Before the Arbitrator

In the Matter of Arbitration of a Dispute Between

AFSCME COUNCIL 31, LOCAL 2946

and

CITY OF CHICAGO
(DEPARTMENT OF WATER)

Appearences:

Katherine Robillard and Nick Infusino, Assistant Corporation Counsel, City of Chicago Department of Law, 30 North LaSalle Street, Suite 1040, Chicago IL 60602, on behalf of the City of Chicago.

Scott Miller, Labor Counsel, 205 North Michigan Avenue, Suite 2100, Chicago IL 60601, on behalf of AFSCME Council 31.

ARBITRATION AWARD

Pursuant to the provisions of their collective bargaining agreement, AFSCME Council 31, Local 2946 (hereinafter referred to as the Union) and the City of Chicago (hereinafter referred to as the City) selected the undersigned as arbitrator to hear and decide a dispute over the termination of Anthony Nguyen. A hearing was held on July 7 and August 10, 2017 at which time the parties were given full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant. The Union submitted a closing argument outside the presence of the City’s representatives and the City filed a post-hearing brief. A transcript of the Union’s argument and a copy of the City’s brief were exchanged through the undersigned on October 20, 2017, whereupon the record was closed.

Now, having considered the evidence, the positions of the parties, the contract language and the record as a whole, the undersigned makes the following Award.
1. Issues

The parties agreed that the issues in this case are:

1. Did the Employer have just cause to terminate the Grievant?
2. If not, what is the appropriate remedy?


A. Collective Bargaining Agreement

ARTICLE 2 – MANAGEMENT RIGHTS

Section 2.1 – Management Rights
The Union recognizes that certain rights, powers, and responsibilities belong to and are exclusively vested in the Employer except only as they may be subject to a specific and express obligation of this Agreement. Among these rights, powers, and responsibilities, but not wholly inclusive are... the right to suspend, discipline, or discharge for just cause***

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ARTICLE 14 – PERSONNEL RECORDS, FORMS AND FILES

Section 14.1(d)(ii)

Any record of discipline, including counseling and disciplinary investigation files in the Police Department, may be used for a period of time not to exceed eighteen (18) months and shall thereafter not be used to support or as evidence of adverse employment action under this Agreement, unless a pattern of sustained infraction exists for the offense in question.

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ARTICLE 20 – DISCIPLINE AND PREDISCIPLINARY PROCEDURES

(a) All disciplinary actions, up to and including discharge, shall be subject to review only under the applicable grievance and arbitration procedures provided in Article 21***

(b) It is the policy of the Employer that discipline administered by it shall be corrective and progressive where appropriate. Consistent with this policy, the Employer within its discretion may determine whether disciplinary action should be an oral warning, written reprimand, suspension (up to 30 days) or discharge, depending upon various factors, such as, but not limited to, the severity of the offense or the employee’s prior record. Such discipline shall be administered as soon as practical after the Employer has had a reasonable opportunity to fully investigate the matter.... The Employer’s failure to satisfy this Article 20(b) shall not in and of itself result in a reversal of the Employer’s disciplinary action or cause the employer to pay back pay to the employee***
ARTICLE 21 – GRIEVANCES AND ARBITRATION

(a) *** Suspensions of over thirty (30) days and discharges shall be governed exclusively by the terms of Section 21.1(b) below ***

Section 21.1(a) – Grievance Procedures ...

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Section 21.1(b) – Procedures for Arbitrations of Suspensions of Over Thirty (30) Days and Discharges

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(3) The terms of Step IV B and Step IV C of Section 21.1(a) above shall also apply to arbitration of suspensions of over thirty (30) days and discharges except only that the arbitrator shall conduct a hearing within sixty (60) days of being notified by the parties of his/her selection, and the arbitration shall submit his/her decision within thirty (30) days following close of hearing, unless the parties mutually agree otherwise ***

B. Personnel Rules

City of Chicago Personnel Rules XVIII, Section 1

The City of Chicago has an interest in promotion of order and general welfare of all employees, as well as the general public. The City of Chicago, a public employer, requires that its employees perform their duties in a manner which furthers the efficiency and best interests of the City, and which results in the highest level of public trust and confidence in municipal government.

The department head has the authority and responsibility to take disciplinary action against any employee whose conduct does not further the efficiency and best interests of the City of Chicago. The degree of discipline to be meted out is dependent on various factors including, but not limited to, the seriousness of the offense, the employee's work record and the totality of the circumstances. The following conduct, discussed below, when engaged in by an employee, will result in disciplinary action which may include discharge unless the employer, taking all circumstances into account, deems it to be excusable.

As with all the Personnel Rules, it should be noted that if an employee is covered by a Collective Bargaining Agreement, that agreement shall govern in the event of a conflict between any part of this Rule and any such agreement. Employees covered by such agreement can only be discharged for just cause ***

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- Subsection 8: Making false, inaccurate, or deliberately incomplete statements in an official inquiry, investigation or other official proceeding.

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- Subsection 23: Discourteous treatment, including verbal abuse, of any other City employee or member of the public. Provoking or inciting another employee or member of the public to engage in such conduct.

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- Subsection 50: Conduct unbecoming an officer or public employee.
• **Subsection 54:** Any act of violence in the workplace or violation of the City’s Violence in the Workplace Policy. Violence, as the term is used in the City’s Violence in the Workplace Policy, includes written or verbal communications, whether direct or indirect, which are of a threatening, intimidating or coercive nature; the threat or use of physical force, including fighting or horseplay; stalking; vandalism or destruction of property; and the use or possession of any weapon and/or ammunition, unless the specific weapon and/or ammunition is authorized by the City for a particular work assignment. For the purpose of this paragraph, violence does not include actions taken by sworn Police Officers or security personnel within the scope of their employment, but does include such employees’ actions with respect to co-workers. Specific acts or omissions which are in violation of the Violence in the Workplace Policy include:

(a) Failure of a manager or supervisor to implement and maintain safe workplace practices, including the Violence in the Workplace Policy, or failure to communicate the Policy to subordinates.

(b) Failure of an employee, including a manager or supervisor, to report an incident of violence in the workplace or any potentially dangerous situation to his or her supervisor or the departmental Violence in the Workplace Liaison.

(c) Failure of an employee, including a manager or supervisor, to promptly report an incident of violence to law enforcement authorities when the employee knows or should know that a violation of law may have occurred and the employee is unable to report the incident to the employee’s supervisor or departmental Violence in the Workplace Liaison.

(d) Failure of an employee, including a manager or supervisor, to notify his or her supervisor and departmental Violence in the Workplace Liaison when an Order of Protection has been obtained by or against the employee naming City premises.

(e) Failure of an employee, including a manager or supervisor, to cooperate with a Violence in the Workplace Liaison or the City’s Equal Opportunity Division in the course of an investigation of workplace violence under the Violence in the Workplace Policy.

(f) Failure of an employee, including a manager or supervisor, to assist persons injured as a result of workplace violence, including summoning EMS personnel, staying with the injured person(s) until EMS arrives, and assisting City officials in reaching the emergency contacts of any injured person(s).

