babysit his children in April 2014. He participated on the Union executive board with Boblitt and Kaiser which was completely voluntary. It is difficult to believe that Boros, as a police officer for many years including previously serving as Boblitt and Kaiser's supervisor would be so intimidated by them that he felt compelled to socialize with them while off duty and entrust the care of his children to the wife of his tormentor. Such a concept defies logic.

So, the question remains: Why would Boros file the complaint when he did? The Union contends that it was part of a conspiracy relating to the re-election of Chief Weeks whose opponent was supported by the Union. I make no finding regarding this theory. It is, however, concluded that based on the totality of the circumstance present here, Boblitt's comments were not so severe or pervasive to alter the terms and conditions of Boros' employment. That being the case, the City has failed to prove that Boblitt engaged in unlawful racial harassment in violation of Title VII. It follows then that Kaiser, was not negligent in failing to report or take corrective action in connection with racially discriminatory harassment in violation of Title VII.

II. Did Grievant's Conduct Violate the Employer's Policies?

The Employer's Anti-Harassment Policy

While an employee's conduct may not rise to the level of violating Title VII, an employer may have policies that are broader in addressing inappropriate conduct in the workplace. In this

case, the City has an anti-harassment policy in its personnel handbook and the Department has a general order that addresses the Grievants' conduct.

The City's anti-harassment policy, in large part, mirrors the guidance set forth by the EEOC guidance discussed above. Section 10.12 of the Personnel Handbook states:

> The City of DeFuniak Springs is committed to providing a work environment that is free from harassment based on race, color, religion, sex, national origin, age, veteran status, or disability. The City strives to maintain an environment where employees treat each other with respect, dignity and courtesy. In keeping with this commitment, the City maintains a strict policy prohibiting *unlawful harassment*. Any behavior that creates a hostile work environment will be considered harassment." (Emphasis added).[13]

While harassment based on race or ethnicity is not defined, the City's policy goes on to define sexual harassment, which can be imputed to the context of this case. It states "sexual harassment of employees by Supervisors, co-workers, or vendors is prohibited. Sexual harassment includes unwelcome verbal, visual, or physical conduct of a sexual nature when:

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3. Conduct which has the purpose or effect of unreasonably interfering with an employee's work performance; and/or

4. Conduct which creates an intimidating, hostile, or offensive work environment.

Examples provided include verbal abuse, offensive comments, offensive jokes, literature or emails. Under the City's reporting provision employees should report such conduct to the immediate supervisor, Human Resources or the City Manager. Determinations regarding whether "the alleged conduct constitutes unlawful harassment should consider the totality of the circumstances, such as the nature of the conduct and the context in which the alleged incident[s]

[13] City Exhibit H at 43.

occurred."[14] For the same reasons that I find that Title VII was not violated, I find that Boblitt and Kaiser did not violate the City's anti-harassment policy. Whether they violated other applicable rules is addressed below.

The Department's General Orders

The Department's General Orders Manual Number 46 requires, among other things, that employees treat supervisory members, subordinates, associates, and the public with respect. In addition, members shall be courteous and civil in their relationships with one another and the community, except when the furtherance of a legitimate duty dictates otherwise. Failure to comply with these rules is unbecoming conduct. Furthermore, "Members are forbidden from the use of slurs, derogatory comments or any other physical or verbal conduct directed at or based upon another person's race, color, national origin, gender, religion, handicap, age or sexual orientation."[15]

It has been concluded that Boblitt's comments were of a racial nature, inappropriate, reflect disrespect and discourtesy.. Irrespective of the fact that they were made in a joking as opposed to a hostile manner, his verbal conduct violated General Order No. 46. Given this violation, the Employer has the right to impose corrective action. Kaiser was a witness to the conduct. Because Kaiser was aware of the inappropriate comments and was a supervisor who took no action against Boblitt or Boros, corrective action is also warranted for him.

[14] City Exhibit H at 44.
[15] City Exhibit E at 3.

III. Appropriateness of the Penalty

As a part of the just cause analysis, once it is concluded that an employee committed an offense, the arbitrator must determine whether the employee's conduct warranted the discipline imposed. If, as a part of this analysis, an arbitrator is persuaded that the punishment imposed by management was beyond the bounds of reasonableness, he or she must conclude that the employer exceeded its managerial right and impose a reduced penalty. In reviewing the discipline imposed upon an employee, an arbitrator must consider and weigh all relevant factors including the employee's seniority, prior work record, any mitigating or aggravating circumstances and the seriousness of the misconduct.

Progressive discipline is an element of the just cause doctrine. The rationale for using a progressive discipline system is that both the employer and the employee "benefit when an employee can be rehabilitated and retained as a productive member of the work force. The trained employee is seen as a valuable resource, making it economically prudent to attempt rehabilitation of a current employee."[16] Progressive discipline is, therefore, corrective and not punitive in nature. In fact, the City's personnel policy provides that

> Discipline should be corrective and constructive rather than punitive and be utilized to educate and motivate employees to exhibit behavior which will contribute to individual growth and development and to the successful operation of the City government.[17]

Given the premise that discipline should be corrective and not punitive, I find that the penalty imposed upon each grievant was unreasonable.

