Elko County, 131 LA 1593 (Arb. 2013)

131 LA 1593

Elko County
Decision of Arbitrator
May 29, 2013

In re ELKO COUNTY [Nev.]/COUNTY/ELKO COUNTY SHERIFF'S DEPARTMENT and ELKO COUNTY DEPUTY SHERIFF'S ASSOCIATION

Arbitrator(s)

Arbitrator: William B. Gould IV

Headnotes

ARBITRATION

[1] Effect of law ‣100.30

Arbitrator will consider effect of law and particularly First Amendment to U.S. Constitution on demotion of sergeant for discussing sheriff's proposed staff reorganization with county commissioner, where parties have given arbitrator authority to frame issue, and have provided submissions, testimony, exhibits, and argument based on assumption that law is properly before arbitrator.

DEMOTIONS

[2] First Amendment ‣100.30 ‣100.552501 ‣100.5509

Improperly-demoted sergeant's discussion of sheriff's proposed staff reorganization with county commissioner was protected by First Amendment to U.S. Constitution, where matter was not related to grievant's normal job duties, was not part of his assignments, and, therefore, he was not obligated to take matter up through chain of command; grievant was acting as private citizen, not public employee.

[3] First Amendment ‣100.30 ‣100.552501 ‣100.5509

Improperly-demoted sergeant's discussion of sheriff's proposed staff reorganization with county commissioner was protected by First Amendment to U.S. Constitution, despite contention that morale was disrupted, where sheriff was angered, but morale was not disrupted.

[4] First Amendment — Back pay ‣100.30 ‣100.552501 ‣100.5509 ‣100.559505

Improperly-demoted sergeant is not entitled to back pay, even though his discussion of sheriff's proposed staff reorganization with county commissioner was protected by First Amendment to U.S. Constitution, where grievant indicated concern that county would be “stuck” with another sergeant under plan, and that speech, while it did not render all speech unprotected in total, it was unprotected speech worthy of some sanction.

Attorneys

Appearances: For the employer—Charlie Cockerill, attorney. For the union—Mark A. Kilburn, attorney.

Opinion Text

FIRST AMENDMENT

Opinion By:

GOULD, Arbitrator.

Issue

At the August 21 hearing, both sides agreed that the Arbitrator would define the issue. Accordingly, I have defined the issue as follows:

> Whether the demotion of Sergeant P__ from the rank of sergeant to deputy by Elko County and the Elko County Sheriff's Office violated the collective bargaining agreement, or the constitutional free speech rights derived from the just cause clause of the Agreement, and was without just cause. If so, what is the remedy?

Contractual Provisions Involved

ARTICLE 4
NON-DISCRIMINATION

> A. The COUNTY and the ASSOCIATION will continue their policy not to interfere with, or discrimination against, any employee because of membership or non-membership in the ASSOCIATION, or because the employee engages in or refrains from engaging in any activity protected by NRS 288.010 and following.
>
> B. The ASSOCIATION recognizes its responsibilities as the exclusive bargaining agent of the employees covered by this agreement, and agrees to represent all employees in the bargaining unit without discrimination, interference, restraint or coercion.
>
> C. Consistent with federal and Nevada law the provisions of this agreement shall be applied to all employees in the bargaining unit without discrimination based on age, sex, marital status, race, color, religion, protected disability, or national origin. The ASSOCIATION shall share equally with the COUNTY the responsibility for applying this provision.

> This article shall not be subject to Article 13.

ARTICLE 27
DISCHARGE, SUSPENSION, DEMOTION AND REDUCTION IN PAY

> A. The COUNTY shall not discharge, demote, suspend or reduce in pay a non-probationary employee without just cause. The COUNTY shall notify employees affected and the ASSOCIATION's grievance committee of all such disciplinary actions taken.
>
> B. Nothing shall be used against an employee in a discharge, demotion, suspension or reduction in pay action unless the employee has been notified in writing of the intended action.
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> C. An employee may appeal a discharge, demotion, suspension, or reduction in pay through the agreement's grievance procedure which shall be the exclusive remedy for the appeal of disciplinary actions.

ELKO COUNTY SHERIFF'S DEPARTMENT
RULES AND REGULATIONS #1-02

V. General Duties

D. *General Conduct*

4. Employees shall not slander or speak detrimentally about the department or another employee.

F. *Suggestions or Grievances*

1. Employees wishing to make suggestions for the improvement of the department, or who feel injured or offended by the treatment, orders, or neglect of duty of a supervisor may communicate the suggestion either orally or in writing through the chain of command to the sheriff; however, certain matters such as those of a personal or confidential nature may be brought directly to the sheriff.

I. *Information*

1. Employees shall not communicate to any person who is not an employee of this department any information concerning operations, activities, or matters of law enforcement business, the release of which is prohibited by law or which may have an adverse impact on the department image, operations, or administration.

J. *Public Appearances and Exercise of Freedom of Speech*

2. Employees shall not unjustly criticize, ridicule, express hatred or contempt toward or otherwise defame the department, its policies, or other employees when to do so might disrupt operations or adversely affect morale or create disharmony in the workplace. The measure of disharmony is the inability of supervisors to maintain discipline.

AA. *Confidentiality*

Employees shall keep all complaints, arrest information, or other official business confidential. Employee shall not indulge in gossip about departmental business.

ELKO COUNTY SHERIFF'S DEPARTMENT
RULES AND REGULATIONS #1-09

III. Procedure

D. *Responsibility for Handling Complaints*

1. As a rule, complaints regarding law enforcement operations will be handled through the chain of command, beginning with the first-line supervisor. Complaints involving how law enforcement service is provided or a failure to provide service or improper attitudes or behavior may be investigated and handled by the investigator or by the sheriff. The sheriff may ask an investigator from another agency to undertake the investigation....