(g) Retaliation against any person for having made a good faith complaint or report of violence in the workplace, or participating in or aiding an investigation of violence in the workplace.
III. Background

This dispute concerns the termination of Anthony Nguyen, an employee of the City's Department of Water Management holding the position of a Water Chemist II at the City’s Jardine Water Purification Plant. It arises from Nguyen’s interactions with two fellow Water Chemist IIs, Christopher Harris, who had been on a leave of absence continuously since April 2011, and David Reed, Jr., who retired in 2012. Harris and Reed are African-American men of above-average height and weight. Harris was six feet, two inches tall and weighed about 260 pounds while Reed was six feet tall and weighed roughly 230 pounds. Nguyen, a Vietnamese immigrant, is five feet, three inches tall, and weighs 135 pounds. The men did not work closely together, but all reported friction. For example, Harris and Reed testified about an incident in which Nguyen stared at them, then crossed the room to confront them. Nguyen describes what is seemingly the same incident as his noticing Harris and Reed staring at him, and he then approaching them to inform them that he was not intimidated. The events specifically at issue here involved text messages and phone calls some years later, in 2015. After an investigation conducted by the City's Office of the Inspector General (OIG) and review of its report by the Department of Water Management, Nguyen was discharged on April 27, 2017 by Commissioner Barrett B. Murphy.¹

A grievance was filed challenging the termination. It was not resolved in the lower stages of the grievance procedure, and was referred to arbitration. At arbitration, in addition to the facts recited above, the following testimony was taken:

Christopher Harris testified via Skype that he had been a Water Chemist II at the City’s Jardine Water Purification Plant from November 1996 until he began a leave of absence in April 2011. Harris never actually worked with Anthony Nguyen, but Nguyen was transferred from the south water plant to Jardine while Harris was there. He said he initially got along with Nguyen, but that changed over time because Nguyen was aggressive, antagonistic, discriminatory, harassing and intimidating. As an example, Harris stated that he was talking to co-worker David Reed in 2008 or 2010 when they noticed Nguyen staring at them. Nguyen came over to them and asked them why they were staring at him and stated he was not afraid of them. Nguyen called Harris a fat pig and “may” have used the “N” word according to Harris.

¹ Although the City’s Office of the Inspector General had recommended that Nguyen be both discharged and placed on the City’s ineligible for rehire list, Commissioner Barrett’s notice of discharge makes no reference to the latter.
Harris filed a violence in the workplace complaint. He could not recall other specific incidents at Jardine.

Long after he began his leave, on April 3, 2015, Harris received phone calls on his cell phone which the caller ID system identified as coming from Nguyen. He also received a text message that came up with Nguyen's name on it. The text message began with the phrase: "hi pig boy." Harris said Nguyen had called him "pig boy" while they worked together at Jardine. Harris said he assumed Nguyen had called him that on more than one occasion. He took a screen shot of the message which, in full, read:

1 (312) 656-****
Hi Pigboy,
I use Talkatone to call/text any number in the US & Canada without using my cell minutes. Get it at tktn.at
-Anthony Nguyen

He captured a second text message received on April 12, 2015 which read:

1312656****
Brother PigBoy, life is passing you by
Text sent 4-12-2015 @ 8:02pm

A third text message, similarly captured by Harris, read:

1312656****
The grim Reaper is at your door!!
Received 4-14-2015 @ 2:04am

Harris said he was quite upset by these messages. He had not communicated with Nguyen in the past five years, since "when we were at work – the time that he used the term fat boy and pig boy and that kind of thing." However, he said he had received a letter at his home address in 2015 or 2014 that referred to him as "brother" and "big brother" and "pig boy" and stated that Harris was "David Reed's bitch." He considered the text messages to be death threats based on Nguyen’s behavior toward him and other African-Americans while at Jardine, and so he forwarded the text messages to the City's Inspector General and also filed a police report. He later filed for an order of protection.

At the hearing, Harris could not initially recall whether he had received any later text messages, but he had earlier forwarded to the Inspector General the following three messages he received on August 10, 2015:
From: +141557******
Howdy my big brother??
2015/08/10 10:59:59PM

From: +141557******
David reed wanna talk to you boy
2015/08/10 11:00:57PM

From +141557******
Hi Pigboy,
I use Talkatone to call/text any number in the US & Canada without using my cell minutes. Get it at tktn.at
-Anthony Nguyen

Harris again said he was quite upset, and had filed a police report.

Although at the hearing Harris could not initially recall receiving any additional messages from Nguyen, he confirmed that he had also sent to the Inspector General the following messages which he received in October 2015:

From +17732******
Hi Friends,
I use Talkatone to call/text any number in the US & Canada without using my cell minutes. Get it at tktn.at
-Anthony Nguyen
2015/10/10 11:25:41AM
Sent from my HTC on T-Mobile 4G LTE

Fwd: From: +17732******
Are u still kicking
2015/10/10 11:26:30AM

From +17732******
Guess not
2015/10/10 11:27:05AM
Sent from my BlackBerry 10 smartphone on the Verizon Wireless 4G LTE network.

From: +17732******
RIP
2015/10/10 11:27:42AM
Sent from my BlackBerry 10 smartphone on the Verizon Wireless 4G LTE network.
Harris said he was in fear for his life after receiving these, and consequently filed police reports. He believed he filed three such reports. He could not initially recall, but then confirmed that he filed a petition for an order of protection on March 10, 2016. When asked if he knew his workplace violence complaint did not result in a finding of workplace violence, Harris said “None of them did.” He denied knowledge of the results of his police complaints, but admitted the police had not contacted him. He stated he had received no text messages since he sought the order of protection in March 2016, and “guessed” he had received none since October 2015. He admitted his phone number was (312) 656-****, but denied having called Nguyen at 6:54 am on April 6, 2015.

David Reed, Jr., testified via Skype that he worked for the City from 2000 to 2012 and was a Water Chemist II at the time he retired. He was a friend of Harris’s and mostly worked at the Jardine plant until he was transferred to the south plant on May 31, 2011. He worked with Nguyen in the lab at Jardine and described their relationship as not good. According to Reed, Nguyen had a problem relating to African-Americans and had a violent temperament—yelling not only at Reed but at other African-Americans. He confirmed that Nguyen had on more than one occasion referred to Harris as “pig” and “pig boy.”

On August 6, 2011, Reed received an envelope at work which had been transferred from his former supervisor to his new supervisor through inter-office mail. At the time he received it, the back of the envelope contained an unflattering caricature of a slumping man with the letters “DR” on his shirt and wearing a hat similar to one Reed had had. Next to the drawing were the words “chick magnet” as well as: “Triple-chin man with hump no ass, no class.” He assumed Nguyen was responsible for the markings because Nguyen had harassed Reed in the past. In addition, Reed said Nguyen had at one time referred to the hump in his back and to his chin. In the bottom right corner were the initials “TB” and “CH”. Reed said “TB” referred to Tracy Byrd who had seen Nguyen filing a shank of some sort one morning and filed a complaint that led to what Reed termed “a big investigation.” He said “CH” referred to Christopher Harris, who along with Byrd and himself, had had troubles with Nguyen.

On January 5, 2015, Reed received an insulting cartoon in the mail at home, similar to the one on the back of the envelope at work. Tracy Byrd’s address was placed as the return address. He assumed this was from Nguyen, and, nervous that Nguyen had his phone number and address, Reed filed a police report the next day. He also gave the letter to the City’s
Inspector General. He said he hadn't spoken to Nguyen since Reed had been transferred to the south plant in 2011 except for the time Nguyen had charged Harris and himself, accusing them of all kinds of stuff and calling Harris a "f-ing pig." Reed also said he had seen Nguyen with a weapon at his desk.

On April 3, 2015, Reed received a call at home and Nguyen's name appeared on the phone's display. He did not answer it, and no voicemail message was left. Reed reported the call to the police. Reed had never called Nguyen, and he knew of no reason Nguyen would call him. He was aware that there was no finding of workplace violence after an investigation of Byrd's complaint against Nguyen, and said this was common.

**Marcela Castillo**, currently an attorney with the Cook County Sheriff's Office, was an investigator at the City's Inspector General's office at the time pertinent to this case. It is the Inspector General who has the responsibility to investigate allegations of abuse, fraud and waste with regard to City employees, and his office receives complaints by phone, email, fax or mail. Upon receipt of such a complaint, staff members write a memo summarizing it, which is then entered into a computer system and reviewed by a supervisor. The supervisor can refer it to a committee which determines whether the claims will be turned into a complaint. If so, the complaint turn into an investigation, and a physical file is created and assigned to an investigator or team of investigators. Castillo explained that the Inspector General has subpoena powers, and that any document received during the investigation is noted in the file.

