IN RE ARBITRATION BETWEEN:

RICE COUNTY, MINNESOTA

and

MINNESOTA PUBLIC EMPLOYEES ASSOCIATION, MNPEA ON BEHALF OF TOM MCBROOM, VETERAN

DECISION AND AWARD OF HEARING OFFICER PURSUANT TO MINN. STAT 197.46

BMS CASE #19-PA-0690

JEFFREY W. JACOBS

ARBITRATOR

September 10, 2018

Rice County,

and

MNPEA, on behalf of Tom McBroom, Jr., Veteran

DECISION AND AWARD OF VETERAN'S HEARING OFFICER
BMS Case # 19-PA-0690
Tom McBroom – Veteran

APPEARANCES:

FOR THE EMPLOYER:

Ann Goering, Attorney for the County
Troy Dunn, Rice County Sheriff
Dan Biaconi, Dakota County Investigator
Jesse Thomas, Chief Deputy of Rice County

FOR THE UNION:

Rob Fowler, Attorney for the Union
Tom McBroom, veteran

PRELIMINARY STATEMENT

Hearings in the matter were held on May 15 & July 5, 2018 at the Rice County Government Center in Faribault, MN, at which point the record closed. The parties filed briefs on August 21, 2018.[1] The matter arose under the Minnesota Veterans Preference Act, Minn. Stat. 197.46, the Act. Deputy McBroom, hereinafter the veteran, is an honorably discharged US Military veteran entitled to a hearing under the Act. There were no procedural issues raised and the parties stipulated that the undersigned had jurisdiction to decide the question of the veteran's demotion/removal from office.

The statutory basis for a "removal" from office, including a demotion, is "incompetency or misconduct." Minnesota courts have interpreted the Act to apply to demotions, as well as terminations. See, *Leininger v. City of Bloomington*, 299 N.W.2d 723 (Minn. 1980). Here the basis was misconduct and that has been equated with the "just cause" standard frequently used in contract labor arbitrations to determine whether discipline or discharge of an employee is appropriate.

[1] The parties disputed each other's post hearing briefs as including information not found on the official record. The parties' initial briefs were submitted on August 21, 2018 and due to objections by the veteran the County filed an amended brief on August 23, 2018. The parties held a conference call to discuss the submissions of post hearing briefs on August 27, 2018. The parties had a dispute over the reference to a link to the Star Tribune newspaper article on which the veteran's original Twitter posts were made and whether he actually saw that article. The article itself was not submitted into evidence even though the link to it is found on the exhibit. See page 20 of the County's Amended Brief. Both the veteran's brief and the County's amended brief were considered submitted and the parties were advised that only the evidence and testimony that was part of the official evidentiary record made on May 15 and July 5, 2018 would be considered in rendering the decision and award in this matter. No other extrinsic evidence was considered or reviewed.

STATEMENT OF THE ISSUES

The County did not submit a formal issue statement but it was clear that the parties' statements of the issue were not significantly different.

The veteran stated the issues as follows: Whether the demotion of the Veteran from the position of Sergeant to Deputy was for incompetence or misconduct (essentially "just Cause")? If not, what is the appropriate remedy?

The veteran submitted a second issue: Whether or not the words of Sgt. McBroom, speaking off duty, were Constitutionally protected?

The issues as framed by the undersigned are as follows: Was the demotion of the veteran appropriate under the incompetency or misconduct/just cause standard? Were the comments made by the veteran in this matter Constitutionally protected?

RELEVANT COUNTY POLICIES

POLICY 340 – STANDARDS OF CONDUCT

POLICY 340.4 GENERAL STANDARDS

> Members shall conduct themselves, whether on or off-duty, in accordance with the United States and Minnesota constitutions and all applicable laws, ordinances and rules enacted or established pursuant to legal authority.

POLICY 340.5.3 DISCRIMINATION, OPPRESSION OR FAVORITISM

> Discriminating against, oppressing or providing favoritism to any person because of age, race, color, creed, religion, sex, sexual orientation or expression, national origin, ancestry, marital status, physical or mental disability, medical condition or other classification protected by law, or intentionally denying or impeding another in the exercise or enjoyment of any right, privilege, power or immunity, knowing the conduct is unlawful.

POLICY 340.5.8 PERFORMANCE

> (e) Disparaging remarks or conduct concerning duly constituted authority to the extent that such conduct disrupts the efficiency of this office or subverts the good order, efficiency and discipline of this office or that would tend to discredit any of its members.
>
> (i) Any act on- or off-duty that brings discredit to this office.

POLICY 340.5.9 CONDUCT

(f) Discourteous, disrespectful or discriminatory treatment of any member of the public or any member of this office or the County.

(m) Any other on- or off-duty conduct which any member knows or reasonably should know is unbecoming a member of this office, is contrary to good order, efficiency or morale, or tends to reflect unfavorably upon this office or its members.

POLICY 1058 – EMPLOYEE SPEECH, EXPRESSION AND SOCIAL NETWORKING

1058.4 PROHIBITED SPEECH, EXPRESSION AND CONDUCT

To meet the organization's safety, performance and public trust needs the following are prohibited unless the speech is otherwise protected (for example, the employee speaks as a private citizen, including acting as an authorized member of a recognized bargaining unit or deputy associations, on a matter of public concern):

(b) Speech or expression that, while not made pursuant to an official duty, is significantly linked to or related to the Sheriff's Office and tends to compromise or damage the mission, function, reputation, or professionalism of the Sheriff's Office or its employees.

(c) Speech or expression that could reasonably be foreseen as having a negative impact on the credibility of the employee as a witness. For example, posting statements or expressions to a website that glorify or endorse dishonest or illegal behavior.

(e) Speech or expression that is contrary to the canons of the Law Enforcement Code of Ethics as adopted by the Sheriff's Office.

(g) Posting, transmitting, or disseminating any photographs, video, or audio recordings, likenesses, or images of office logos, emblems, uniforms, badges, patches, marked vehicles, equipment, or other material that specifically identifies the Sheriff's Office on any personal or social networking or other website or web page without the express authorization of the Sheriff.

1058.4.1 UNAUTHORIZED ENDORSEMENTS AND ADVERTISEMENT

While employees are not restricted from engaging in the following activities as private citizens or as authorized members of a recognized bargaining unit or deputy associations, employees may not represent the Rice County Sheriff's office or identify themselves in any way that could be reasonably perceived as representing the Rice County Sheriff's office in order to do any of the following, unless specifically authorized by the Sheriff:

LAW ENFORCEMENT CODE OF ETHICS – FROM RICE COUNTY POLICY MANUAL[2]

I will keep my private life unsullied as an example to all and will behave in a manner that does not bring discredit to me or to my agency. Honest in thought and deed, both in my personal and official life. I recognize the badge of my office as a symbol of public faith, and I accept it as a public trust to be held so long as I am true to the ethics of police service.

[2] The full text is found at County Exhibit 13 and is far longer. Only the pertinent of the provisions are set forth here.

FACTUAL BACKGROUND

The veteran is a 12-year veteran of the Rice County Sheriff's department. He is also as noted above, an honorably discharged US Military veteran. There was no evidence of any prior discipline against the veteran and he was originally hired as a deputy and later promoted to the rank of sergeant. The evidence was also clear that as a sergeant, he was responsible for knowing and adhering to and enforcing all the relevant policies and rules of the Rice County Sheriff's department. The sheriff testified credibly that sergeants are held to an even somewhat higher standard of conduct since they hold a higher rank and are responsible for complying with all such policies and holding those under their command accountable for that knowledge and compliance as well. As discussed more below, it was clear on this record that the veteran was aware of and understood these policies. There was no credible evidence that he did not understand any part of them or that he was unclear what they said or meant.

There was little argument about what the veteran posted even though there was some dispute about what he meant or intended when he posted the messages, the words speak for themselves. There was also no dispute about what he said to the press when interviewed by various news agencies. There was no assertion that he was misquoted or taken out of context by the press.

On November 28, 2017 the Minneapolis Star and Tribune newspaper ran a story regarding a settlement between the City of St. Anthony Minnesota and Ms. Diamond Reynolds, who was Mr. Castile's girlfriend and was in the car at the time he was shot and killed by a St. Anthony Police Officer. The story of Mr. Castile's homicide was widely reported in the print and broadcast media and was widely discussed on social media. There was also a highly publicized trial of the officer who shot Mr. Castile.

There was a claim made by Ms. Reynolds and the matter was settled for a large sum of money. The Star and Tribune story was about that settlement and showed a picture of Ms. Reynolds leaving a building that ran along with the story.[3]

[3] As referenced above, the parties disputed whether the veteran actually read the story. The parties submitted argument by phone and by e-mail and those arguments were considered. On this record, the question of whether the veteran did or did not read the entire story was given very little evidentiary weight and did not factor into this decision in terms of the veteran's credibility. What was found to be significant is discussed on the following pages.

In response to that story and on the Star and Tribune's Twitter page, the veteran posted the following message: "She'll have that [i.e. the money from the settlement] spent in 6 months on crack cocaine." There was another post only seconds later that read: "I hope she loses all her State and County Aid now that she has this cash." This was posted under the veteran's Twitter handle as "Tom McBroom Sr @McBroomSE" at approximately 9:52 p.m. on November 28, 2017.

The evidence also showed that he repeated his earlier comments approximately 20 minutes later with a post at 10:15 p.m. that read as follows: "She needs to come off County and State Aid now that she has some cash. It'll be gone in 6 months on crack cocaine." There was no mention in this post either regarding the use of public money or the settlement itself nor of the need to protect the Ms. Reynolds child. It was, as discussed herein, a statement made without knowing Ms. Reynolds and based on assumptions the veteran made regarding her status as a recipient of such aid and her YouTube posts showing her smoking what appears to be a marijuana joint.[4] The published picture attached to the story shows Ms. Reynolds, who is African American, walking out of a building.

The clear evidence on this record showed that the veteran's post set off an immediate and somewhat negative set of responses. The very next post responded to the veteran's post as follows: "Great way to jeopardize any case you have ever been a part of, Tom." It was never clear who that person was; it was posted with the handle "Matt Sandy @appupio," nor why they appeared to know that "@McBroomSE" would make arrests. The implication was that person apparently knew that he was a law enforcement officer and opined bluntly about the nature of the post. Another wrote, "lots of false assumptions on your part." Yet another posted in response: "What leads you to that conclusion? I'm guessing stereotypes. #uneducated." To these, the veteran responded: "history." There was no other explanation offered at that time for that statement.

[4] The veteran claimed that he had watched the videos of Ms. Reynolds smoking what appears to be marijuana on You Tube. And that he saw those before posting his messages on Twitter. I have assumed that testimony to be true since there was no evidence to the contrary. As discussed more herein, those videos only show what appears to be marijuana and not crack. There was no evidence on this record to compel the result that Ms. Reynolds was a user of crack cocaine.

As discussed more below, contrary to his assertions at the hearing, neither of these posts had anything to do with the sum of money received nor with the fact that there was no trust account set up for the minor child of Ms. Reynolds. Neither did they make any statement regarding whether there should have been a settlement. The posts were shown by clear and convincing evidence to be nothing more than an insult to Ms. Reynolds.

As discussed more herein, his posts never discussed or raised any of the larger societal issues he claimed he was addressing at the hearing. They never talked about a "war on police" or the propriety of paying the settlement to a person who was not Mr. Castile's wife. At the end of the day these were simply statements about her based on speculation regarding crack cocaine use and assumptions about her personal lifestyle and were personal comments about her individually. They were not, contrary to his assertions made at the hearing, about some greater issue of public concern.

There was evidence introduced at the hearing that Ms. Reynolds may not be the model citizen or a fine parent. There were excerpts of videos she posted showing her smoking what appears to be a marijuana joint while her young daughter is in the back seat of her car. The veteran acknowledged however that he was not aware of what she was smoking, has never met Ms. Reynolds and did not know if she has or was using crack cocaine in any of the video shots introduced as Veteran's exhibit 10. The assertion that she would use all the money from the settlement on crack in 6 months was also shown to be mere speculation on his part. There was also clear evidence that the allegation that she would essentially use the money for crack was an accusation of a felony and that he had no basis for making such an accusation.

The veteran has a Facebook page showing a picture of him in his Rice County uniform and a separate photo that shows him in front of his County issued squad car. His Facebook settings were set to "public," meaning that anyone could access his Facebook page and see what was posted there. He claimed that others had posted the pictures of him on his Facebook page and he was unaware of how to delete them.