Grievant Boblitt has worked for the City with a mostly unblemished record since 1999—a total of 16 years at the time of termination. His performance evaluations demonstrate that he has

[16] *Discipline and Discharge in Arbitration*, Brand, Second Edition (BNA 2008) at 66.
[17] City Exhibit H at 106.

served the Department as a good employee while receiving "commendable" performance (4 out of 5 rating) in a significant number of his job duty aspects over the years. In addition, the record contains several commendations written by the public that reflect that he has gone beyond the call to duty on many occasions. Witnesses at the hearing testified in the same manner. There was no evidence presented that Grievant Boblitt's behavior cannot be corrected with the imposition of discipline less than termination. Grievant Kaiser was not employed with the Department nearly as long as Boblitt. He worked for the Department for only four (4) years prior to his termination. However, during that time he was promoted to the rank of sergeant and received good performance evaluations. Like Boblitt, there is no evidence in the record that his conduct is beyond correction.

Additionally, there has been disparate treatment in the manner in which discipline has been meted out. When Chief Week's executive assistant was found to have made unwelcomed sexual advances toward Captain Lolley, the Chief attempted to correct her behavior with an oral counseling. Upon a repeat violation after the counseling, she received a written reprimand. Lolley testified that the conduct subsequently stopped, demonstrating that corrective action can be successful. Here, neither Grievant was given an opportunity to correct his behavior for violating what the Employer believed was the same anti-harassment policy.

Furthermore, the fact that Boros engaged in the racial banter (calling Boblitt a redneck); there is a culture of using off-colored humor within the police department; and no specific training has been provided to the Department on appropriate workplace conduct, in particular, as it relates to race discrimination serve as mitigating factors. It is noted that both Grievants have had training on racial profiling during traffic stops. However, this type of training is different than conduct for the workplace. This is particularly significant because most of the testimony reflected that the joking nature of the racial comments did not alarm staff to the point that they needed to report

anything. I find no due process violations that warrant further mitigation. That said, the question becomes, what level of discipline is appropriate to send a clear message that inappropriate racial comments will not be tolerated while at the same time providing Grievants with the opportunity to correct their behavior as required by just cause principles and like other employees in the Department have been allowed to do.

Arbitrators have broad remedial powers. "When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies."[18] According to the City's personnel policy, a Level I Reprimand is given where the oral and formal counseling has not resulted in the expected improvement, or when an employee commits a more serious offense.[19] A police officer is charged with conducting himself or herself in a professional manner. They are held to a higher standard than other employees. Police officers must understand that their words have power whether among its citizenry or within the workplace. For this reason, use of potentially racially offensive language and clearly inappropriate name calling in reference to a co-worker's national origin is serious enough to warrant a suspension. Therefore, it is concluded that both Grievants shall receive a 5-day suspension for their conduct in this case.

As a final note, I believe guidance from the EEOC would be instructive to this workplace. As stated by the EEOC:

> Prevention is the best tool to eliminate harassment in the workplace. Employers are encouraged to take appropriate steps to prevent and correct unlawful harassment. They should clearly communicate to employees that unwelcome harassing conduct will not be tolerated. They can do this by establishing an effective complaint or grievance process, providing anti-harassment training to their managers and employees, and taking immediate and appropriate action when an employee

[18] *Steelworkers v. Enterprise Wheel & Car Corp*., 363 U.S. 593 (1960).
[19] City Exhibit H at 106.

> complains. Employers should strive to create an environment in which employees feel free to raise concerns and are confident that those concerns will be addressed. Employees are encouraged to inform the harasser directly that the conduct is unwelcome and must stop. Employees should also report harassment to management at an early stage to prevent its escalation.[20]

While the Employer has a written anti-harassment and reporting policy in place, it might serve the Department and City well to reinforce through regular training what is appropriate conduct for the workplace.

CONCLUSION

The record evidence shows that the termination of Grievants Boblitt and Kaiser were not for just cause. The City did not prove that Grievants engaged in unlawful racial harassment. However, the City did prove that Grievant Boblitt violated work rules regarding the use of verbal conduct directed at or based upon another person's race or national origin. Grievant Kaiser failed to take corrective action upon witnessing such conduct. However, because of several mitigating circumstances discussed in detail above, the penalty of termination is beyond the bounds of reasonableness and is hereby reversed. Each grievant shall serve a 5-day suspension which is consistent with the principles of progressive discipline and the Employer's personnel policy.

AWARD

For the reasons set forth above and incorporated herein:

1. The grievance is SUSTAINED, in part.
2. The Grievants shall be reinstated to their positions effective with the date of this Award.
3. The Grievants' personnel files shall reflect a 5-day suspension for misconduct in violation of General Order No. 46.

[20] EEOC Compliance Manual (2006, April 19). Harassment. Retrieved June 1, 2017, from https://www.eeoc.gov/laws/types/harassment.cfm.

4. The Grievants shall be made whole for any wages and other benefits lost as a result of the termination less any replacement income and the 5-day suspension.

5. The parties shall equally share the fees of the Arbitrator in accordance with Article 6, Section 3 (4) of the CBA.

6. The Arbitrator retains jurisdiction over this matter for the sole purpose of resolving any issue pertaining to the implementation of this Award. Such retention of jurisdiction shall be for a period of thirty (30) days from the date of this Award. A request to the Arbitrator to exercise jurisdiction shall be made in writing as to the exact issue and shall be served on the other party at the same time that it is filed with the Arbitrator. It is within the sole discretion of the Arbitrator to determine whether the issue presented by the party or parties is within the jurisdiction of this provision pertaining to the Arbitrator's retention of jurisdiction.

_____

Jeanne Charles Wood, Arbitrator

Dated: June 19, 2017