Castillo was the initial lead investigator in this case. The investigation began in May 2015, but Castillo's participation in that investigation ended in April or May of 2016 when she left the OIG. Catherine Broomfield had earlier participated in some interviews with Castillo and took over the investigation when Castillo left. Assistant Investigator Kimberly Brown also helped with some of the interviews. Melissa Villa was a forensic analyst who helped with respect to phone records. The complaints filed by both Harris and Reed came via the office's telephone "hotline" and were received by Hector Arelllo, who listed them as involving telephone harassment. As previously noted, Reed was retired at that point, while Harris was on a disability leave.

Castillo interviewed David Reed on May 19, 2015, along with secondary investigator James Berlage. At that time Reed presented her with documents related to violence in the
workplace complaints he had filed against Nguyen, the mailing with the derogatory drawing which he alleged Nguyen had made, and other incident reports he had submitted through the Water Department including complaints to the Human Rights Commission. Castillo wrote a memorandum summarizing the interview. The memorandum was reviewed by Berlage for content and grammatical errors, and then reviewed by a supervisor for grammatical errors. Reed subsequently submitted a copy of a police report he had made sometime in 2015 for telephonic harassment by Nguyen. Castillo said she had no knowledge of whether the police did anything with Reed’s police report.

Castillo and Berlage also separately interviewed Christopher Harris on May 19, 2015. In summary, the allegations were of a history of harassment and derogatory language, together with receipt of harassing text messages during April 2015. She received no documents from Harris during this interview, but he later sent her text messages he received in August and October 2015 as well as some violence in the workplace documents. He forwarded them to her work Blackberry and she in turn forwarded them to her work email. Sometime in March or April 2016 Harris also sent her his petition for a “Stalking No Contact Order”.

After interviewing Reed and Harris, Castillo obtained Nguyen’s personnel file. She noticed it contained documented history of violence in the workplace incident reports, so she contacted Judith Mars, a deputy in the Department of Human Resources who oversaw the violence in the workplace and EEO divisions and requested documents specific to those incidents. Castillo interviewed Mars on June 15, and Mars subsequently emailed her documents relating to workplace violence reports. Among these documents was an allegation that Nguyen had called Harris a 500-pound fucking pig or something to that effect, though the underlying complaint was not sustained.

Castillo then subpoenaed phone service providers both for call information on the number Reed provided (which Castillo confirmed was Nguyen’s personal cell phone), and the number listed on the text messages. She also issued a subpoena for Harris’s and Reed’s cell phone numbers. Forensic analyst Melissa Villa performed a Pen-Link analysis of the records obtained. The records show that only one of the calls alleged to have been made by Nguyen was

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2 Harris’s request for an Emergency Civil No Contact Order – Stalking was denied, but on March 31, 2018 the Circuit Court of Cook County ordered the Grievant and Harris to stay away from each other. That Order was to be in effect through March 30, 2018.
made during the time he was at work. They also show that, contrary to his testimony, Harris had called Nguyen on one occasion.

Castillo and secondary investigator Jessica Brady next interviewed Nguyen. Nguyen had union representatives present and completed an “Advisement of Rights” form. The interview was transcribed and entered into the record. Castillo provided Nguyen with copies of the drawing on the envelope, the telephonic records, the screen shots of text messages, subscriber information from the company that runs Talkatone, and a copy of the 2013 EEOC policy that Nguyen had signed.

On May 31, 2016, Castillo and Catherine Broomfield also interviewed Water Chemist Karma Ashley who Nguyen said had taken his cell phone and texted Reed and Harris with it. Ashley denied using Nguyen’s phone.

Prior to leaving the OIG, Castillo met with Broomfield, an attorney assigned to the case, Sarah Ansari, and her supervisor, Anne Florio, and a decision was made to proceed with the case.

**Melissa Villa** testified that she been employed by the Inspector General for 16 years, and had been a senior data analyst for a year at the time of the hearing. She said that she used Pen-Link analytical software to determine how frequently phone numbers belonging to Nguyen, Harris and Reed contacted each other. She also extracted time and attendance records for Nguyen between April 1, 2015 and April 1, 2016, which showed the times he punched in and out for work. The report Villa prepared after her analysis indicates records from AT&T, Nguyen’s carrier, show one person-to-person call from Nguyen’s phone to Harris’s phone on April 3, 2015 and two text messages from Nguyen’s phone to Harris’s, one on April 13, 2015 and another on April 14, 2015. Records from Harris’s carrier, T-Mobile, confirms there were two text messages from Nguyen’s phone to Harris’s phone on April 13 and 14, 2015 and that Harris received one incoming call from Nguyen’s phone on April 3, 2015 (likely received by voicemail because it was marked “unknown”). It also shows one outgoing phone call from Harris’s phone to Nguyen’s AT&T phone on April 6, 2015 (again, likely to voicemail). Nguyen had two other phone numbers, and Harris’s T-Mobile records show Nguyen texted Harris from one of those numbers four times on October 10, 2015 during a two-minute period around 4:30 pm. They further show Nguyen phoned Harris from the third number on April 22 and May 14, 2015 (likely to
voicemails), and texted him on April 3, 2015, and twice on August 11, 2015. Nguyen’s AT&T records show one phone call from his phone to Reed’s phone on April 3, 2015. Harris’s T-Mobile records show there were 405 calls between Harris and Reed.

A comparison of the phone records with the time and attendance records shows only one occasion when Nguyen contacted Harris during work hours. On April 14, 2015, a text message was sent from Nguyen’s phone to Harris’s phone at 7:04 am, a little over a half-hour before Nguyen punched out from his overnight shift. Nguyen also sent a text on April 3, 2015 at 3:07 pm and a person-to-person call to Harris on April 3, 2015 at 3:10 pm (likely to voicemail), but Villa said there was a Family and Medical Leave Act pay code for that period, indicating that Nguyen was taking FMLA leave at that time.

Katherine Broomfield testified that she had been an investigator with the OIG and became the lead investigator of Anthony Nguyen when Castillo left the office. She had subpoenaed records from Talkatone and explained that Talkatone was an application by which a user can send text messages and make calls while connected to Wi-Fi and not using cell minutes. Talkatone keeps call and text messages for only 180 days so it did not have call records. It did, however, have subscriber information and the phone number Broomfield gave it showed Nguyen was a subscriber. Broomfield also obtained police reports and found that David Reed had filed a police report on January 6, 2015 alleging harassment by mail by Anthony Nguyen, and Christopher Harris similarly filed a police report alleging harassment by telephone by Nguyen on April 3, 2015.

Based on the evidence they gathered, Broomfield, along with the Assistant Inspector General assigned to the case and the Chief Investigator, determined that the case should be sustained. Broomfield then wrote a summary report of the investigation and forwarded it to the office’s General Counsel. It was reviewed by the Inspector General after which the Inspector General and those previously involved in the investigation discussed the matter. If upon such review the Inspector General determines to sustain the case, the OIG will make a recommendation for discipline and the matter will be forwarded to the Law Department. In Nguyen’s case, the Inspector General recommended termination and placement on the City’s ineligible for rehire list based on four violations of personnel rules: making false statements; discourteous treatment of City employees or members of the public; conduct unbecoming an officer or public employee; and violence of the workplace. Broomfield’s report referenced
unsubstantiated allegations of incidents between Nguyen and Reed and Harris, but Broomfield stated the Inspector General’s recommendation was not based on those or any older discipline, and that they were included only to show the gravity the recipients might attach to Nguyen’s text messages and phone calls.¹

**Alan Stark** testified that he is the Deputy Commissioner for the Bureau of Water Supply of the Department of Water Management, the entity responsible for treating and pumping Lake Michigan water to residents. The Bureau has three divisions: the Treatment Division, with the Jardine Water Purification Plant as its main facility as well as the Sawyer Water Filtration Plant, (formerly known as the South Plant); the Pumping Division with 12 pumping stations; and the Water Quality Division, which does most of the water quality testing, mainly at the Jardine plant. Stark said Nguyen worked in the Water Quality Department and more recently in Water Treatment.