He acknowledged that he is responsible for the content of the Facebook page. It was also shown that he could have inquired about how to delete such pictures and change the settings but that was not done.

There were other pictures posted on the Facebook page that the County claimed showed a lack of discretion, such as pictures of drinking as well as off color humor of various types. These were reviewed and while they were a bit coarse and sophomoric in content they were given very little evidentiary weight. Had those pictures been the only thing found or the only pieces of evidence on this record, there would certainly have been insufficient basis for a demotion. The initial posts regarding Ms. Reynolds as well as the responses to the press were far more significant.

County Exhibit 7, at page 17 shows a "pitch the story" idea submitted to the City Pages newspaper. It was not clear who the person was that submitted this to the paper but apparently the Twitter posts were attached to the document. The post/message is signed only by "GJ" with an e-mail address but no other identifying information. The idea reads as follows: "Racist City Councilman/Patrol SGT from Rice County" with links to the Star and Tribune story and the veteran's Twitter posts there.

The person who submitted this was not called to testify and it is not clear how that person got the information, but it was clear from the document that they knew who the veteran was and of his posts to the Star and Tribune Twitter page set forth above. It was also apparent that the person submitting the idea for a story also knew that the veteran was a councilman in the City of Elysian. [5]

The pitch the story message caught the attention of a reporter from the City Pages newspaper and she apparently investigated and quickly found the veteran's Facebook page. She then sent messages to the veteran's Facebook account and to his City of Elysian e-mail address. These communications were identical, and stated, in relevant part:

> My name is Susan Du and I'm a reporter with the *City Pages*. A few of your tweets yesterday in response to the *Star Tribune* story about St. Anthony's settlement with Diamond Reynolds were brought to my attention. In those tweets, you predict Ms. Reynolds would spend $800,000 on crack cocaine because of "history."
>
> Could you explain what you mean by that? I'm afraid Twitter users who saw your tweets are now questioning whether your attitude would hinder your work as a professional law enforcement office and city council member.

[5] The veteran also serves as an elected member of the City Council of the City of Elysian Minnesota.

There was no evidence that he responded at all to the e-mail sent to his City of Elysian e-mail address. He did however respond to the Facebook message – even though he had no obligation to. He could have simply ignored Ms. Du's message and let it alone but he did not. The veteran instead accepted her invitation to the message and then blatantly lied to her and responded with, "Who said I was Law Enforcement or council member. I'm a general contractor. Wrong person. Sorry." This was not true.

The evidence showed that he could have simply left it at that, as Ms. Du responded with a "Sad" emoji and did not pursue the matter further. Instead, the veteran called her later and retracted some of his earlier comments. This conversation was recorded and made part of this record. See County exhibit 8. The parties stipulated to the authenticity of the recording. The recording was troubling in that the veteran demonstrated in both word and demeanor a somewhat flippant, even cavalier, and defiant attitude toward the whole matter. He claimed that his Tweet to the Star and Tribune was meant only to draw attention to the need to help recipients of large sums of money to help manage their affairs. He further explained, paraphrasing somewhat, that it is his experience that no one sets up a fund to provide for the future education of children and that the money is spent, perhaps irresponsibly[6] and that it is "etched in [his experience] all of a sudden, families, friends, they come and stick their hands out."

He further told her that people "… come to court, they have lost their children, but they come to court dressed to the nines, with Michael Kors purses and you know, quite to be frank with you, before then they didn't have a pot to piss in. And they come to court and very nice, well dressed, Michael Kors purses, jewelry and I see them in court six or seven months later and they're in mediation because creditors want their money. And I've seen it time and time again. And I just shake my head. I'm like why wasn't there someone to help that person?"[7]

[6] Ms. Du used the word "squandered."

[7] These comments were also reported in the local newspaper, the Faribault Daily News. See County exhibit 11.

Frankly, if that had been the actual post, this case might have been very different, but his actual posts said nothing about any of that and it was only after the initial contact from Ms. Du and the initial untruthful response that he later made these claims regarding the need to protect the children of recipients of such sums of money. His initial posts said nothing about protecting the children of the recipients of the money and were simply an assertion that the money Ms. Reynolds received would be gone in 6 months on crack cocaine. He also indicated that he wished she would now lose any state or County Aid.

He then even denied that his post said that, even though it was clear from this record that that was exactly what it said. He acknowledged to Ms. Du that he had no personal experience with people who had squandered their money after receiving a large sum of money. See, Tr. At 404-405.

When asked why he initially lied about his identity he replied that he did it "just to screw with you" "because I can." Ms. Du responded that she was initially concerned that someone was trying to impersonate him on social media and that she had seen his Facebook page with him in his Rice County uniform.

Ms. Du then contacted the Rice County Sheriff's office and spoke with Chief Deputy Thomas. He had not been aware of the veteran's posts until that point. She sent him copies of the posts and it was at that point the investigation was commenced.

The veteran was also contacted by the local Faribault Daily News.[8] His comments there were also troubling; essentially doubling down on his initial comments. The Faribault newspaper repeated many of the comments regarding Ms. Reynolds as posted on the Star and Tribune's Twitter page and that the veteran responded with "history" when asked why he made those statements. The local paper also repeated the comments he made regarding not being in law enforcement and claiming he was a general contractor and that he lied to the City pages reporter to "screw with her." He was asked about his comments regarding crack cocaine and 'why he invoked crack cocaine specifically, the veteran responded that he "thought it was a "common purchase" for anyone in the cities."

[8] Faribault Minnesota is the County seat of Rice County and where the sheriff's office is located.

He claimed that he spoke with a colleague on the Minneapolis police force and understood there to be an epidemic of crack cocaine and opioids up there.[9] There was no basis for that conclusion or that Ms. Reynolds was subject to that "epidemic" other than his assumptions about what happens "in the cities."

He again denied mentioning crack cocaine anywhere. The reporter on the Faribault Daily News story called that denial "inexplicable." It was not clear why the veteran had such a lapse of memory only 3 or 4 days after posting that Ms. Reynolds would have spent her entire settlement on crack cocaine in 6 months. The original post to the Star and Tribune site was made on November 28, 2017 and the Faribault story was published on December 1, 2017.

Almost immediately there was a veritable firestorm of public reaction to these stories and the Twitter post by the veteran. Both Sheriff Dunn and Chief Deputy Thomas testified credibly and persuasively that they were required to spend significant portions of their time in the days and weeks following the veteran's actions, responding to and answering calls, letters, e-mails and other social media posts regarding the veteran's comments as reported in the news.

The disruption was not, as argued by the veteran, "de minimus" or insignificant. It was a substantial disruption to the office and the duties they were required to perform. There was evidence that the media still inquires about the status of the veteran's appeal of his demotion right up to the date of the second hearing in this matter. It can reasonably be surmised that the media will continue to follow this story.

The nature of the messages showed many angry even profane responses to the veteran's actions. Many called for his termination outright and for the resignation of the Sheriff. Others called for better training and vetting of the deputies and other employees so as to instill a greater sense of respect for those they serve and for the public in general. The sheriff testified credibly that the messages caused concern over the loss of trust by the public in his department.

[9] That person was never identified on this record nor did anyone from the Minneapolis Police Department testify here.

These comments came from a wide variety of places – not just from Rice County or even around Minnesota. Many came from out of state, as the story went "viral." The public reaction was almost universally negative although there were a very few messages that supported the veteran's comments.

Overall, the clear and convincing evidence was that the messages and comments the veteran made caused considerable disruption to the Rice County Sheriff's Department and, as discussed later, to the law enforcement community in general by feeding into the very "war on police" the veteran argued. Whether these comments were justified or not, there was a clear perception of negativity that was left in the public's view of the Rice County Sheriff's Department and perhaps law enforcement in general. Simply stated, the damage done was palpable and significant and perhaps lingers to this very day.

The Sheriff issued a statement to the press regarding the veteran's comments that "these comments do not reflect the beliefs of the Rice County Sheriff's office and the Rice County Administration." Sheriff Dunn testified that he needed to do this to assure the public that they took the matter seriously and that the veteran was not speaking on behalf of the Sheriff's Department.

As noted, the veteran's Facebook page was open to the public and showed him in his uniform and in a separate picture, sitting in a Rice County squad car. These facts could reasonably have led to the perception that the veteran somehow represented the Sheriff's Department or that he was speaking in his role as a law enforcement deputy and the Sheriff issued that statement to make it clear that he did not.

The County commenced an investigation using Dakota County personnel to do so in order to avoid the appearance of bias or impropriety. Captain Dan Biaconi from the Dakota County Sheriff's office conducted the investigation and spoke with the veteran as well as others involved in this matter. His testimony was both credible and persuasive and verified the facts set forth above; that the veteran posted the messages on twitter, that his Facebook page was set to "public," that the two photos on Facebook showed him in his uniform and another sitting in a Rice County car, that he acknowledged being in control of that Facebook page and further that he made the comments to the press as set forth above as well.

The evidence showed clearly that it was the veteran's presence on his Facebook page identifying him as a law enforcement officer for Rice County that was the basis of the contact by the news media. The evidence further showed that it was this very identification as a law enforcement officer, when connected to his Twitter posts that was why the media picked up on this. The "pitch a story" document did so as well. It was this shown that there was a connection between the admitted violation of portions of Policy 340, i.e. the Facebook page identifying the veteran as a Rice County Deputy Sheriff. It was due directly to that violation and the Facebook page that the public was able to connect the Star and Tribune post to the veteran.

Captain Bianconi also verified that the veteran acknowledged that he is familiar with Rice County policy and that his role as a sergeant encompasses accountability for his actions. He also testified credibly and persuasively that he conducted a thorough investigation interviewing the veteran and others regarding the operative facts of this matter. His report was shown to be thorough and unbiased. Captain Bianconi's report outlined three major areas of violations of County policy as follows:

1. Policy 1058 – Employee Speech, Expression & Social Networking – 1058.4 (B)(C)(E) and 1058.4.1
2. Policy 340 – Professional Conduct of Peace officers
3. Policy 340.4 Standards of Conduct

In this report Captain Bianconi again indicated that the veteran denied that he stated in his Tweet to the Star and Tribune that the money from the settlement given to Mr. Reynolds "would be gone in 6 months." This was again troubling in that it was obvious that he said exactly that and had ample time to review the messages he sent yet denied posting that message when asked about it in an official investigation by Captain Bianconi. There was clear evidence that the veteran knew why he was being interviewed by Captain Biaconi and that it was about those very messages. See Biaconi report at County exhibit 7 at page 4 of 11 of his report.

He did however indicate that he felt that the money from the settlement was going to fund drug use. There was no basis for this other than his assumptions about Ms. Reynolds from her You Tube posts. There was also clear evidence that the veteran admitted intentionally misleading the reporter from City Pages as to his identity and that he did so to "screw" with her.

Despite making the assertion that he was concerned about people getting large settlements and losing or spending the money unwisely, or words to that effect as he indicated at the hearing, he admitted to Captain Bianconi that he did not know people who had received police settlements as he claimed. Id at 6 of 11. Captain Bianconi also found that the veteran's comments reflected the Rice County Sheriff's office in a negative light to the reporter from City Pages. In the interview with the veteran himself, Captain Biaconi also determined that the veteran referred to the wrong drug in his comments about Ms. Reynolds – i.e. crack cocaine versus marijuana.

Captain Bianconi's report found that the veteran had violated the Rice County Policies set forth above, both because the acts complained of occurred and that they constituted misconduct. The veteran denied violating Policy 1058 but admitted violating Policies 340.5.8(E) and (I), and Policy 340.5.9(F) and (M). See, County Exhibit 7, p. 6; County Exhibit. 10 at pp. 19-20.

On December 1, 2017 the County Attorney advised the Sheriff and Chief Deputy that due to the conflicting and misleading statements made by the veteran and the widely reported news media coverage, his office placed the veteran on the list of officers with Brady Giglio issues which must be disclosed. He further indicated that "this may hinder his ability to testify in Court and must be disclosed prior to testimony." The County Attorney further advised that his office would "attempt to limit the damage, we cannot promise it will not be part of cross examination used to undermine his credibility." See County exhibit 12. There was no evidence that this has been changed or rescinded by the County Attorney.