Starks first met Nguyen around 2005 when he was laboratory director. As laboratory director, Starks said he has 600 employees working under him. Reluctant to provide an estimate, Starks eventually stated about half those employees are African-American while some are Middle Eastern. He could think of only one Asian, Nguyen.

In March 2017, Stark received and reviewed the Inspector General’s report regarding Nguyen and the text messages received by Harris and Reed. He understood it to have found that Nguyen had sent harassing texts and phone calls to one former employee and one who was on leave. Stark found Nguyen’s conduct to be egregious in that it was threatening. Although neither Reed or Harris were working at the time, he considered the conduct to constitute violence in the work place solely because it was done while Nguyen was on City time. He concurred with the Inspector General’s recommendation to terminate Nguyen and discussed the report with First Deputy Commissioner Julie Harris. Ultimately the Department sought Nguyen’s termination.

On April 25, 2017, a pre-disciplinary hearing was held with Nguyen, a Union representative, Managing Deputy William Bresnahan, and Ralph Tushuski who was in charge of

¹ It is unclear whether the evidence of older unsubstantiated disciplinary matters was retained in his personnel file in violation of the parties’ collective bargaining agreement, and I make no determination on that point. The more pertinent point is that unsubstantiated charges, by definition, are not proof of the conduct alleged. They cannot be used in determining whether to discipline an employee for other conduct, and for that reason I give their existence no weight in this proceeding.
safety and security at the Department’s facilities. Nguyen was presented with the following charges:

1. On or about April 13, 2016, during an investigatory interview with the City of Chicago Office of Inspector General, conducted pursuant to Chapter 2-56 of the Municipal Code of Chicago, you denied transmitting one or more derogatory and/or threatening and/or intimidating text messages and/or phone calls to David Reed and/or Christopher Harris; instead, you stated and/or claimed that your friend(s) and/or niece(s) and/or nephew and/or daughter and/or security personnel and/or Water Chemist II Karma Ashley may have transmitted those text messages and/or phone calls, or you made statements and/or claims to that effect. Thus, you made false, inaccurate or deliberately incomplete statements in an official inquiry, investigation or other official proceeding, in violation of City of Chicago Personnel Rule XVIII, Section 1, Subsection 8.

2. On one or more occasions between approximately April 2015 and approximately October 2015, you transmitted derogatory and/or threatening and/or intimidating text messages and/or phone calls to David Reed and/or Christopher Harris, including (but not limited to), text messages with the following content: “Hi Pigboy;” “Brother Pigboy, life is passing you by;” “Howdy my big brother??;” “David reed wanna talk to you boy;” “Are you still kicking ... Guess not ... RIP,” or text messages with words to that effect. Thus, you engaged in discourteous treatment, including verbal abuse, of any other City employee or member of the public and/or you provoked or incited another employee or member of the public to engage in such conduct, in violation of City of Chicago Personnel Rule XVIII, Section 1, Subsection 23.

3. On one or more occasions between approximately April 2015 and approximately October 2015, you transmitted one or more threatening and/or intimidating text messages and/or phone calls to David Reed and/or Christopher Harris while on duty, thereby engaging in act(s) of violence in the workplace and/or violating the City of Chicago’s Violence in the Workplace Policy, in violation of City of Chicago Personnel Rule XVIII, Section 1, Subsection 54.

4. Based on the foregoing, you have displayed conduct unbecoming a City of Chicago employee, in violation of City of Chicago Personnel Rule XVIII, Section 1, Subsection 50.

Nguyen was also presented with all of the material from the Inspector General’s investigation.

The next day, April 26, 2017, Nguyen presented a written response in a letter addressed to Commissioner Murphy:

Dear Commissioner Murphy,

I think you probably saw me around the control lab occasionally. I will try to be as brief as possible. Please allow me to introduce myself. I’m the Asian chemist that one day months ago attempted to make a small conversation with
you by saying that I found your city ID cards in the locker room twice and gave them to Control Center.

If you were only to read the reports and allegations against me I think you would probably conclude I am a very bad person, a racist and a violent thug. I can assure you that I am not. I would like to appeal to your sense of fairness by suggesting that you talk to my co-workers in the control lab, including my bosses Mrs. Lovely Jacob and Mr. Abdurrazaq Siddiqui. These two bosses, and possibly Deputy Commissioner Alan Stark, witnessed a lot of harassment, intimidation and false accusation done to me by Chris Harris and David Reed when they were still working.

These two gentlemen even called the Illinois Labor Department two times to come out to the plant. Each time, they spent two weeks investigating, interviewing witnesses. Commissioner Stark sat in one of the hearings. After the first investigation, they found that the accusations of racism and violent intimidation could not be substantiated. (The investigators asked witnesses if they ever saw me walk around with a big knife threatening African Americans in Jardine, as per the accusation). The second time the Illinois Labor investigators came out was a year later. The accusation was that I assaulted them. Please keep in mind that I am probably the smallest guy in Jardine and that the two accusers were all at least twice my size, one of them, Chris Harris, was a martial arts expert. There were no final letter of findings this time, they told me later, because they realized these two accusers were making up lies and they had wasted their valuable time and were angry at being lied to. They were very surprised when they saw me because they had expected to see a big and violent looking racist, based on the description given to them. These two claimed that they had repeatedly complained to management at the plant but management were too afraid of me to do anything to me.

Commissioner Murphy, I am a father of three, with two kids still in college needing my financial support. I am not what they accused me of being. I appeal to your sense of fairness and compassion by asking you to grant me a personal audience. I will answer any and all of the questions you have about all those hearings and suspensions, about how I was forbidden to speak in my own defense. And if you do not wish to see me in person, at least please grant me a telephone interview.

Please call me at 773-965-****. (I was advised that I cannot call you).

Stark testified that Nguyen's written response did not cause him to change his mind about the situation because Nguyen never addressed the charges.

Stark testified that there were other instances in which Nguyen had been disciplined and the City entered evidence of that discipline into the record. Between the dates of the text messages in 2015 and the April 2016 pre-disciplinary meeting, Nguyen was disciplined twice. Nguyen was given a 10-day suspension from January 31, 2016 through February 9, 2016 for violation of Personnel Rule XVIII, Section 1, Subsections 25 29, 36, 39 and 48, for "[a]ctions
taken and procedures performed [that] were not in accordance to the policies, rules and regulations governing the work performed.” According to Stark, Nguyen had been “dry-labbing”—that is writing results on laboratory sheets without actually doing the analysis.

Nguyen had just returned from a five-day suspension from January 21 through January 25, 2016, for violation of Personnel Rule XVIII, Section 1, Subsection 54—Any act of Violence in the Workplace. However, the suspension notice references an EEO report number that did not sustain a finding of workplace violence. The City submitted a memorandum from its EEO Officer issued on January 30, 2015 about the complaint which had been received nearly three years earlier, on April 24, 2012. The complainant was an African-American, female co-worker who claimed Nguyen had made harassing statements toward her based on her race and national origin and physically intimidated and threatened her. After investigation involving interviews with the parties and three witnesses, the EEO Officer found sufficient evidence to support a conclusion of violation of EEO policy and sustained the allegation of national origin harassment. However, the EEO Officer found insufficient evidence to support finding harassment based on race or violation of violence in the workplace policy and did not sustain the allegation of threatening behavior.

The City also submitted evidence of older disciplinary actions imposed between 1999 and 2010. Although Starks testified about each incident, he was not directly involved in those that occurred prior to 2005 and relied on City reports. On April 27, 1999, Nguyen received a written reprimand for “Screaming/shouting at workplace and could not calm down for a period of time. (Police called to calm him down.)” He was suspended for five days on November 24, 1999 because of a complaint filed with Personnel’s sexual harassment office. A related report shows that both of these incidents stemmed from Nguyen’s attempts at humor by stating that his co-worker had a “sugar daddy,” the second directly related to that comment and the first following a work assignment dispute with that same co-worker in which Nguyen’s supervisor suggested the two disputes were related. Starks noted that Nguyen’s supervisor at that time was African-American. On May 15, 2000, Nguyen was suspended for seven days and reassigned to the

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4 The suspension actually states from January 21, 2016 with a return to work date of January 26, 2015, but this is evidently a typographical error - the two signatures on the document were dated 2016.

5 I allowed this older evidence to be entered over the objection of the Union with the understanding that this evidence would not be used in support of the penalty but might support a suggestion that Nguyen’s 2015 conduct was of a serious nature, and not merely juvenile humor.
Jardine plant because of “discourteous treatment, shouting, screaming, verbal abuse, and explosive behavior [he] exhibited and directed toward [his] immediate supervisor on April 10, 2000.” The related report shows that, through a math error, his supervisor had given him an erroneously low overall evaluation score, 3.00 which was corrected to 3.60. Starks observed that this supervisor was a female African-American. On May 23, 2005, Nguyen was suspended for 29 days because on February 7, 2005 he left his work location without authorization and without notifying his supervisor and because he was involved in a violence in the workplace situation with a co-worker and failed to report the incident to his supervisor at the time it occurred. Starks recalled that the other employee was a fellow chemist who was African-American and well over six feet tall. Both employees were disciplined for the incident. There had also been a written reprimand issued on September 24, 2007 for criminal or improper conduct and violation of City policy or rule based on Nguyen being discourteous and verbally abusive to a co-worker on July 20, 2007. Starks explained that the other employee was Nguyen’s immediate supervisor, an African-American man, and that the incident began with a dispute between Nguyen and Reed over use of a computer. Nguyen also received a notice of suspension from December 23, 2010 through January 2, 2011, for conduct involving three categories: criminal or improper conduct, violation of City policy or rule, and misrepresentation. This was based on Reed’s complaint that Nguyen had walked past him and Harris, turned his head toward them, and continued to walk while raising his hand to make an obscene gesture—conduct which Nguyen denied but which Stark noted video recordings confirmed.

**Anthony Nguyen** testified that he immigrated from Vietnam in 1976 after the conclusion of the Vietnam War. He arrived in Chicago and received a bachelor’s degree in chemistry. A child with a medical condition prevented him from completing his master’s degree program. He worked in private industry, then for the State EPA doing water testing for all the municipalities in the State, and began working for the City in 1999. He initially worked for the water control lab, first at the South Plant, then at Jardine, but because the control lab involved rotating shifts and he had small children, he transferred to the chemistry lab in 2002. He stayed in the chemistry lab until 2010 when, because of lay-offs, he chose to transfer to the control lab at Jardine rather than returning to the South Plant.

Nguyen estimated 80 percent of the employees in the control lab were African-American. The same was true of the South Plant when he was there. When he arrived at Jardine, all of the
managers and supervisors and most of the chemists were African-American. The makeup changed a little over time with other minorities were hired, but he remained the only Southeast Asian; the rest were mostly Western Asian—Pakistani or Indian.

In his interview with the Office of the Inspector General, Nguyen denied having ever seen the inter-office mail with the caricature on it described above by Reed. Nguyen further denied ever calling Reed. He had no explanation for phone records showing calls from his phone to Reed's, but he also said that he sometimes leaves his phone on his desk at work where others have access to it and that he lets his friends and kids play with his phone and perhaps his friends, nieces or nephew made the call. He initially denied having Reed's number, then referenced a master list of chemist's phone numbers used in case a chemist needs to have another chemist cover his time slot and stated that he must have entered this list into his phone.

Nguyen also denied having sent mail to Harris's home, stating he did not even know Harris's home address. He further denied having called Harris. He provided two explanations for his subscription to Talkatone, initially stating that his niece downloaded it and it was the type of program that asks you to invite others to join in. He did not download it, but said its messages were signed with his name because it was his phone. He knew this because he had texted his wife with it on one occasion. Nguyen also said that it was one of his tenants who introduced him to Talkatone and asked him to try it. As to the text to Harris stating "Hi, pigboy", Nguyen stated it must have been one of his nieces or nephews or a friend or daughter who had sent that. He speculated that the term "pigboy" may have come with the app. He had no explanation for the phrase "the grim reaper is at your door."

When it was pointed out that one of the calls was made while he was at work, Nguyen said co-workers borrow each other's phones all the time—for example, when they get a new phone. He said it could have been co-worker Karma Ashley who made the call. With respect to calls made from other phone numbers, Nguyen said his family has five cell phones in the house. He denied having the phone number 773-280-**** though, which phone records indicate was one of his used to call Harris. He pointed out that Nguyen is a very common Vietnamese last name, suggesting the records had the wrong Anthony Nguyen. Nguyen denied having any reason to call Reed or Harris in 2015. In fact, he said the happiest days of his life were when Reed retired and Harris was transferred to the South Plant.
At the hearing, Nguyen reviewed these portions of the transcript of his interview and stated he had nothing to add to it. He said he had no reason or desire to or text Reed or Harris in the future. On cross-examination, Nguyen stated his daughter had downloaded the Talkatone app onto his iPad, but not onto his iPhone and stated that his tenant had nothing to do with that. When asked about his prior statement concerning his tenant introducing it to him, he denied remembering what had been said in the interview, saying it felt like an ambush to him. Ultimately, he admitted that phone calls and text messages to Reed and Harris came from his cell phone, but he continued to deny that he was the one who made them. He said Talkatone sent messages automatically to those who had downloaded the app, and this had gotten him into trouble with his wife when she received a message that she assumed had been intended for another woman.

Nguyen now also offered an explanation for the reference to “pigboy” that appeared in these Talkatone messages. He stated he had entered Chris Harris’s number into his phone, and a neighbor asked him who Chris Harris was. He explained that Harris harassed him at work and was really fat like a pig. He joked that calling Harris a pig was unfair to pigs, explaining that his family had raised pigs back in Vietnam. Nguyen said his neighbor then changed the name for Chris Harris entered into Nguyen’s cell phone to “Pigboy” without Nguyen’s knowledge.

With respect to the text message concerning the grim reaper sent while Nguyen was at work, Nguyen acknowledged he told the investigators that Karma Ashley or a security guard must have sent it. At the hearing he supported his position that he had not sent it from work by saying that his AT&T cell phone never has reception at work, the signal is completely dead. He explained his earlier answer by stating “I made it up on the fly, because that was the best answer that I could truthfully give to them.” When asked if that had not been truthful, Nguyen said

If you said it’s not truthful, then I would disagree with you because in my mind, I was under pressure.... I forgot that when I brought my cell phone to work, usually, not all the time, I could not use it at all to receive or to send anything. I only used the land line at work, so I said that must have been someone else using it, so I mentioned the co-worker’s name. His name came to my mind. [Transcript, page 118, folios 9-17]

Nguyen admitted that his written response to the charges against him provided none of this information, explaining his only intent in his writing was to obtain a meeting with the commissioner in order to present his side of the story.
Anthony Buchanan, another Water Chemist II who began working in the control lab at the Jardine plant in 2012 where Nguyen helped train him. He testified that Nguyen was friendly and not a racist. He never heard Nguyen use racial epithets, threaten anyone, or use obscene gestures. He expressed the opinion that Nguyen would be welcome if he returned to the Department. Buchanan said he had never worked with Reed or Harris.
IV. The Arguments of the Parties

The Position of the City

The City states that the issue is whether it had just cause to discharge Nguyen. To establish just cause, it must show by a preponderance of the evidence that Nguyen engaged in the misconduct with which he was charged, and that the discipline imposed was appropriate. If the misconduct is established, the penalty must be upheld unless it constitutes an abuse of discretion. The City points the arbitrator to two treatises\(^6\) and Section 20(b) of the Collective Bargaining Agreement in support of this assertion.\(^7\)

The City asserts that it proved Nguyen is guilty of all four of the charges. With respect to the first charge concerning harassment of Reed and Harris, there is no dispute that the communications at issue came from Nguyen’s phone. Phone records conclusively show this and Nguyen admitted as much. Despite Nguyen’s assertions that the communications nevertheless came from someone else, the content of the messages reveal Nguyen as the author. They included the term “pig boy”, Nguyen’s own unique epithet for Harris. One of the persons he accused of having sent a text from work using his phone, Karma Ashley, told the OIG investigators she had not used it, and Nguyen’s explanations for others’ use of his phone were self-contradictory and repeatedly impeached. In fact, Nguyen admitted lying. The only credible evidence supports finding that Nguyen himself had sent the communications.