Based on the investigation and the overall facts in this matter, including the Twitter posts, the statements made to the press and the false statements made to the City Pages reporter, all as set forth above, Sheriff Dunn determined that a demotion was appropriate and served the veteran with a letter dated February 12, 2018 notifying the veteran of a demotion from Sergeant to Deputy. See County Exhibit 2. The basis for the demotion were the allegations of violations of the Rice County Code of Ethics, as well as Policy 1058 and 340 set forth in the letter of February 12, 2018.

The Sheriff testified credibly that: "[P]eople hold law enforcement to a higher standard and there's a lot of public trust that goes with this job, and so if we do something illegal or unlawful or not following procedures, then obviously that will reflect negatively not only on the officer, but his agency." Tr. at p. 241-42. he also testified that his decision to demote rather than imposing some lesser form of discipline, was based upon the fact that it was not just a single policy violation, but rather multiple violations that were magnified by the veteran's dishonesty. Tr., p. 246. It was clear too from the record that he does not consider the veteran to be a "true racist"[10] and took his record and length of service into account in determining the appropriate discipline in this matter. The veteran made a timely request for a hearing pursuant to Minn. Stat. 197.46. It is against that general factual backdrop that the analysis of the matter proceeds.

PARTIES POSITIONS

COUNTY POSITION

The County's position is that the demotion was appropriate for misconduct as that term is defined and applied under the Act. In support of this position the County made the following contentions:

1. The County argued adamantly that this is not a First Amendment case and that the question is whether the veteran violated the policies set forth above and which were found to have been violated by both the Dakota County investigator and Sheriff Dunn.

[10] Both the Sheriff and Chief Deputy testified that they did not consider the veteran to be a racist in the strict sense of the word.

2. The County argued that this is a simple case of an employee who blatantly violated multiple policies, lied about it to the media, placed the Rice County Sheriff's office in a very negative light, caused extraordinary disruption of the operations of the office and damaged the reputation of the Sheriff's office and law enforcement in general. The County also argued that the veteran's continued recalcitrant and defiant attitude toward this and his continued assertion that he had a "right" to post these offensive and insulting messages demonstrates his unfitness for the position of a sergeant in this department. The veteran is simply wrong about this being a "First Amendment case." The record and the investigation show that the veteran committed serious misconduct – multiple times and took no responsibility for it at all.

3. The County argued that the veteran admitted violating Policy #'s 340.5.8(E) and (I), and Policy 340.5.9(F) and (M) and while he denied violating the other Policies set forth herein, he admitted to the conduct that showed he did.

4. Under the misconduct/just cause standard applicable here, the County argued that there is no doubt that there was just cause for the demotion. The veteran acknowledged that he was aware of the County policies, never claimed that the investigation was biased or lacking in any way and the unrefutably evidence shows that he said what he said both on the social media pages and to the reporters. There was no question that he is guilty of violating multiple policies on several occasions and remained unabashedly unapologetic about it right up to the hearing.

5. The County argued that the misconduct standard and just cause are closely tied. The County asserted that the role of the hearing officer/arbitrator is two-fold: First, the arbitrator must determine whether the employer acted reasonably; second, were there extenuating circumstances justifying a modification in the disciplinary action. *Matter of Schrader*, 394 N.W.2d 796, 801-02 (Minn. 1986). In determining whether the employer acted reasonably, the question is guided by the veteran's conduct, the effect upon the workplace and work environment, and the effect upon the veteran's competency and fitness for the job.

6. The cause for discipline must specifically relate to and affect the administration of the office, and must be restricted to something of a substantial nature directly affecting the rights and interests of the public. The cause must be one touching the qualifications of the office or the performance of its duties, showing that he is not a fit or proper person to hold the office. Citing *Ekstedt v. Village of New Hope*, 193 N.W.2d 821, 828 (Minn. 1972) (quoting *State ex rel. Hart v. Common Council*, 55 N.W. 118 (Minn. 1893)).

7. The County asserted that there is no question, and by any measure or quantum of proof, that the veteran violated several County policies and that his violations impacted his workplace and directly impacted his ability to perform his job. His comments were perceived, reasonably, to be racially biased and negatively impacted the Rice County Sheriff's office and damaged the trust all law enforcement departments need from the public to do its job.

8. Both Captain Gianconi and the Chief Deputy testified that it was clear to them that the veteran's comments could well be perceived as racist and insulting and that "it would not be a good idea to represent yourself as a law enforcement officer and make those statements." *Tr.*, p. 101. Testimony of Gianconi. See also Tr. at 148, testimony of Chief Deputy Thomas.

9. The County asserted that the veteran's comments did just that and caused great disruption in the operations of the Sheriff's office and caused both the Sheriff and Chief Deputy to deal with a huge number of messages, by phone, by e-mail and by letters regarding the veteran's comments. The County argued vigorously against the veteran's claim that this was a *de minimus* disruption that blew over in a few days. The County asserted that this claim was simply not true and that there are media contacts to this day regarding this whole matter.

10. Further, the damage done was immeasurable and caused people literally from around the country to send angry and even threatening messages to the Sheriff's office calling for the veteran to be fired and even for the Sheriff himself to resign.

11. Further, the Sheriff determined that a demotion was appropriate both due to the multiple violations, and because the veteran's misconduct negatively impacts his ability to perform the essential duties of a sergeant. He is now on the Brady Giglio list due to his actions and the hearing officer has no power to alter that fact. The County argued that the level of discipline is appropriate given the record and that it is not for the hearing officer to essentially substitute his judgment for that of the sheriff. There were no extenuating or mitigating circumstances to alter the level of discipline. The mere fact that the veteran is a long time, 12-year employee did not in the County's view mitigate the discipline. As a sergeant and a long-term employee, he should have known the rules and abided by them. See, *Roger Jorgenson and City of Maple Grove*, (May 2013, Befort)[11] and *City of St. Paul v. St. Paul Police Federation*, BMS Case No. 13-PA-0880 (2013, Kirchner), both cases ruling that even where a veteran has a long tenure and a good record, a single instance of misconduct can result in a removal from office.

12. The County pointed to what it termed multiple instances of lying. The first was the blatant lie to the City Pages reporter – claiming he was a general contractor. The County asserted that when asked why, his somewhat shocking response was "because I can." There were multiple statements to the press that he did not claim that Ms. Reynolds would spend the settlement on crack – yet he clearly did.

13. He claimed that he "knew" of people who prior to the settlements they got, "didn't have a pot to piss in," and a few months later they would be broke, having squandered their settlement money. He admitted that he knew of no one like that. A lie and an invalid assumption based on speculation. The County claimed that his entire story about what he "meant" when making these stamens is simply self-serving and not credible.

[11] No BMS file number provided but the case can be found at https://mn.gov/bms-stat/assets/20130514-Maple-Grove.pdf#

14. He further lied about his intent to share his comments about Ms. Reynolds to a few friends and family members, yet his Twitter post was to the Star Tribune website – viewable by the general public. His story simply cannot be given any credibility at all. The County alleged that his statements were racist in nature and insulting. They further undermined the trust that the public needs to have in the professionalism and unbiased conduct of law enforcement.

15. The County pointed to the county policies on ethical and appropriate conduct and asserted that the veteran's actions in perpetrating these lies clearly violated those policies and demonstrates his unfitness for the position of a sergeant. See, Chief Deputy Thomas' testimony at Tr. at 133.

16. The County also noted that the prior instance in which the veteran gave a statement to the press regarding "getting the trash off the street" in response to several arrests made, did not somehow set a precedent for the veteran to post the messages in this instance. Only one person asked that the message be retracted, not the dozens or more who responded to the offensive messages here; there was no evidence of outright lying to the press or to the public in that prior instance, no showing of violations of other policies, such as Policy 340 set forth above and no disruption to the department. That prior incident did not give *carte blanche* to the veteran to violate the policies in the manner in which he did in this instance.

17. The County also countered the claim that this case is somehow tied to the larger societal discussion of police conduct and a so-called "war on police" by the media as asserted by the veteran and his counsel. The County argued that the posts were about a specific person and accused her both of a felony and that she would squander $800,000.00 on crack cocaine in 6 months. He had never met this woman and knew almost nothing about her, yet felt that it was acceptable to make these bald faced and irresponsible messages about her on a very public forum. This was nothing more than a personal attack on a person he had never met and was not under any circumstances a matter of public concern as he asserts here.

18. The County pointed out repeatedly that the posts themselves never mentioned "a war on police" or even the Philando Castile homicide or the propriety of the settlement itself. Neither did they make any mention of the need to protect the minor child. In short, the veteran's self-serving testimony made afterward must be discounted in light of the actual posts themselves and what they actually said.

19. The County also asserted that he clearly lied to the news reporter, "just to screw" with her. This conduct is also a clear violation of the Code of Ethics and the Rice County policies set forth above. The County pointed out that while it is perhaps acceptable to lie about one's identity as a law enforcement officer if there is a threat to safety, such as an undercover officer where revealing his/her identity might jeopardize the safety of that officer or others, none of that was present here. The veteran simply lied to hide who he was and to avoid accountability for his actions.

20. The County summed up the discussion regarding whether there were violations of policy warranting demotion as that it clearly met all the pertinent elements of just cause/misconduct, given the multiple violations of policies, the constant lying and dissembling and the disruption his actions caused.

21. On the question of the 1st Amendment, the County first pointed out that several of the proven violations, including the ones the veteran admitted to, were not even covered by the 1st amendment Free Speech protections. These included the Facebook pictures and lying to the investigator regarding what he actually posted as well as to the press. These are clearly violations of the code of conduct and would not even be arguable covered.

22. The County also argued that his Twitter posts are also not protected speech. The County pointed to *Garcetti v Caballos*, 547 U.S. 410, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006) and noted that one must be speaking as a private citizen on a matter of public concern. Here the veteran was identified as a Rice County deputy on his Facebook page that was set to public. This rendered the first prong of the Pickering/Garcetti test inapplicable. He was not speaking as a private citizen.

23. Further, the County argued that his posts were not on a matter of public concern but were, as noted above, simply insulting and even slanderous to Ms. Reynold's. He accused her of felonious behavior and that she would literally spend hundreds of thousands of dollars on crack cocaine in 6 months. These comments were offensive, racist and not on anything of public concern. The County argued too that it is not credible that his "intent," at least as he tried to spin it later, was about public money and protecting the minor child, since the words he used in that twitter post had nothing to do with any of that.

24. Neither did the lies he then perpetrated on the press and the Dakota County investigator by trying to claim that he had not actually said Ms. Reynolds would "blow" it all on crack cocaine in 6 months.

25. The County also argued that even if the veteran can meet the threshold set forth above, the second inquiry is whether the speech created an actual or reasonably foreseeable disruption to the employer's operations. If the employer establishes evidence of disruption, there is a balance of the interests of the employee and the interest of the government in promoting the efficiency of the public services it provides through its employees. See, *Pickering v. Bd. of Educ.,* 391 U.S. 563, 568 (1968).

26. The County pointed to the factors to be considered under *Pickering* and noted that they are flexible and allow for weight to be given to any one of the factors depending on the facts of the case. Those are as follows: the need for harmony in the workplace; whether the government's responsibilities require a close working relationship; the time, manner, and place of the speech; the context in which the dispute arose; the degree of public interest in the speech; and whether the speech impeded the employee's ability to perform his or her duties. See also, *Anzaldua v. Northeast Ambulance and Fire Protection Dist.,* 793 F.3d 822, 835 (8th Cir. 2015).

27. The County argued too that whether there is some sort of "war" on law enforcement or not, his comments hurt the public perception of law enforcement in general. The County argued that law enforcement is a paramilitary operation and functions as a team. The team must have the trust of those they serve – without it they cannot do their jobs. This is particularly true for supervisors, who must maintain the respect and trust of both the administration and their subordinates.

28. The veteran's conduct, and the negative impact it caused impedes his ability to perform the duties of a sergeant. Simply stated, the veteran's comments hurt the team – not just in Rice County but the entire team known as law enforcement.

29. The County summed up its case by noting that the totality of these facts showed clearly that the veteran's actions were both egregious, intentional and harmful. The County summed up the most serious of his actions as follows: the tweet asserting Ms. Reynolds would blow hundreds of thousands of dollars within six months on crack cocaine; the follow-up tweets about "history"; the intentional decision to accept Ms. Du's Facebook message request; the equally intentional decision to lie about his identity to her; the decision to be interviewed by Ms. Du; the decision to repeatedly refer to poor people not having a "pot to piss in" yet squandering money on extravagant items such Michael Kors purses; telling Ms. Du that he lied to her "because he could;" speculating, even lying, about his experience with people receiving court settlements; and his continuing refusal to admit fault for his actions, acknowledge wrongdoing on his part, and accept responsibility for his conduct. The County asserted that there was nothing in any of the messages that contributed to a matter of public concern and that they were simply insulting, even racist and harmful to the reputation of law enforcement in general.