The City also asserts that the communications constituted violence in the workplace, the subject of the second charge. It challenges positions the Union took at the hearing that the communications were merely juvenile in nature and constituted “out of work” conduct. The City asserts characterization of Nguyen’s conduct as juvenile ignores the history of his conduct and the reactions of Reed and Harris who expressed fear and immediately filed complaints with OIG and the police and in the case of Harris, sought an order of protection. It also cannot be characterized as out of work conduct because one of the recipients of the messages, Harris, was still a City employee. He was merely on a leave of absence and the City’s violence in the


\(^7\) Article 20(b) provides in part: “the Employer within its discretion may determine whether disciplinary action should be an oral warning, written reprimand, suspension (up to 30 days) or discharge, depending upon various factors, such as, but not limited to, the severity of the offense or the employee’s prior record.”
workplace policy applies to "volunteers and employees of the City of Chicago whether paid or unpaid." Furthermore, one of the messages was sent while Nguyen was still on the job.

More broadly, the City states that it is fundamentally absurd to argue that out of work conduct cannot be disciplined. The City has several policies that involve off duty conduct such as secondary employment that causes a conflict of interest, use of illegal drugs while off duty, City residency requirements, and non-payment of debts owed the City. It states that "immunizing" off duty conduct would incentivize antagonistic employees to bully targeted coworkers outside the workplace where they are less easily monitored. And it cites judicial authority for the proposition that under Title VII sexual "harassment need not take place within the physical confines of the workplace to be actionable; it need only have consequences in the workplace", Lapka v. Chertoff, 517 F.3d 974, 983 (7th Cir. 2008) (citing Doe v. Oberweis Dairy, 456 F.3d 704, 715 (7th Cir. 2006), and its anti-retaliation provisions protect even former employees, Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997), Yeprinsky v. Fluor Daniel, Inc., 87 F.3d 881, 895 (7th Cir. 1996). The City claims the communications had a "clear nexus" with Nguyen's employment.

With respect to the third charge that Nguyen made false statements during the official inquiry into this matter, the City notes that Nguyen admitted lying. It also repeats its point that Nguyen's statements to the OIG and at the hearing were contradictory and were repeatedly impeached. Overall, he was evasive and lacked candor, which is generally accepted as a sign of untrustworthiness.

The City argues that, having demonstrated that Nguyen committed all four violations, its determination to discharge Nguyen cannot be found to constitute an abuse of discretion. It argues that his communications with Reed and Harris alone were sufficient to warrant discharge. It states it is critically important to consider the context in which the phone calls and text messages were sent, and the history of the relationship between Nguyen and Reed and Harris shows the conduct was egregious and cannot be tolerated. Reed and Harris's feelings of intimidation and fear were reasonable, and must be taken into account. It notes they had not heard from Nguyen in years before receiving these morbid messages. It states the incidents at

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8 The City did not actually address the fourth charge in its brief, but if the first three were present I would necessarily find that Nguyen also "displayed conduct unbecoming a City of Chicago employee." In this case, it is a derivative violation.
issue took place over a six-month period and history shows disruptive behavior dating back to 1999, constituting an ongoing and sustained pattern of behavior.

The City also argues that it overwhelmingly demonstrated that Nguyen made false statements to OIG, damaging the employer-employee relationship beyond repair. Dishonesty is commonly held to be among the most serious of offenses, and arbitrators are very strict with respect to dishonest acts such as intentional theft and fraud. It states that citizens must trust that government employees are truthful, and this applies to interactions with OIG. The municipal code requires that employees cooperate with OIG, and that cooperation is an integral component of the employer-employee relationship. The City contends that Nguyen is utterly incapable of fulfilling the essential responsibility of being honest with his employer, and consequently must remain discharged.

While the violations by themselves warrant discharge, Nguyen's disciplinary history must also be considered. Moreover, the disciplinary history should not be considered merely for background, but as establishing a "pattern of sustained infraction" referenced as an exception to Section 14.1(d)(ii)'s contractual prohibition on using discipline more than 18 months old in fashioning discipline. With respect to the five-year gap between Nguyen's most recent discipline and the 2015 communications, the City posits that Section 14.1(d)(ii) makes no mention of gaps. In any event, the gap should not negate the seriousness of Nguyen's most recent harassment. In fact, the City states it should cause greater concern. The City also asserts that the two post-communication disciplines Nguyen received in 2016 should be considered in determining whether discharge constituted an abuse of discretion because they both involved inappropriate and disruptive behavior akin to the misconduct at issue.

Finally, the City states the severity of the misconduct at issue shows that any effort to rehabilitate or correctively discipline the Grievant will not succeed and therefore there is no reasonable or appropriate alternative to discharge. It states the only way Nguyen can be expected to correct his behavior is to take responsibility for it, yet he repeatedly attempted to shift blame onto others.

With respect to potential remedy, should the arbitrator somehow determine that discharge was inappropriate, the City requests that any back-pay award be tolled for the period of time beyond the contractually specified 60-day window for hearing that was required by the
union's unavailability. It notes that this Arbitrator was selected on May 2, 2017, and the hearing originally scheduled for May 30, but because of the Union's unavailability the hearing was rescheduled to July 7 and August 10, both dates that fall outside the 60-day window. The City also asks that, should back pay be awarded, it be allowed to offset it with any interim earnings that Nguyen had or otherwise argue that Nguyen had a duty to mitigate.

The Position of the Union

The Union describes the City's case as consisting of three calls and eight text messages to Christopher Harris and two calls to David Reed over a six-month period. With only one exception, all the communication took place off duty. It points out that the police appeared to have taken no action concerning Harris and Reed's reports of mortal fear of Nguyen, and a current African-American co-worker has no such fear even though he remains in contact with him. The Union suggests this was essentially a private matter among the three men, and Harris addressed that private off-duty conduct by obtaining a court order that requires both parties to stay away from each other. That tactic has proven successful: there has been no contact between the parties since October 2015, and consequently no reason for Nguyen's employer to fire him in 2017.

The Union states that the only way to support discipline for off-duty conduct is if there is a nexus between the employee's off-duty conduct and his specific job duties, but Nguyen's job duties as a chemist were to test water and there is no nexus between those duties and his communications with Harris and Reed. The Union references two decisions where arbitrators returned employees to work after finding a similar lack of nexus, one where a civilian police department employee had engaged in identity theft, and another where a municipal wastewater tester had been convicted of the felony of burning down a bowling alley.

The Union states workplace violence is a union issue with which it is very concerned and for which it has established protocols. The general definition of workplace violence involves violent acts, including physical assaults and threats of assaults, directed toward persons at work or on duty. Zero tolerance should be the rule, but that does not mean that every unpleasant exchange is workplace violence, or that every case of workplace violence should result in summary discharge. The first question to ask here is whether texting "pig brother" is an assault or battery. The second is whether the text is directed toward a person at work or on duty. The answer to both is "no." The Union points to an analogous decision of Arbitrator Simon, in which
he returned an employee to work who swore and threatened a lawsuit after being denied worker’s compensation. The swearing, which the employer had heard before, was not workplace violence.

People are not fired for being egregiously rude to others who are not at work, and the City is really relying on Nguyen’s past disciplinary history, including matters for which he was exonerated and thus should not even be in his file, let alone used as a basis for discipline. The Department of Labor made no finding with regard to a written warning Nguyen received in September 2007 and that should not be in his disciplinary record. Nor should the December 2008 workplace violence counseling be used or the April 2009 workplace violence with a weapon charge for which insufficient evidence had been found, or the June 2009 oral reprimand or the October 2010 allegation of workplace violence.

The Union had not objected to the two disciplines imposed in 2016, but the 2016 EEO matter did not include a finding of workplace violence. There had been a finding of discrimination, but as the discipline was imposed after the incidents at issue here it cannot be used as a basis for enhancing progressive discipline. The other 2016 discipline concerned misconduct solely related to Nguyen’s duties as a chemist, not workplace violence.

Significantly, Nguyen’s disciplinary record shows a five-year gap from charges filed in 2010 until the 2015 incidents at issue. Section 14.1(d)(ii) of the contract provides that discipline imposed greater than 18 months back cannot be considered unless there is a sustained pattern of misconduct. The five-year gap precludes finding a sustained pattern here. The gap is also significant in that it shows that, in the absence of Harris and Reed from the workplace, Nguyen has been having no problems. In fact, his co-worker, who has been working with Nguyen during this period and, like Reed and Harris, is African-American, testified that his co-workers would be happy to have him back.

V. Discussion

Just Cause

Article 2 of the collective bargaining agreement provides that employees can only be discharged for just cause. This standard is also required under Article XVIII, Section 1 of the City of Chicago Personnel Rules. The City contends that this requires it to demonstrate by a preponderance of the evidence that the Grievant engaged in the misconduct alleged. If such a
demonstration is made, the City asserts it has the discretion to determine the appropriate discipline, and that its selection of the discipline cannot be overturned unless found to be an abuse of discretion. It bases this latter point on Article 20(b) of the parties’ collective bargaining agreement: “the Employer within its discretion may determine whether disciplinary action should be an oral warning, written reprimand, suspension (up to 30 days) or discharge...” It must be noted, though, that the discretion granted in Article 20(b) is not unlimited. The full text of that provision identifies factors the Employer is to consider in determining penalties, and includes adoption of a progressive discipline policy:

It is the policy of the Employer that discipline administered by it shall be corrective and progressive where appropriate. Consistent with this policy, the Employer within its discretion may determine whether disciplinary action should be an oral warning, written reprimand, suspension (up to 30 days) or discharge, depending upon various factors, such as, but not limited to, the severity of the offense or the employee’s prior record.

As is evident from the wording of the contract and the Personnel Rules, there are two facets to just cause. The first is whether the City can prove that there was just cause for some measure of discipline. The second is whether the City can demonstrate that there was just cause for the measure of discipline imposed. Each is addressed in turn.

**Just Cause for Discipline - Violation of Personnel Rules**

The determination to discharge the Grievant was based upon the City’s finding that he had violated four Personnel Rules – disrespect, untruthfulness, conduct unbecoming a public employee, and violence in the workplace. I find sufficient support for the first three of those charges, and insufficient support for the final charge.

There can be no serious doubt that the Grievant violated Section 1, Subsection 23 of the City’s Personnel Rules by sending harassing messages to Reed and Harris in April and October 2015, and in doing so also violated Section 1, Subsection 50. Subsection 23 prohibits

Discourteous treatment, including verbal abuse, of any other City employee or member of the public. Provoking or inciting another employee or member of the public to engage in such conduct.

Subsection 50 prohibits “[c]onduct unbecoming an officer or public employee.”
The text messages received by Reed and Harris were obviously discourteous, perhaps abusive, and likely intended to provoke discourteous responses. The Union characterized them as “juvenile” but did not otherwise argue to the contrary. It does not matter that Reed was no longer an employee of the City or that Harris was on leave because the rule prohibits discourteous treatment of members of the public.9 It is uncontroversial that both the offensive text messages and the phone calls came from phones or iPads owned by the Grievant, and Nguyen himself admitted as much. The only issue is whether it was the Grievant who sent the text messages and placed the phone calls. He denied that he had and attempted to offer other possibilities: his children, his nieces and nephews, his neighbors, his co-workers, or some other person named Anthony Nguyen. The suggestions, improbable in their own right, were contradictory and in some instances shown to be false. Indeed, the Grievant admitted making one up “on the fly.” Taken as a whole, his explanations for these messages are more than simply not credible – they make no sense at all. The great weight of evidence presented supports finding that the Grievant sent the offensive text messages and placed the phone calls to Reed and Harris, thereby violating both Subsections 23 and 50 of the Personnel Rules.10

There similarly can be no doubt that the Grievant violated Section 1, Subsection 8, which prohibits making “false, inaccurate, or deliberately incomplete statements in an official inquiry, investigation or other official proceeding” and in doing so violated Subsection 50 a second time. Again, the Grievant admitted that some of his responses to questions posed during his interview with OIG investigators were made up “on the fly”, while others made no sense. He attempted to excuse this by saying that he felt ambushed during the interview. But discomfort or surprise do not excuse falsehoods in an investigation. He made no effort to correct the record once his discomfort abated and his surprise passed. In fact, the Grievant made no real attempt to argue that he had not lied.

9 The Union argues with some justification that rudeness to another person away from the job is not generally seen as grounds for formal discipline. That is true, as far as it goes, but these were not random members of the public. These were people he had relationships with based on their mutual employment at the Water plants, and their shared history of animosity at work, including formal charges back and forth. Harris, while on leave, technically remains a co-worker. I find sufficient nexus between the conduct and the Grievant’s employment to warrant treating these messages as violations of the Personnel Rules.

10 I do not consider the text messages saying “I use Talkatone to call/text any number in the US & Canada without using my cell minutes. Get it at tktn.at” to be discourteous or abusive, because they appear to be an automated marketing message sent by the app itself. Nor can I characterize the phone calls in any way, as there was no conversation.
Where the City’s presentation of evidence comes up short is in its attempt to prove a violation of Subsection 54, the violence in the workplace policy, which in part prohibits:

Any act of violence in the workplace or violation of the City’s Violence in the Workplace Policy. Violence, as the term is used in the City’s Violence in the Workplace Policy, includes written or verbal communications, whether direct or indirect, which are of a threatening, intimidating or coercive nature; the threat or use of physical force, including fighting or horseplay; stalking; vandalism or destruction of property; and the use or possession of any weapon and/or ammunition, unless the specific weapon and/or ammunition is authorized by the City for a particular work assignment.

The Grievant’s actions clearly did not involve the use of a weapon, destruction of property, stalking, or physical force. The City attempted to portray the text messages as threatening or intimidating, or perhaps even a threat of physical force, but the language of the texts themselves and the contexts in which they were delivered will not support such a finding. For example, the City suggests the text “RIP” was a threat to murder Harris, but that is not a plausible conclusion, given the context in which it was sent. The Grievant received no response to his inquiry “are you still kicking” and commented “guess not” before sending the text “RIP”. This is a self-contained string of commentary, not some sort of plan of action. It is odd and perhaps even disturbing, but characterizing it as a threat is a considerable stretch. Similarly, the Grievant’s text that “The grim Reaper is at your door!!” does not suggest that he was threatening to take violent action, when that text is placed in its actual context, as a follow-up to the Grievant’s earlier observation to Harris that “life is passing you by.” These texts, like others he sent, were obnoxious and harassing and clearly constituted a violation of Subsection 23, but they did not constitute “violence in the workplace” even under the loose definition of that term in Subsection 54.