The County seeks an award denying the veteran's request for reinstatement to his sergeant's position and upholding the demotion.

VETERANS POSITION

The veteran's position was both that he did not violate the County policies set forth above and that his messages were an exercise of his rights protected from adverse action by the First Amendment to the Constitution. In support of this position the veteran made the following contentions:

1. The veteran's main assertion here is that his messages, including those made to the press were protected by the 1st Amendment and as such no adverse employment action is allowable in this matter. The veteran cited numerous commentators and historians for the proposition that the right of free speech is sacrosanct and may not be disturbed or abridged by adverse governmental action. Protected speech thus cannot be the basis of discipline or adverse employment action, such as happened here.

2. The basis of the veteran's claims is that the Sheriff's department unconstitutionally trampled those rights and that allowing this would result in a chilling effect on the right of free speech throughout the country for anyone in public employment. The veteran asserted repeatedly that merely because a person is a sworn law enforcement officer, does not mean that they give up or agree to limit those rights guaranteed to all citizens of the United States. This case was characterized as greater and larger than just one demotion for one deputy but rather as a test of the strength of the 1st amendment in general.

3. The veteran was also quick to point out that even though the evidentiary standard for misconduct under the Act and just cause as that term has been interpreted in the labor arbitration context are similar, this case is not a labor arbitration but rather arises under the statutory rights of honorably discharged U.S. Military veterans to a hearing before removal from office. As such the County is held to a high standard of proof and has the burden of showing by at least clear and convincing evidence of all of the necessary elements of misconduct. The veteran asserted vociferously that the County failed in that regard.

4. The veteran also cited several; of the same cases for the standard of proof required to demonstrate misconduct and just cause and argued that these cases require a high bar indeed before such severe discipline can be imposed.[12] See, *See State ex rel Hart v. Counsel of Duluth,* 55 N.W.118, 120 (Minn. 1893); *Eagan v. State Civil Service Board*, 164 N.W.2d 629, 632 (Minn. 1969); and *Ekstedt v. Village of New Hope,* 193 N.W.2d 821, 827-28 (Minn. 1972). The reason for just cause must directly relate to the job being performed and the ability to adequately perform the job.

[12] The veteran acknowledged that this is a demotion and not termination but asserted that the economic consequences of a demotion are severe indeed and thus this case should be viewed in the same light as a termination/removal must be.

5. The veteran pointed out that the comments were made off duty and away from the work site and were made as a private citizen on a matter of public concern and are thus protected. His intent was to comment about the propriety of a large settlement paid to a person who was not the victim's wife and about the need to protect the child.

6. Just cause and misconduct require that certain elements be proven and most arbitrators use a test of 7 such elements to establish just cause. These were cited as follows: Adequate notice. Here the veteran asserted that in a similar prior instance, he made a comment to the press that some found offensive and asked that he retract it. The Sheriff asked him to do so and he refused. The Sheriff backed down, took no action and the matter was never brought up again. The veteran argued that he reasonably believed that off-duty speech was immune from discipline and he had a right to speak out in the manner he did here.

7. Reasonable rule: The veteran argued here that the employer's rules upon which the discipline was based exert an undue chilling effect on free speech and may not be used to impose discipline where the speech on which that discipline is based is protected.

8. The veteran did not assail the investigation per se nor was there any claim that the veteran did not post the messages or make the comments as alleged. The veteran claimed that the demotion was far too harsh a penalty given the length of his service to the County along with his exemplary record.

9. The veteran argued that he never used any racially insensitive words and never intended to disparage Ms. Reynolds either for her race or her status on public assistance. He merely commented that now that she had received such a large sum of money, she should no longer be eligible for public assistance.

10. The main assertion is that the messages were protected speech, citing *Pickering v Board of Education* for that proposition and asserted that *Pickering* and other cases require a balance to determine if a citizen's comments on a matter of public concern is outweighed by the government's interests. The veteran set forth a somewhat different set of tests for that inquiry: Was the speech made pursuant to an employee's official duties? If so it would not be protected. The veteran asserted that none of his comments were made as part of his official duties and the Twitter posts was made entirely off duty.

11. Was the speech on a matter of public concern? The veteran argued that this was a matter of public concern and was about the use of public money and the propriety of giving such a large sum to a known drug user without making any provision for the minor child. The shooting of Mr. Castile and the settlement with Ms. Reynolds is a major source of debate and freedom of speech requires that even those with unpopular opinions be allowed to express them. That was all the veteran was doing – exercising that most basic freedom on a matter of huge public concern.

12. Whether the government's interests, as an employer, in promoting the efficiency of the public service are sufficient to outweigh the employee's free speech interests? Here the veteran argued that the citizen's right to free speech far outweighed any interest the County had here. The veteran asserted that the disruption to the department was both *de minimus*, requiring that the Chief Deputy and Sheriff answer a few extra phone calls and messages but did not adversely affected the law enforcement duties of any of the other deputies. It was also short lived and lasted a few weeks as the news cycle moved to other matters.

13. The veteran argued that the only factor even arguably in the County's favor is this factor but argued that under *Helget v City of Hays Kansas*, 84 F.3d 1216 (10th Cir. 2017) there must be an actual showing of actual and substantial adverse effect on the work of the government operation or the public trust. Here there was only a showing of minor disruption at best and no showing at all of any adverse effect on the actual law enforcement activities of the County. There was further no evidence of any adverse effects on the veteran's ability to perform his duties. Many of the messages came from out of state, which of course means that the contact the veteran would have with any of these people would be highly unlikely.

14. The veteran characterized the analysis as boiling down to this one essential question: did the employer establish, by at least clear and convincing evidence, that "the government's interests, as an employer, in promoting the efficiency of the public service are sufficient to outweigh the employee's free speech interests," which, requires proof of "direct disruption, by the free speech itself, of the employer's internal operations and employment relationships. The veteran argued that there was no such proof at all much less by a clear and convincing standard.

15. Whether the protected speech was a motivating factor in the adverse employment action? Clearly it was in that the entire matter was based on the Twitter messages and the comments the veteran made to the press.

16. Finally, would the government have reached the same employment decision in the absence of protected conduct? The veteran also argued that it was clear that the protected speech was the sole basis for this action and that the mere fact that the veteran's Facebook page showed him in uniform would not have resulted in such severe discipline.

17. The veteran also argued that the Facebook policy has been overturned in at least one Federal Circuit Court, see *Liverman v Petersburg*, 2016 WL 7240179 (4th Cir. 2016). Thus, the claim by the County that this was the nexus or that it provided even a separate ground for discipline must be rejected.

18. The veteran distinguished both the Garcetti and Connick holdings, apparently relied on by the County. *Garcetti v Caballos*, 547 U.S. 410, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006) involved speech made in the employee's official duties – not present here. *Connick v. Meyers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983), discussed the very different situation where the post was made as an employee upon matters only of personal interest. That was also not present here. This was a message about a matter of great public concern made as a private citizen.

19. The veteran also assailed Ms. Reynolds, noting she is a known drug user and has even posted videos of herself smoking illegal marijuana with her young daughter in the car. While the veteran was incorrect about the drug she was smoking, there was every reason to believe she could have even been smoking a joint that was laced with crack – as many people do.

20. Regarding the statements made to the press, the veteran maintained that there is no affirmative duty to identify oneself while off duty and not acting in any official capacity as a law enforcement officer. There is further no direct rule on this subject so his initial statements to Ms. Du regarding who he is are simply not actionable.

21. The final argument was that the demotion for this longstanding and otherwise excellent employee was simply too harsh. It is incumbent on a veteran's hearing officer, just as it is in arbitration to determine if the penalty is appropriate. The veteran acknowledged that if there had been a short suspension he would have accepted that but this will cost him considerable money both in terms of salary as well as pension benefits in the future. A demotion was simply punitive, serves no rational purpose and is too harsh given the proven infractions even if one can get around the protections afforded by the 1st Amendment.

The veteran seeks an award overturning the discipline in its entirety and all record of discipline be ordered to be removed and purged from all files at Rice County. Furthermore, that the Opinion, when submitted to the Minnesota BMS, not identify the veteran.

MEMORANDUM AND ANALYSIS

Unquestionably, this is a most difficult case, even though many of the operative facts were either undisputed or clearly shown. There is nothing more basic to the underlying notion of what it is to be an American than the guarantees provided by the Constitution. There is also nothing more important to a free and peaceful society than the trust the public must have in those who are sworn to protect and serve the public in the capacity of law enforcement. This case involves the stark conflict between those two very important policies. It arises in the context of the statutory hearing under the Act, with its attendant protections and limitations on the role and the power of the hearing officer. There was an extensive record in this matter. While there were disputes about the post hearing submissions, it was made clear to the parties in several respects and at several times that only the evidence made part of the official record would be considered in rendering this decision.

The case also involved two very different views of the law pertaining to this case, as discussed herein at some length. Accordingly, the analysis will first focus on the County policies and whether the veteran's conduct overall violated those policies. Upon making that determination, it was then necessary to determine if the veteran's statements, which were shown to be the basis of the demotion here, were protected by the 1st Amendment.

STANDARD OF PROOF REQUIRED

As noted, this matter arises under the Minnesota Veteran's Preference Act, Minn. Stat 197.46, Act. The standard for removal from office is incompetency or misconduct. There was no allegation of incompetency on this record and the matter proceeds to determine if there was misconduct as that term has been defined over time.

There was also agreement that the term "misconduct "is equated with "just cause" as that term has evolved in arbitrations between labor and management in collective bargaining agreements. The parties cited many of the same cases for that proportion and no further citations are necessary.

It was also clear from the record and the underlying caselaw that the standard of proof here in this unique case is whether there was a showing by clear and convincing evidence. There is no generally accepted definition of what that means but it requires more than a preponderance of the evidence but less than reasonable doubt. The clear and convincing standard requires a somewhat clearer and greater showing of proof than 50% plus 1.

DID THE VETERAN'S ACTIONS VIOLATE APPLICABLE COUNTY POLICIES?

Initially the case was analyzed in the absence of any consideration of whether his speech was protected, that will, of course, be discussed in some detail below, but for now the question is whether his actions constituted a violation of the applicable County policies. If not, then no discussion of the 1st Amendment would even be necessary.

There was little doubt as to what the veteran posted on the Star and Tribune Twitter page and that these posts were publicly viewed. It was also clear that his Facebook page was set to public and that it showed him in his Rice County uniform and in another picture, sitting in a Rice County squad car. The overall evidence showed that it took mere minutes for members of the public to look both at the Twitter page from the Star and Tribune and that they found the veteran on his Facebook page identifying him as a Rice County Deputy Sergeant.

One of the more relevant policies at play is #1058.4.1, providing that "employees may not represent the Rice County Sheriff's office or identify themselves in any way that could be reasonably perceived as representing the Rice County Sheriff's office …"

While that policy goes on to discuss endorsement and advertisements, it is clear that the import of that policy is that the deputies are not to identify themselves as Rice County deputies with the approval of the Sheriff. No such approval was shown here.

Further, Policy 1058.4, set forth above, but reiterated here for ease of reference as follows:

> (a) Speech or expression that, while not made pursuant to an official duty, is significantly linked to or related to the Sheriff's Office and tends to compromise or damage the mission, function, reputation, or professionalism of the Sheriff's Office or its employees.
>
> (b) Speech or expression that could reasonably be foreseen as having a negative impact on the credibility of the employee as a witness. For example, posting statements or expressions to a website that glorify or endorse dishonest or illegal behavior.
>
> (e) Speech or expression that is contrary to the canons of the Law Enforcement Code of Ethics as adopted by the Sheriff's Office.
>
> (g) Posting, transmitting, or disseminating any photographs, video, or audio recordings, likenesses, or images of office logos, emblems, uniforms, badges, patches, marked vehicles, equipment, or other material that specifically identifies the Sheriff's Office on any personal of social networking or other website or web page without the express authorization of the Sheriff.[13]

His speech was shown to be "significantly linked to or related to the Sheriff's office" in that he is shown on Facebook in his uniform. This too is also covered by section (g) set forth above and is a clear violation of that portion of the policy. It was also clear that as a result of this violation, his identity was readily and quickly revealed as a Rice County Deputy. It was not known if anyone would have been able to "connect the dots," as the County put it, to identify him without the Facebook page. It was apparent that at least one of the people who responded to the initial Tweet seemed to know who he was but, it cannot be determined if the press or the public would have been able to identify him as a Rice County deputy without the Facebook page. They obviously were able to do so by looking at the Facebook page.

[13] There was no authority provided by either party directly on the issue of whether a hearing officer operating under the auspices of the Minnesota Veteran's Preference Act can declare a duly promulgated policy by the elected Sheriff of a Minnesota County, unconstitutional. I must therefore defer the question of whether the policy(ies) themselves are unconstitutional either as drafted to a determination the appropriate Court of law.

His claims that he was unaware of the Facebook settings or how to change them were of no value here in that he admitted that he controlled that Facebook page. This claim is akin to not knowing the speed limit when being caught speeding, or falling asleep while intoxicated in the back seat of the car while the keys are still in the ignition. The fact that others posted the pictures of him on the Facebook page is also not helpful. He could have easily deleted them and complied with County policy.

It was also clearly shown that the comments had a negative impact, as discussed more herein, on the mission, function, *reputation, or professionalism*" of the department (emphasis added.) There was no question that his comments were intended to draw responses – as evidenced by the statement he also made that "dialogue is refreshing." One need not be so naïve or unaware of the context of this statement that this comment cannot be seen for what it was – a somewhat sarcastic response to the negative responses made on the Star and Tribune's page to his initial commentary about Ms. Reynolds losing her state and county aid and blowing the settlement money on crack cocaine in 6 months.

As discussed, below, while he may not have foreseen being placed on the Brady Giglio list as a result of this, his comments certainly led to that placement by the County Attorney. It should also be noted that being on that list could very well impair the veteran's ability to perform his job and could well be directly related to his ability to testify in court and impact any future prosecution in which he is involved as an arresting officer or one who is called to testify about an incident or arrest.

There was no evidence or argument made that the undersigned has the power to reverse that decision by the County Attorney. There appears to be no such authority in the Act or in relevant caselaw provided as part of the parties' submissions here. It must thus be part of the record that the veteran is on that list and that he was placed there as a result of his actions in this matter – and not just the twitter comments but his overall actions including his comments to the press and to the investigator.

Further, on this record as a whole, it was not only reasonably foreseeable that his speech on that Twitter page would have a negative impact on the reputation of the department. While he claimed later that his intent was something different, his Twitter comments said nothing of the sort.

The veteran claimed that there was precedent for his actions and he thought he had the Sheriff's tacit permission to post whatever he wished on social media. The veteran argued that on one prior occasion, this Sheriff was presented with a similar situation in which the veteran made a statement to the press that one person found offensive and asked that the veteran retract it. The comment was about some arrests and the veteran made a comment about getting the "trash" off the streets. The veteran asserted that the Sheriff asked him to retract it but he refused. The veteran argued that this set a precedent of allowing him to exercise his First Amendment rights since the Sheriff took no action and essentially backed down.

The obvious differences were that in the prior instance one person and only one asked that the statement be retracted not the multitude of people who responded to the veteran's messages in this case. Second, the statement itself in that instance was on a matter of public concern whereas, as discussed above, the Twitter posts did not strictly pertain to a matter of public concern but instead were simply an insult to a person of color who was on government aid at the time and it was at the very least about her status on government aid and at worst a slanderous comment about her use of illegal drugs and her character as a person. The two cases were shown to be very different and while the Sheriff took no action at that time that did not grant license to the veteran to post anything he wanted about anything in the future irrespective of the content of the message or how much disruption it might cause.

His initial comments to the reporter were in clear violation of the Code of Ethics and conduct set forth above as well. The veteran argued that he is under no legal obligation to identify himself as a law enforcement officer. First, that does not grant *carte blanche* to blatantly lie about it either. Second, while he claimed that he was unaware of who had contacted him, and wanted to protect his safety when Ms. Du contacted him on Facebook, this too rang hollow. Ms. Du identified herself and gave her employer and phone number. Moreover, she contacted him on Facebook. It was not as if she showed up unannounced at his doorstep in the dark of night. There was frankly no reason at all to lie to her. Indeed, he did not have to respond at all yet he did, multiple times, initially lying to her about who he was.

Truthfulness is at the very heart of law enforcement. The public must have faith in the veracity of those in those uniforms and performing those essential societal functions. To lie to somebody because they "think they can," and to just "screw" with them is anathema to that very basic notion of law enforcement. On this record those comments were also shown to be in violation of County policy.

There was also a clear showing of considerable disruption of the County's operations for a period of time and to the reputation of the Rice County Sheriff's department. Both Chief Deputy Thomas and Sheriff Dunn testified credibly and persuasively to that effect. There is a somewhat longer and more extensive discussion of the issue of disruption set forth below in the context of the 1st Amendment analysis and those comments apply equally here as well. Suffice to say that the veteran's comments brought the department into disrepute and caused extra work and damage control by both the Sheriff and Chief Deputy.

The parties also cited the same standards for determining just cause. The necessary elements were met here on all of the pertinent pieces of that analysis.

Was there notice? Yes, the veteran was a sergeant and as such is fully responsible for knowledge of those policies. He is also a 12-year veteran of the Sheriff's department and he acknowledged that he was familiar with the applicable County policies.

Were those rules reasonable? In this context yes. As noted, I must defer to any reviewing Court to determine if any portion of the policy or policies are found to be unconstitutionally vague or overbroad. Here though, using a simple just cause analysis the polices are not unreasonable nor difficult to understand.

Was there an adequate investigation? Yes, and the veteran did not raise any significant issue with the investigation or the investigator. The evidence showed that the investigator was both thorough and unbiased in determining the facts. His testimony and his report were reviewed and showed that he followed up on all relevant leads and interviewed the right people and that his questions to them were unbiased and designed to gather the facts of the case so he could make a recommendation on whether and which policies if any were violated.

Was there sufficient evidence that the veteran violated the policies? As noted above, yes. His comments both on the Twitter page were simply insulting to an individual. The veteran admitted violating Policy 340.5.8, prohibiting making "disparaging remarks or conduct concerning duly constituted authority to the extent that such conduct disrupts the efficiency of this office or subverts the good order, efficiency and discipline of this office or that would tend to discredit any of its members."

Further, policy 340.5.9 prohibits "Discourteous, disrespectful or discriminatory treatment of any member of the public or any member of this office of the County" and "Any other on- or off-duty conduct which any member knows or reasonably should know is unbecoming a member of this office, is contrary to good order, efficiency or morale, or tends to reflect unfavorably upon this office or its members."

The veteran claimed that he did not violated policy 1058 set forth above on the premise that the comments in violation of that policy, which were frankly the same comments he admitted violated 340.5.8 and 340.5.9, were protected by the 1st Amendment. The veteran did not mount any serious claim that the speech did not violate the terms of the pertinent policies; rather his claim was that the speech and comments in this matter were protected by the 1st Amendment guarantee of free speech.

That question will be discussed below; here the inquiry centers over whether there was a violation of the policies as they are written. Clearly, on this record they were and but for the claim of the 1st Amendment, the result would be mandated by that conclusion.

Moreover, his comments to the press, at least initially, were both untruthful and troubling. His subsequent comments to the Faribault Daily News were also shown to be accurately quoted and were also shown to be without any of the personal knowledge he claimed to have regarding people without a "pot to piss in." As the County pointed out, the veteran acknowledged that he had no personal knowledge of the sorts of people or situations he claimed he had – despite saying to the press that he sees these situations time and time again. In fact, the overall record shows that he may well have never seen it but simply made assumptions about it and the people involved.

His comments regarding users of crack cocaine were also based on speculation at best. He claimed that he spoke to a Minneapolis officer who claimed that there is an epidemic of crack cocaine usage and told the reporter that crack cocaine was a "common purchase" in the cities. This was apparently based solely on the comment that there was an "epidemic up there." It would again be somewhat naïve to accept his statement that the reference to crack cocaine had nothing to do with race or that anyone reading his story would not perceive that it did.[14]

There was no claim of disparate treatment here and the question of the appropriateness of the demotion itself will be discussed more below. Suffice it to say that while a hearing officer under the Acct has the power to modify the discipline imposed, it was clear that the Sheriff considered the length of service and record and decided that a demotion as opposed to a lesser or greater discipline was appropriate.

Accordingly, in the overall context of the evidence as a whole the County showed that the veteran violated the terms of all of the relevant polices and Code of conduct referenced in Sheriff Dunn's letter of February 12, 2018 and that there was just cause for discipline and that the veteran committed misconduct as that term is used under the Act and arbitral literature.

His comments made to the press about "history" and about those who receive large settlements were also troubling, albeit less so. What they do show though is a complete lack of contrition for the comments or any sort of understanding of the potentially racially insensitive message some perceived that they conveyed. They were a personal commentary about Ms. Reynolds. They did not address the issue of the Castile homicide nor of the settlement itself. As discussed below, the Court in addressing free speech concerns requires that the speech be analyzed in its overall context.

[14] There was absolutely no evidence of this assertion other than the veteran's speculation about it. Without casting any aspersions here it should be noted that most people in the cities would not know the difference between a rock of crack cocaine and a hailstone. His comments were simply mere speculation based on unwarranted assumptions about people he does not know and facts he could not verify. Further, as noted, no one from the Minneapolis Police Department testified in this matter and the claim that there is an epidemic or that crack cocaine is a "common purchase" was based on speculation.

Here it was completely clear that the comments made and the words used were not on a matter of public concern but were uniquely personal about Ms. Reynolds and that he was identified as a Rice County deputy due to his presence on Facebook. While his stated intent was otherwise, the investigator, the Chief Deputy and the Sheriff determined otherwise. Thus, there was ample proof of the violations of the applicable County policies to warrant discipline. We now turn to the question of whether his comments and actions were somehow protected by the 1st Amendment.

WERE THE VETERAN'S MESSAGES PROTECTED UNDER THE 1ST AMENDMENT?

A great many Supreme Court and Court of Appeals cases were reviewed to determine whether this case was indeed a First Amendment case as the veteran asserted throughout or not as the County argued. More than just those cited here were reviewed and to say that the cases go in all directions depending on the underling facts is an understatement. Still though there appears to be a consistent guidance in the analysis to be used even though the actual holdings depend on the underlying facts of each case.

The veteran cited Justice Oliver Wendell Holmes who stated that: "If there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought — not free thought for those who agree with us but freedom for the thought that we hate."

True enough, but it was the same Oliver Wendell Holmes writing for the Massachusetts Supreme Court in *McAuliffe v New Bedford*, 155 Mass. 216, 29 N.E. 517 (Mass. 1982) who wrote that "a policeman may have a constitutional right to talk politics but does not have a constitutional right to be a policeman."[15] These seemingly contravening statements demonstrate precisely why the analysis of this case is so difficult and requires that the various court pronouncements on this question be dissected in their essential elements.

The seminal case on this question and the one most often cited by later courts is *Pickering v Board of Educ*, supra. The case arose when Marvin Pickering was fired from his position as a teacher after sending a letter to the local paper regarding a proposed tax increase and which was critical of the way in which the School Board and Superintendent was managing revenue.

[15] The *Connick v Myers* Court also cited this very phrase in its opinion, see infra, 461 U.S. 144.

The Court noted that "what we do have before us is a case in which a teacher has made erroneous statement upon issues then currently the subject of public attention, which are critical of his ultimate employer but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operations of the schools generally." 391 U.S. at 573.

The Court also noted that "the public interest in having free and unhindered debate on matters of public importance [is] the core value of the Free Speech Clause of the First Amendment." Id. The Court also noted that "the threat of dismissal from public employment is nonetheless a potent means of prohibiting free speech." Id. at 574. Even though the statements Pickering made were in some cases false, but these could have been refuted by publishing accurate numbers in the same newspaper and overturned the dismissal.