The City attempted to bolster its position with reference to prior discipline, many involving charges of workplace violence against the Grievant, most often brought by or involving Harris and Reed. There are several defects to this tactic. First, many of the charges of workplace violence were ultimately determined to be unsubstantiated. Second, only one of the two recent disciplinary actions involved a charge of workplace violence, and in that case the workplace violence charge was not substantiated. Third, all of the other disciplinary actions cited by the City occurred more than 18 months prior to the communications at issue here. In fact, they occurred more than five years earlier. Section 14.1(d)(ii) of the parties’ collective bargaining agreement provides that, except in a single narrow exception, such older disciplinary actions cannot be used:
Any record of discipline, including counseling and disciplinary investigation files in the Police Department, may be used for a period of time not to exceed eighteen (18) months and shall thereafter not be used to support or as evidence of adverse employment action under this Agreement, unless a pattern of sustained infraction exists for the offense in question.

The City argues that the exception applies in that the prior discipline with respect to workplace violence establishes "a pattern of sustained infraction" for the current alleged offense of workplace violence, but there is a major flaw to the argument: the five-year gap from 2010 until 2015 when The Grievant received no discipline at all. This five-year period without discipline necessarily negates the presence of a sustained infraction. Not only can this evidence of older discipline not be used "to support or as evidence of adverse employment action" under the terms of the collective bargaining agreement, but the passage of five years without any infractions or discipline actively undermines any inference that the Grievant's obnoxious text messages posed any sort of actual threat. There was no event or interaction that would have triggered such a threat. Taking the record as a whole, there is nothing to show that the Grievant's unwelcome communications with Reed and Harris had any overtones of violence.

**Just Cause for Discharge**

The City has proved that in April and October 2015 Anthony Nguyen sent several text messages that constituted discourteous treatment of a City employee and a member of the public, and that he subsequently lied to OIG investigators about that conduct. In each of these ways he engaged in conduct unbecoming a public employee. All of this conduct violates the Personnel Rules, and all of it constitutes just cause for discipline. The question then is whether there was just cause for discharge.

The City correctly argues that it has discretion in deciding on the penalty when misconduct has been established. As noted, however, that discretion has limits, both as a matter of contract and rule. By contract, Article 20 requires that "discipline administered by it shall be corrective and progressive where appropriate..." Article XVIII, Section 1 of the Personnel Rules it has further defined the City's discretion:

The degree of discipline to be meted out is dependent on various factors including, but not limited to, the seriousness of the offense, the employee's work record and the totality of the circumstances.

It seems reasonably clear that the decision to terminate the Grievant was premised upon the finding that he had engaged in workplace violence. It is easily the most serious of the
charges leveled against him, and Starks said as much at the hearing. However, that is the charge that has not been proved. The charges of conduct unbecoming are derivative of the other charges. The allegations of disrespect have been discussed above, and while there is a sufficient nexus to his employment to warrant formal discipline, these are not the type of charges that would normally support a summary discharge. The allegation of untruthfulness to the OIG is the most serious of the remaining charges, and it is more fully discussed below. While I agree that it would support serious discipline, denying guilt when questioned about misconduct, without more, is not a standalone offense that would lead to the discharge of a civilian employee.

Given the failure of the charge of violence in the workplace, I find it was an abuse of the City's discretion to discharge the Grievant on the basis of the three lesser charges. I base this on the factors in the contract and the Personnel Rules. Discharge is not corrective, and it is inconsistent with the City's policy favoring progressive discipline, since the Grievant received no discipline at all for the five-year period prior to his 2015 communications with Reed and Harris. Without a finding of workplace violence, the "seriousness of the offense" factor is significantly diminished. Consideration of the Grievant's workplace record—spotless the last five years that Harris and Reed have been absent—favors a lesser form of discipline. So does "the totality of the circumstances", where there was evidence by one of his co-workers, an African-American male like Harris and Reed, that the Grievant has not demonstrated antagonism toward African-Americans during the five years he has worked with him, and that the Grievant's return to the Water Plant would not be viewed as a disruption by his co-workers. This suggests that the Grievant's problems were not with African-American co-workers as a group, but with Harris and Reed as individuals. Contrary to the City's assertion that the Grievant has proven incapable of rehabilitation, the five-year gap in discipline proves the opposite. That conclusion is reinforced by the fact that there has been no further contact since these three individuals brought things to a head with their petitions to the courts and were ordered to have no contact. There simply is no evidence to support the City's claim that this case falls out of the reach of corrective action.

Consideration of these factors, factors the City itself has agreed must be considered, demonstrates that the City lacked just cause to discharge the Grievant. That is not to say that his conduct does not merit serious discipline. In particular, his untruthfulness to the OIG investigators can be considered fairly egregious misconduct. It leads to a waste of resources as people try to sort out what really occurred, and it undermines the confidence the City can place in what he tells them. He may have been resentful of these charges, and he may have been
frightened of the possible consequences of these proceedings, but neither of those things can justify his willful lack of truthfulness.\textsuperscript{11} Without purporting to define a standard for other cases, I conclude that the combination of proven charges in this case, and his prior disciplinary history, would warrant a suspension of 30 days without pay.

The Appropriate Remedy

The City had just cause to suspend the Grievant for untruthfulness, disrespect, and conduct unbecoming a public employee. It did not have just cause to discipline him for violence in the workplace, and it did not have just cause to discharge him. The appropriate remedy is to reduce the discharge to a 30 day suspension, reinstate him to his prior position, and make him whole for his losses beyond the suspension.

The City seeks to have additional offsets for interim earnings and for the period of time that this hearing was delayed at the Union's request. With respect to interim earnings, it is in the nature of a make whole remedy that the Grievant is not double paid. The purpose of a make whole is to place him in the position he would have occupied but for the termination, so any earnings he had that he would not have had but for the termination would be deducted. As for the requested offset for the delay in commencing the hearing, I find that offset inappropriate under the facts of the case. The parties agree that termination cases should commence within 60 days following the appointment of the arbitrator. After this hearing was scheduled, the Union requested a continuance, and a new date was set. That date fell 6 days outside of the 60 day window from the time of appointment. However, that continuance had no material effect on the City's liability. At the same time the continued hearing was being scheduled, the parties agreed that a second day of hearing would be required. That second day was scheduled on the earliest available date for all parties, a date that in any event would have fallen outside of the 60 days. Thus, there was no increased liability for the City as a consequence of convening the hearing after the 60 days had passed.

On the basis of the foregoing, and the record as a whole, I have made the following

\textsuperscript{11} While his untruthfulness cannot be excused, it is not, as the City asserts, an independent basis for discharge. In the Grievant's own disciplinary history, there is a case of a false statement, in the form of dry-labbed test results, that resulted in a suspension. It appears that cases of false statements are judged on their own merits, rather than according to a set schedule of penalties.
AWARD

The City had just cause to discipline the Grievant, Anthony Nguyen. The City did not have just cause to discharge the Grievant. The appropriate remedy is to reduce the discharge to a 30 day unpaid suspension, immediately reinstate the Grievant to his former position, and to make him whole for his losses resulting from the discharge.

The arbitrator will retain jurisdiction for a period of 60 days following the date of this Award, for the sole purpose of resolving disputes over the remedy ordered herein. Should either party invoke the arbitrator’s retained jurisdiction during the 60-day period, jurisdiction will be extended for a period of time necessary to resolve the dispute. Should neither party invoke the arbitrator’s retained jurisdiction during the 60-day period, jurisdiction will lapse.11

Signed and issued this 27th day of November, 2017:

Daniel Nielsen, Arbitrator

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11 The contract contains a loser pays provision. This Award is in the nature of mixed outcome, as just cause for discipline was proved on three out of four charges, but the penalty imposed was found to be inappropriate. I have accordingly split the fee between the parties.