Pickering has long been interpreted as allowing speech by a private citizen who holds a position in public employment on a matter of public concern as long as it is not knowingly recklessly made. It has also been interpreted as creating a balancing test if there is a showing that the person making the statements was speaking as a private citizen and that the matter was of public concern. The employee's interest as a citizen commenting on such matters of public concern must be weighed against the government's interests in maintaining efficiency and maintaining public trust. The Court stated that "the problem in any case is to arrive at a balance between the interests of the teacher as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. *Id.* at 568.

As discussed more below, the threshold questions are whether the employee was truly speaking as a private citizen and whether the issue was of public concern. If those are not met, the inquiry ends. Other cases have fleshed out the balancing test and set forth a series of factors to consider in weighing the two important interests – i.e. the individual's right to speech versus the government interests in maintaining and running an efficient operation and maintaining the public trust.

In *Connick v Myers,* 461 U.S. 138 (1983) the Court was again faced with a claim that a public employee was dismissed for speech that was alleged to be protected by the First Amendment. The Court noted that Pickering Court recognized that the state's interest as an employer in regulating the speech of its employees "differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering* at 568.

In *Connick* the employee circulated a questionnaire asking for the views of fellow staff members concerning officer transfers and whether the coworkers felt pressured to work on political campaigns. The questionnaire was termed as creating a "mini-insurrection" within the office and the employee was fired for insubordination. The employee sued claiming a violation of her First Amendment rights.

The Court ruled that "for at least 15 years, it has been settled that a state cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of speech." 461 U.S. 143 (Citing Pickering and others). The Court then cited specifically to Pickering and the task is to set a balance between the interests of the employee and those of the govenment. The District Court and Court of Appeals had ruled in favor of the employee but the Supreme Court found that the lower courts had misapplied that balancing test in that unique instance and reversed.

The District Court in Connick determined that the issues presented in the questionnaire were matters of public concern and thus protected by the First Amendment. The Court discussed the statement in Pickering and noted that the repeated emphasis in *Pickering* to the right of an employee "as a citizen, in commenting on matters of public concern" was not accidental.

The Court further noted that this oft-repeated phrase in *Pickering* and its progeny "reflects both the historical evolvement of the rights of public employees, and the common sense realization that government offices could not function if every employment decision became a constitutional matter. The Court dropped a footnote and stated that "the question of whether expression is of a kind that is of legitimate concern to the public is also the standard in determining whether a common-law action for invasion of privacy is present. (citing Restatement 2nd of Torts and *Cox Broadcasting v Cohn* and *Time, Inc. v Hill*.)

The Court examined the questionnaire and the circumstances surrounding it and held that it could not be "fairly characterized as constituting speech on a matter of public concern." Id at 146. Having made that determination, the Court held that it was thus unnecessary to scrutinize the reasons for the discharge. Id. As Connick and subsequent cases show, each case must be examined on its own unique facts to determine if indeed the speech was on a "matter of public concern." The holding of the *Connick* court is as follows: "we hold only that when a public employee speaks out not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." Id at 147.

The Court also held that "whether an employee's speech addresses a matter of public concern must be determined by the content, form and context of a given statement, as revealed by the whole record." Id at 147-148.[16] See also, *Brooks v Arthur*, 685 F.3d 367 (4th Cir. 2012), where the 4th Circuit upheld summary judgment for the employer where there was an insufficient showing of a matter of public concern.

The *Brooks* Court also held consistent with *Rankin* and *Connick* that if the speech does not pertain to a matter of public concern the inquiry need proceed no further. The Brooks Court also held that even if there is a showing of a matter of public concern, the next step is to balance the interests to determine if the employee's interests outweigh the need for the government in managing the working environment. The Courts have also held that once all of those issues have been determined there remains the final question of whether the speech was a substantial factor in the employee's termination."[17]

[16] The Connick Court examined the record before it and found that the employee's complaints did not seek to inform the public of any public issues and essentially found that the focus of the questionnaire was not to inform the public of any issues with the performance of the office but was rather to gather ammunition for controversy with her supervisors and was an attempt to turn her displeasure into a cause celebre." As discussed herein, the comments here were not to inform or educate the public or even to weight in on the propriety of the settlement but were rather personal comments about the individual receiving that settlement and were simply insulting to her personally.

[17] This record showed that the Twitter posts were not the sole factor in the determination to demote the veteran. Other comments he made both to the reporters as well as to the investigator were also shown to be factors. Here though, it was clear that the speech was at least a substantial factor in the decision to demote. Accordingly, while the analysis of this issue focused on the threshold questions of whether the veteran was speaking as a private citizen on a matter of public concern and the balancing test referenced in Pickering, the question of whether the speech was a substantial factor appeared clear and will not be discussed further.

The veteran argued that *Connick* is entirely inapposite to the present situation. On this record though, it's holding does apply in that there must be a determination of both whether the employee was speaking as a private citizen and whether or not the speech was on a matter of public concern. The mere fact that he was not airing an individual complaint regarding some employment action taken by the Sheriff, as in *Connick*, does not mean that the *Connick* analysis does not apply.

Further, the fact that the veteran identified himself by name on the Star and Tribune Twitter page and that his Facebook page was set to public and showed him in uniform and in a Rice County car, detracted considerably from the claim that he was speaking only as a private citizen.

Moreover, while the Castile homicide and the Reynolds settlement were matters of public concern, his comments regarding Ms. Reynolds' status on public assistance and that she would spend it all on crack cocaine in 6 months were not. Neither were several of the untruthful statements made to the press and to the investigator, as discussed herein.

In *Rankin v McPherson*, 483 U.S. 378 (1987) the Court held that the speech in that context was protected and that the termination of the employee violated her free speech rights. The issue arose when, after there was a news report of an attempt on the life of President Reagan, an employee made comments to another person in the office that "if they go for him again, I hope they get him." The Court found that she was fired for the content of that statement.

Upon an examination of the facts of the case as well as the Court's discussion, it was readily apparent that there are significant differences in the context and circumstances of the two cases that render the *Rankin* holding distinguishable. The employee worked in a law enforcement agency and her title was "deputy constable" but she was not in uniform, was not authorized to make arrests, not permitted to carry a firearm and her office had no telephone. She worked in a room where the public had no access and was essentially a computer data entry employee. Her statement was made orally to one other person and was overhead, unbeknownst to her, by a third person. She claimed that she did not mean anything by her statement.

The Court reiterated that a State may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech, citing *Perry v Linderman*, 408 U.S. 593 (1972), and cited *Pickering* for the well-established proposition that the determination whether public employee has properly been discharged requires a "balance between the interests of the [employee] as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. *Pickering* at 568.

The Court in *Rankin* also reiterated that the threshold question is whether the speech may be "fairly characterized as constituting speech on a matter of public concern," citing *Connick* at 146, and "whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." Id. at 17, *Rankin* at 384-2385.

The Court noted as significant that the statement did concern a matter of public concern – i.e. the attempt of the life of a President, and thus required the balancing analysis required by *Pickering*. However, the Court stated that "the statement will not be considered in a vacuum, the time manner and place of the employee's expression are relevant, as is the context in which the dispute arose. See, 483 U.S. at 388. This was a significant factor in the instant case given the high degree of publicity these statements received.

The Court examined the context of the statement found significant the following facts:

> "while [the employee's] statement was made at the workplace, there is no evidence that it interfered with the efficient functioning of the office. The Constable was not afraid that McPherson had disturbed or interrupted other employees, … nor was there any danger that McPherson had discredited the office by making her statements in public. McPherson's speech took place in an area to which there was ordinarily no public access; her remark was made in a private conversation with another employee. There is no suggestion that any member of the general public was present or even heard the statement. Nor was there any evidence that employees other than Jackson who worked in the room even heard the remark. Not only was McPherson's discharge unrelated to the functioning of the office, it was not based on any assessment by the Constable that the remark demonstrated a character trait that made the respondent unfit to perform her work." Id. at 388.

These comments show the stark contrast between the two cases. Almost everything about the two cases are different in that this was a very public statement made in a very public way. Further, while McPherson's comments were not shown to have affected the functioning of the office, this record showed just the opposite – the disruption was real, longstanding and palpable.

The veteran in this case was placed on Brady Giglio list due to his statement, and that could well have an impact on his ability to function as a law enforcement officer. Finally, the veteran is licensed to carry a weapon, is allowed to make arrests and serves in a role that requires the public trust – discussed further herein.[18] That too distinguishes that case from the instant matter.

In *Garcetti v Caballos*, 547 U.S. 410 (2006) the Court was faced with whether a district attorney was subject to adverse employment action for writing a memo as part of his official duties that recommended dismissal of a case based on purported government misconduct. The employee submitted a report highly critical of the manner in which a matter was handled by the government and was fired for this memo. He alleged that the way a government agency handles a criminal matter is always a matter of public concern and that his speech was therefore protected.

The Supreme Court in *Garcetti* reversed the lower Court's determination that the speech was protected and held as follows: "when public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes and the Constitution does not insulate their comments from employer discipline."

The situation there was somewhat different from the present case in that the employee was acting in his official capacity on a matter that was uniquely part of his job. The Court also grappled with the question of whether the statements touched on matters of public concern and held that in that case they did not. In so doing the Court rejected the claim that the issues raised were matters of public concern.

The Court also noted that the "controlling factor in Ceballos' case is that his expressions were made pursuant to his official duties as a calendar deputy." 547 U.S. at 421. Here there was no evidence that the veteran made these comments as part of an investigation or as part of any official duty.

[18] The veteran's counsel opined that there is a trend toward enhancing the sanctity of the First Amendment in recent years. However, it was of some note that Justice Scalia, who commented that he agreed with the comment that no one should be allowed to ride with the cops and cheer for the robbers, as well as several others who are no longer with the Court dissented from the Rankin holding. Given their respective replacements, it may not be so clear as to how that same case would be decided today.

This was thus a factor that mitigated in his favor and does distinguish his case from that presented in *Garcetti*. As discussed further herein, that alone did not save his argument from the other facts presented in this case or the analysis of other caselaw. These facts showed that the statement was not perceived as being made by a private citizen but rather in the veteran's role as a Rice County Deputy – due to the public nature of the Facebook page. Further, his statements were not about the matter of public concern but rather were simply insulting statements about Ms. Reynolds. Several of his subsequent statements were either outright lies to the reporters about his identity and what he actually posted, i.e. denying that he said Ms. Reynolds would "blow it all on crack cocaine in 6 months." Based on the Supreme Court precedent, there was also a clearly greater weight to be given to the County's interests under the Pickering balancing test even if one gets to that portion of the analysis.

The Federal Courts of Appeals have also grappled with similar cases. In *Anzaldua v Northeast Ambulance District*, 793 F.3d 822 (8th Cir. 2015) the Court held that even if the speech involved in that case qualified as a matter of public concern, it failed under the *Pickering* balancing test. The case originated with a comment to a news reporter regarding expressing concerns about the Fire District and the Captain. The employee was fired based on the division the e-mail fostered between his co-workers.

The Court used the Pickering analysis and noted that the threshold issues were first whether the employee was speaking as a private citizen, see *Garcetti* above, and then whether the speech pertained to the matter of public concern. If the answer is "no," according to the court, then no further analysis is necessary. If the answer is "yes, then the possibility of a First Amendment claim arises. 793 F.3d at 833, Citing *Garcetti*. The Court then stated that if the possibility of a "First Amendment claim arises; the second inquiry is to ask whether the employer has produced evidence to indicate that the speech has an adverse impact on the efficiency of the employer's operations." (Citations omitted.) Id.

The employee in *Anzaldua* argued that the matter was of public concern since it pertained to misuse of public money. The employer argued that it was simply to air personal grievances.

The Court explained that "to determine whether speech qualifies as a matter of public concern, we must examine the content, form and context of speech, as revealed by the whole record. (citation omitted). When speech relates both to an employee's private interests as well as matters of public concern, the speech is protected if it is primarily motivated by public concern. (citation omitted). If the motivation or the speech was furthering the employee's private interests rather than to raise issues public concern, [the] speech is not protected, even if the public would have an interest in the topic of [the] speech. (citation omitted).

The *Anzaldua* Court was "skeptical "of whether the speech was primarily motived by public concerns but proceeded to the balancing test under *Pickering* anyway. The Court held that the balance was in favor of the employer in that case. The Court cited other 8th Circuit Court decisions for the proposition that "a showing of actual disruption is not always required in the balancing process under *Pickering*. … This is because we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." *Anzaldua* at 833-834. (citing *Connick*). This statement stands in contrast to the veteran's arguments regarding actual disruption caused to the department in this instant case.

The Court went on as follows: "We have consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large" and "we have given substantial weight to government employer's predictions of disruption, even where the speech involved is a matter of public concern." Id. at 834. (citations omitted).

The Court also stated, "further, in a fire department, as a public safety organization, has a more significant interest than the typical government employer in regulating speech activities of its employees in order to promote efficiency, foster loyalty and obedience to superior officers, maintain morale and instill public confidence in its ability." Id.

This was a significant statement by the Court since the instant case involves a law enforcement department and a sworn deputy. All of the concerns listed by the Court are present in such an office – perhaps even more so - since law enforcement officers must have the trust and confidence of the public. The loss of trust in those who enforce the law results in the disintegration of the very rule of law that is the bedrock of the American way of life. Once that is lost, the government could not hire enough police.

The Court listed 6 factors under *Pickering* in determining the balancing test in the interests of the employee against those of the government. Those are set forth above at #26 of the County's contentions. The Court then went through those on the facts before it and determined that "the balance weighs in favor of the [employer]." Id. at 835.

Significantly as well, the Court noted that "of critical important is the principle… that we show substantial deference both to the Fire District's determination that Anzaldua's e-mail had caused or would cause dissension and disruption, and to it response to the actual or perceived disruption. … [w]here lives may be at stake in a fire, an *esprit de corps* is essential to the success of the joint endeavor." Id. The Court noted that the department worked closely with other nearby departments in emergencies and that there needs to be trust between firefighters and in the command structure.

There, as here, such trust was shown by clear evidence to be required by any law enforcement department. County witnesses testified both persuasively and credibly that without the trust of the public in the unbiased enforcement of the laws their job would be harder, even impossible. The veteran's speech was shown to undermine that very confidence, whether the outcry came from local Rice County residents or not. The *Anzaldua* holding was important here in making the determinations required in this case.

Analyzing the relevant factors shows support for the County's position. There is a need for harmony in the workplace. There was no evidence that the other deputies were affected by the veteran's comments but the Chief Deputy and Sheriff certainly were. They testified that they had lost some degree of trust in the veteran due to his actions and statements.

The next factor is whether the government's responsibilities require a close working relationship. Clearly this factor was met here. The need for such relationships in a law enforcement setting is crucial, as noted above. Deputies have to work with each other, irrespective of their race or nationality. Deputies need to work with other agencies – under the same circumstances and law enforcement in general needs to work with the public and maintain their trust in order to both prevent and solve crime and keep the peace.

The next factor analyzes the time, manner, and place of the speech and the context in which the dispute arose. As discussed in the analysis of the *McPherson* case, the overall circumstances of this speech demonstrated that the harm done far outweighed any interest the veteran had. While McPherson's comments were largely private, the veteran's could not have been more public. The problem with social media in general is that speech can go "viral" within minutes and the damage done to reputations can be done before anything can be done to stop it. That is precisely what happened here. This factor weighed heavily in the County's favor.

What was the degree of public interest in the speech? It goes without saying that the level of public interest under these acts was a very significant factor. The veteran argued that most of the public commentary came from outside the County. This may well have made it worse. Some of the negative feedback came from the Twin Cities only about 35 miles away. Some came from out of state entirely. As discussed herein, the real damage was done to law enforcement in general, not just to Rice County. There remains public interest in this story even now. This factor clearly weighted in the County's favor.

Whether the speech impeded the employee's ability to perform his or her duties. Clearly, it caused the veteran to be placed on the Brady Giglio list, a decision over which the veteran's hearing officer has no power to change. It further may well have caused his name to be remembered to some degree in the public domain, even though the news cycle moves quickly, and remain a source of concern for the department. `

Overall, the greater weight of evidence using the *Pickering* balancing test was shown to be in the County's favor here. Thus, even if one gets to the balancing analysis, the result remains the same – the government's interest outweighed that of the veteran on these facts.

In *Helget v City of Hays, Kansas,* 844 F.3d 1216 (10th Cir. 2017) the Court sided with the government in rejecting a claim by an employee whose speech was determined to be not protected.[19] The Court was faced with a case where an employee provided an affidavit in support of another police officer who had been fired by the City. The employee was an administrative secretary and her affidavit was not made public and did not appear on social media as far as can be gleaned from the record in the decision.

The Court stated, that "speech by citizens on matters of public concern lies at the heart of the First Amendment and that public employers may not condition employment on the relinquishment of constitutional rights." 84 F.3d at 1221.

The Court however cited *Pickering* and stated that "a public employer must be able to control the operations of its workplace." The Court cited 5 steps to the analysis as follows: Whether the speech was made pursuant to the employee's official duties; whether the speech was on a matter of public concern; whether the government's interests as employer, promoting the efficiency of the public service are sufficient to outweigh the plaintiff's free speech interests; whether the protected speech was a motivating factor in the adverse employment action and whether the [employee] would have reached the same employment decision in the absence of the protected conduct" Citing *Trant v Oklahoma,* 754 F.3d 1158 (10th Cir. 2014).

In assessing the balancing test required by *Pickering* and *Rankin* the Court reiterated that the speech is not considered in a vacuum and that the time, manner and place of the expressions are relevant. The Court cited *Rankin* and noted that the factors to consider are whether the statement "impairs discipline by superiors or harmony among co-workers, does it have a detrimental impact on personal loyalty and confidence… and does it impede the performance of the specific duties or interfere with the regular operation of the enterprise." Considering these factors, it was clear that the time and manner of the speech, as well as the detrimental impact it had on the personal trust the Sheriff had lost in the veteran and the detrimental impact it has in the veteran's ability to perform his duties shows that his actions and speech ran afoul of virtually all of these factors.

[19] The veteran cited this case in his brief as "directly on point."

The *Helget* Court held that "we have stated the primary consideration is the impact of the disputed speech on the effective functioning of the public employer's enterprise. … A public employer need not show that the employee's speech *in fact* disrupted internal operations and employment relationships. *Trant*, 754 F.3d at 1166. Instead, it need only to establish that the speech could *potentially* become so disruptive to the employer's operations as to outweigh the employee's interest in the speech. (emphasis in original). *Helget*, F.3d at 1222. Further, the employer need not await the detrimental impact before taking action… we will generally defer to a public employer's reasonable predictions of disruption." Id.

Significantly as it pertains to this case, the *Helget* Court discussed law enforcement as follows:

> "We begin our analysis with the City's interests. We have long recognized that loyalty and confidence among employees is especially important in a law enforcement setting. The need for workplace harmony is particularly acute in the context of law enforcement, where there is heightened interest in maintaining discipline and harmony among employees. and these concerns are even greater in a small department, where a minor disturbance in morale might loom large. The court noted that the actions of the employee caused her superiors to lose trust in her and that that loss of trust outweighed any interest she had to protected speech.

The language in *Helget* was significant on a number of levels. In this case, the potential for loss of public trust was a substantial factor. Rather, as the Court stated in *Helget* and as anyone familiar with law enforcement agencies is aware, the need for harmonious relationships both internally, externally and with the public is critical. Lives are at stake.

The *Helget* Court ruled against the employee and held that the government's interests outweighed the employee's right of free speech.

Weighing the factors set forth above it is clear that the county's interest still outweighed any interest by the veteran. While the statements were not made as part of the veteran's official duties, the statements themselves were not about a matter of public concern, as discussed at length above. As several of the cases hold, the speech itself must be analyzed to determine the First Amendment question.

Clearly too, the government's interests in promoting efficiency and maintaining public trust in law enforcement outweighed the veteran's interests in free speech on these unique facts.

The veteran also cited *Liverman v. Petersburg,* 2016 WL 7240179 (4th Cir. Dec. 15, 2016) and argued that the County's policy regarding social media presence may also be violative of the Constitution. The court noted initially that anyone who accepts public employment must also accept some limitation of their rights to free speech. There the Police Chief issued an order prohibiting information that might tend to discredit or reflect unfavorably on the department. It further stated that negative comments on the internal operations of the Bureau, or specific conduct of supervisors or peers that impacts the public's perception of the department is not protected by the First Amendment. Two officers posted comments regarding rookie officers or those with short tenure being assigned to do training. The officers were disciplined and told that the discipline would not affect any future promotional opportunities. Several weeks later though the Chief changed the promotional policy in such a way as to exclude the two officers from promotions.

The Court held that the language of the policy in that case was overbroad and prohibited the officers' rights to speak of matters of public concern in direct violation of Pickering and its progeny. The language at issue here does not do that and is different language. Thus, the argument that all such policies, including the one in Rice County, did not find the broad support the veteran sought. It was a different set of facts and resulted in a different outcome. The policy in *Liverman* also prohibited any speech regarding the internal operations irrespective of whether it may involve a matter of public concern, which the Court characterized as "which could be just about anything." The Court also examined the content of the speech and determined that inadequate training for police officers was a matter of public concern entitled to protection.[20]

In *Bailey v Dep't of Elementary and Secondary Education*, 451 F.3d 514 (8th Cir. 2006) the Court affirmed a finding against the employee who was fired, finding that the termination was justified based on the balancing test under *Pickering*.

[20] The *Liverman* Court seemed somewhat averse to the allegation by the Police Chief regarding what is and what is not protected by the First Amendment as stated in the policy. Here there is no such general broad pronouncement and the case proceeded on an analysis of the case based on the facts presented.

The Court cited *Schilcher v Univ. of Arkansas,* 387 F.3d 963 (8th. Cir 2004) and stated that "If the speech was mostly intended to further the employee's private interests rather than to raise issues of public concern, his speech is not protected even if the public might have an interest in the topic of the speech." This appears to apply to this case directly. While the underlying matter was of public concern, i.e. the homicide of Philando Castile and the settlement, the veteran's comments on the Star and Tribune twitter page were not about either in any direct sense – they were as noted above merely insults to Ms. Reynolds, based on large measure on her personal lifestyle – which the veteran claimed he was aware of due to viewing the You Tube videos. See, Veteran's exhibit 10.

While each of the above cases were decided based on their own facts they establish a guideline for the analysis of this case. The first inquiry is whether the speaker was speaking as a private citizen. The second is whether the speech was on a matter of public concern. If the answer is no to these then the inquiry need go no further. If yes, then the balancing test under *Pickering* is to be employed – although different courts have articulated that test in slightly different ways. It is to that analysis we not turn.

WAS THE VETERAN SPEAKING AS A PRIVATE CITIZEN?

The veteran claimed at the hearing that he was speaking only as a private citizen when he posted the Twitter messages and that they were intended as his opinions only. While that may have been his intent, his actions, the use of his name and the public setting of his Facebook page with him in uniform mitigated strongly in favor of the conclusion that the public reasonably viewed this as that he either represented the views of the Rice County Sheriff's department or that these were his views as a Sergeant within that office.

The facts though showed that his actual Twitter post identified him by name. There was a response that showed that someone in the public knew who he was and that he was in law enforcement. Within a very short time members of the public "connected the dots," as the County put it, and found his Facebook page, which showed him in a Rice County uniform and sitting in a Rice County vehicle. He stated that his intent was to speak as a private citizen but the manner in which the posts were made and the Facebook page issue – also shown to have been a violation - pushed this claim to the limit.

It was also clear that due to the public nature of the Facebook page and the very public comments he made, the sheriff felt the need to issue a disclaimer disavowing the comments of one of its sergeants and making it clear that the veteran's comments did not reflect the views of the County Administration or of the Sheriff's office.

On this record, the facts tended to show that it was quite likely he was perceived by the public as speaking in his official capacity as a Rice County deputy rather than a private citizen. That was certainly the response that came in overwhelming number from the public. See County exhibit 12. The record as a whole, shows that the public did not perceive this as a person speaking as a private citizen.

However, for purposes of argument, let us assume that the veteran was speaking as a private citizen. He must also show under the *Pickering* holding, along with its progeny, that he spoke out as a matter of public concern.

MATTER OF PUBLIC CONCERN?

As noted *Pickering* and *Garcetti* as well as the other cases that have dealt with this subject require both that a public employee, in order to enjoy the protection afforded by the First Amendment, must speak as private citizen and that the speech be on a matter of public concern. There is no hard and fast or "bright line" test that can be applied here. As noted above, many courts have grappled with this issue and it was clear that the time, manner and context of the speech may well govern this result.

The veteran's arguments here are understandable given the very public nature of the homicide of Mr. Castile and the press coverage of the settlement given to Ms. Reynolds. That was a matter of public concern. As several of the cases discussed though, the inquiry focuses on the speech. The distinction appears to be whether the speech is about a matter of public concern or is merely a private grievance.

The veteran argued that the homicide of Philando Castile and the settlement with Ms. Reynolds were both matters of public concern and that his statements were intended to raise issues of the propriety of the settlement and of the need to protect the interest of the minor child. As noted above, in some detail, his comments had nothing to do with either of those matters.

Frankly, he claimed a number of things later but the fatal flaw in the argument is this: none of his words said that. The messages said nothing about the use of public money or the propriety of using public dollars for a settlement in those circumstances. The words he used said nothing about the child. They were, as noted above, an insult to Ms. Reynolds. That was not a matter of any public concern at all and were, as the County argued, slander per se – accusing her of crack cocaine use so extensive that she would spend "it all" on crack in 6 months.

The veteran acknowledged that the You Tube videos show her smoking marijuana and admitted that crack cocaine is a very different drug and that possession of it carries a very different penalty. More to the point, he further admitted that he had no knowledge of Ms. Reynolds nor that she had ever used crack cocaine. His statements were, as the County suggested, speculation. See, Tr., pp. 411, 427-28.

What his conclusions about her were actually based on remains a mystery, but it was clear that many in the public drew their own conclusions about where they came from. The veteran's claimed intent did not comport with his words. These were merely private statements based on his own personal views – nothing more and nothing less – and were not shown on this record to be matters of public concern.

Under *Pickering*, *Rankin* and other holdings, that determination ends the First Amendment inquiry in a case like this. Once there is a finding that the matter is not of public concern, no further analysis is needed. Here however, given the nature of the issue, I will assume, arguendo only, that the veteran can meet the required showing that he was both acting as a private citizen, despite the findings above, and that the statements he made and the words he used were of public concern.

THE PICKERING BALANCING TEST

Even if this does become a 1st Amendment case, *Pickering* and its progeny require a balancing test between the rights of the individual to be weighed against the disruption to the office as the result of the speech. As the cases discuss, each case must be examined on its own unique facts and the balance to be performed in assessing such a case is a difficult one at best. Those tests are set forth above and do not need to be unduly repeated here.

The balance here is between the veteran's need and interest in insulting and disparaging Ms. Reynolds weighed against the County's interest in maintaining effective, efficient operations and the maintenance of public trust in performing law enforcement duties.

This case was analyzed through the lens of *Pickering* and its progeny and showed that the government interest, especially since this is a law enforcement agency, far outweighed the veteran's interests in making the post he did – whether he intended to be insulting or not. The posts "say what they say" and they got the reaction they got. The reaction was almost universally negative and harmful to the reputation to this department in particular and law enforcement in general.

As the caselaw shows, when public safety and law enforcement interests are involved, the Courts swing more in favor of the employer's need to maintain efficiency, good working relationships and public trust. The Sheriff's testimony was compelling in this regard and demonstrated by clear and convincing evidence the disruption it caused to the operations and the harm it did and, as the *Helget* Court and others have held, *potentially* will do in the future. On balance, the County's interests here were determined to outweigh any interest the veteran had to post the messages and make the statements he made.

The clear evidence showed that it was reasonably foreseeable that these posts would engender the very sort of reaction they caused. In fact, the last post by the veteran on the Star and Tribune Twitter feed page in response to several of the negative reactions he got in response to the first two such posts was as follows: "Thank you for your opinion, dialogue is always refreshing." This showed a clear intent to engender some sort of reaction to the posts he made and quite likely, the reaction that ensued.

The damage and disruption caused to his department as well as the potential for future damage to the reputation of this department based on the reaction to the posts, and was far more severe than the veteran claimed. The County's witnesses showed by clear and convincing evidence that there was damage done to the reputation of their department and that the public outcry over his posts caused them considerable damage control and extra work for a lengthy period of time. The press continues to contact the department up to the date of the hearing inquiring as to the status of this case.

Here, the balancing test required of the relevant caselaw swings in favor of the County. The words used and the manner and circumstances of the posts showed that these messages were not protected by the 1st Amendment.

WAR ON POLICE

The veteran's counsel argued that there is a "war" on police fueled by the media and that the attacks on police actions are a false narrative. This was a significant part of the veteran's arguments here and deserves some discussion.

The essence of this argument was that the perceptions regarding law enforcement by those people clamoring for action after seeing the veteran's posts should be discounted and ignored. This was a troubling argument and rang hollow. Frankly, to simply discount the perceived reality by those living in a free society may well be the most dangerous false narrative of all.

Further, there was no actual evidence of any such "war" and even though the Sheriff acknowledged that he felt that way too, this claim was based on people's opinions and their perception of how it views law enforcement personnel. However, for better or worse, it would be naïve to assume that there is no such perception, which of course leads to this conclusion: all the more reason NOT to have posted the messages. The damage to the reputation of his fellow officers in Rice County and in law enforcement was immeasurable, and in light of *Pickering* and its progeny, may be the worst infraction of all.

The public needs to respect the law and those who are charged with enforcing it. Comments such as the ones in this matter undermine the respect and confidence the public needs to have in its law enforcement professionals. These comments reflected poorly not just on the Rice County Sheriff's office but on the law enforcement community in general. The veteran's comments insulted the integrity of his fellow deputies and law enforcement professionals around the State, and indeed around the country.

The reality is that the vast majority of law enforcement personnel throughout this country are highly trained, dedicated, hardworking professionals who take their jobs and their responsibility to the public very seriously and who enforce the laws without regard to a person's race, gender or other protected class. The Twitter posts here, based on the overall evidence, and could well leave the unfortunate impression that at least some law enforcement officers are unable or unwilling to commit themselves to the highest standards of conduct necessary to uphold and enforce the law in an unbiased and professional manner.

Further, both the Twitter messages and the veteran's publicly reported lack of candor and truthfulness in this matter not only violated clear policies in Rice County, which, as a sergeant, he was responsible for knowing and enforcing - but also undermined the very confidence and trust the public needs to have in law enforcement professionals. There was no question that there was a nexus between these comments and messages and the Rice County Sheriff's Department. There was also no question that the speech here was not protected. It was not made as a private citizen since his Facebook page was public and readily available for anyone to see; and many made the connection between his posts and his uniform.

The posts were not made on a matter of public concern, but were insulting, even possibly slanderous to Ms. Reynolds. None made any reference to the use of public money nor did any mention the child as the veteran claimed later was his intent. Even if one gets over these two hurdles and arrives at the *Pickering* balancing analysis, the scale swings in favor of the County. The damage and disruption to the office was more than just having to deal with a bunch of phone call and cards and e-mails. The damage went to the very heart of law enforcement – public trust and faith in those who enforce the law. It is that damage that the veteran's arguments gloss over.

The veteran argued that he had a free speech right to these opinions and that to impose discipline would in effect chill his free speech rights. Free speech, as the US Supreme Court, has noted many times, is not absolute. One cannot yell fire in a crowded theater or "joke" about having a bomb or a weapon in a TSA security line, because the TSA doesn't think that's funny at all, nor can one threaten bodily harm, just to name a few of those exceptions.

Further, as every law enforcement officer knows, speech and actions can have consequences. The messages the veteran sent are no exception to that rule. His messages brought disrepute to his department and to his fellow deputies. Law enforcement officers are held to a higher standard of conduct and must demonstrate exemplary conduct in their professional and personal affairs. No one expects that law enforcement officers are perfect, but to send out a message of this nature on social media, knowing that social media is an electronic passageway to the entire world, crossed the line and then some on this record.

Not only did this message disparage his fellow deputies in Rice County, it sent a chilling and dangerous message to the public in general and cast aspersions on the greater law enforcement community. He insulted not only his position as a law enforcement officer but also his fellow law enforcement officers throughout the country.

The veteran's counsel did an admirable job defending the veteran's actions but also made the point that law enforcement is under greater scrutiny than ever before and that there are those who jump to conclusions regarding police use of force and their motivations for doing so. He asserted that there is "a war being waged on police" and that "the media is biased and complicit in it." There was no actual evidence of this but assuming that to be true – as some firmly believe – this was all the more reason for the veteran NOT to have posted what he did for the reasons set forth above.

It simply added to the already present perception by some that many law enforcement officers harbor racially negative views. Whether that is true or not is by no means the issue here but it demonstrates the disruptive nature of the impact of his actions here. As noted, the damage done to his department and to law enforcement in general was not merely "de minimus" as the veteran alleged. It was far greater than that and the Sheriff and Chief Deputy testified credibly and persuasively to that effect. The veteran's actions here cannot be minimized or shrugged off as "no big deal." The impact on his department was a very big deal and the damage to the public perception may be hard to judge by any objective measure and may well last long into the future. Clearly, the actions he took and the decision he made in this matter caused considerable disruption within the meaning of *Pickering* and its progeny.

Troubling too was his reaction to being questioned about the post by the press. Instead of admitting to it, talking responsibility about it, trying to somehow explain it or even apologize for it, he lied to the reporter about his identity and claimed he was a general contractor. It was only later, when it was apparent that he indeed had sent the post that he acknowledged that the post was his.

At that point, again instead of apologizing, he doubled down on the message and claimed that "history" supported his claims. It was clear that he had no intention of apologizing for his statements or acknowledging the damage they were doing and had done to the department.

He claimed too that he is not a racist and indeed he may well not be.[21] Both the Chief Deputy and the Sheriff testified that the posts were out of character and that they did not believe the veteran to be a racist. Here however the overwhelming evidence showed that he made disparaging statements about a person he did not know, had never met or spoken to, based entirely on speculation about her use of crack cocaine and that his statements were based on his view of "history." The question is whether his posts were protected by the First Amendment based on this unique record. For all the reasons set forth above, even if one gets to the question of the First Amendment and the balancing test required by Pickering, these posts were not shown to be protected and that they violated clear policies in place. Discipline was thus appropriate. The last remaining issue is whether there are grounds to reduce the demotion.

WAS THE DEMOTION APPROPRIATE ON THESE FACTS

The veteran acknowledged at the hearing that a suspension might well have been appropriate but that the demotion given its financial impacts is simply too harsh. He asked that his record of service and otherwise good record be considered to mitigate and reduce the demotion to something less.

[21] Even though the demotion has been upheld here, there was clear evidence that the veteran is an otherwise good law enforcement officer who made a series of bad judgments here. There was no evidence of any other racially charged comments nor of any issues in the performance of his duties during his career in that regard.

Some thought was given to doing that but, on this record, the facts did not support a reduction in the discipline imposed. Where there is a showing that the employer did not prove its entire case that was the basis for a demotion, arbitrators have and should consider a lesser penalty. See e.g. *LELS and Ramsey County*, 17-PA-0922 (Jacobs 2018), a demotion of a Sergeant was reduced to a short suspension where the County failed to prove portions of its case. Likewise, if there is a sense that there is disparate treatment or that the penalty was unduly harsh or punitive, arbitrators may well also reduce the level of discipline to a lesser discipline. Here none of those factors were present.

Arbitrators, just as hearing officers acting under the statute must be wary not to dispense their own brand of industrial justice or to substitute their own judgment for that of the employer unless there are grounds to do so. Changing the disciplinary penalty to a suspension, of whatever length here would be tantamount to simply siting in the Sheriff's chair. Here, there was no basis to do so. While the analysis of misconduct under the Act, can encompass a review of the appropriateness of the discipline and there is jurisdiction to reduce it in appropriate cases, there was not enough on this record to justify doing so.

First, the County proved its case. The County showed by clear and convincing evidence that the veteran violated the policies as alleged. Second, there was no evidence of any punitive or arbitrary action by the Sheriff. It appeared that in doing a demotion, as opposed to outright termination, the Sheriff had already taken the veteran's length of service and otherwise clean record into account. There was also no showing of disparate treatment or other cases where other employees committed similar infractions but received something less.

Finally, as Arbitrator Befort ruled in the Maple Grove veteran's preference case cited by the employer,[22] a long-term employee may be terminated even though that employee has 15 years of service and a clean disciplinary record.

On this record there was insufficient evidence or basis to reduce the demotion.

[22] https://mn.gov/bms-stat/assets/20130514-Maple-Grove.pdf#

AWARD

The demotion is upheld.

Dated: September 10, 2018

Jeffrey W. Jacobs, Arbitrator

Rice County and McBroom veteran's AWARD 2018.doc