E. *Complaint Handling Procedure*

3. Normally, a citizen with a complaint shall be referred to the undersheriff who shall assist the citizen in recording pertinent information. The first-line supervisor shall at least conduct a preliminary investigation. The sheriff may, if appropriate, conduct a preliminary investigation. The preliminary

investigation consists of questioning the deputy, complainants, or witnesses, and securing evidence.

Background

Elko County is located in the far northeastern corner of Nevada near the Utah border. As of the 2010 census, the population was 48,818. The County is home to ranching, extensive gold mining, gaming, vast public lands, and the annual Cowboy Poetry event. The County encompasses 17,200 square miles which makes it the second largest county in Nevada and the fourth largest in the entire contiguous United States. The county seat and largest city is Elko with other serviced smaller communities of Wells, Jackpot, and West Wendover. The County Sheriff's Department is the chief law enforcement entity for the County and is responsible for maintaining the peace in the area. The Department has an elected Sheriff, appointed Undersheriff, and 53 sworn and 14 unsworn employees. There are currently 45 Deputies, 7 Sergeants, and 3 Lieutenants.

The Association is the sole bargaining representative for all deputies, sergeants, jailers, corporals, detectives, and civil deputies employed

by the Department. The grievant, P__, has been employed with the County Sheriff's Office for 11 years as a Sergeant for the Department. Prior to the factual background which gave rise to the grievance in this case, the grievant, promoted to the position of Sergeant two years after his initial hire, received a disciplinary one-day suspension without pay for disrespect to a fellow employee.

Sheriff J__ was elected to office in November 2010 and was inaugurated on January 3, 2011. County Commissioner Jeff Williams was elected to office in November 2010 and he also took his oath of office on January 3, 2011. Williams is the Chairman of the Elko County Commission, designated as the liaison between the County Department and the Commissioners.

On January 4, 2012, Sheriff J__ appeared before a public hearing of the Elko County Commission and proposed a staff reorganization which included not filling two vacant Sergeants positions and the addition of a third Lieutenant position to supervise operations in Wells and in the northeastern portion of the County. Sheriff J__ determined that two Sergeants were to be acting Lieutenants—Sergeant Mike Silva, who was the acting Lieutenant of the jail, and Sergeant B__, who was acting Patrol Lieutenant for the “urban area” (i.e., Elko and Spring Creek). Subsequent to the public hearing the matter was referred to the County Budget Committee for review and recommendation, and the Committee and Commission both subsequently approved the Sheriff's recommendation.

On January 16, 2012, the grievant contacted and met with County Commissioner Jeff Williams for breakfast and discussed the Sheriff's proposed staff reorganization plan as well as presenting a newspaper article containing an interview with Sheriff J__ on this subject and provided Commissioner Williams with a memo and a 1950s article. At the meeting, P__ brought to Commissioner Williams's attention his document entitled “Span of Control and the Proposed Restructuring of the Sheriff's Office Staff” and set forth his concerns about the increased span of control resulting from the plan and his concern that increased span of control had been a problem for the department. P__ also brought to Williams's attention his concern about the promotion of Sergeant B__, the fact that she had not been tested, and his view that the County would be “stuck” with her under this plan. As the County notes, it is undisputed that “Sgt. P__ did not meet or inform the Sheriff or anyone else in his chain of command of his views or his critical memo addressing the Sheriff's proposed staff reorganization prior to contacting and meeting with Commissioner Williams.”

On January 18, 2012, Sergeant P__ and Sheriff J__ bumped into each other and the Sheriff expressed concern and disappointment with the memo. The Sheriff inquired as to why the matter had not been brought “through the chain of command.”

On February 16, 2012, Sergeant P__ was provided a notice of a pre-disciplinary hearing on his, in the County's words, “written and oral communications to Commissioner Williams.” Sheriff J__ had concluded at this point that Sergeant P__’s communication with Commissioner Williams was in violation of policies relating to confidentiality and “Public Appearance and Exercise of Freedom of Speech.” The

memorandum notified Sergeant P__ that Sheriff J__ was “contemplating demoting you from your Sergeant's position to a Deputy position.” As a result, a pre-disciplinary hearing was established for March 8. On March 20, the Sheriff issued a decision demoting Sergeant P__ to the rank of Deputy Sheriff effective March 26, 2012. On April 3, the Association filed the grievance, appealing the disciplinary demotion, and arbitration was demanded on April 19, these events leading to the August 21 hearing before me.

Contentions of the Parties

The County states that between January 16 and January 18 Sergeant P__ “bypassed his chain of command and went directly to the Chairman of the Elko County Commission to proposed [an] alternative ‘Remedy’ to what the Sheriff was recommending.” Moreover, the County states that Sergeant P__, in the process of fashioning an alternative remedy, “lambasted and slandered Sheriff J__ and his immediate supervisory Acting Lieutenant B__.” The County contends that Sergeant P__’s critical memo and his meeting with Commissioner Williams do not constitute protected speech. Accordingly, the County contends that it had just cause to fashion a disciplinary demotion given the “seriousness” of his misconduct and his prior disciplinary suspension for “similar misconduct.”

The heart of the County's position is as follows:

> The Sheriff cannot have his first line supervisory employees bypassing the chain of command and violating Department rules and regulations and disclosing confidential employee information and demeaning and being critical of fellow employees and his immediate supervisor Acting Lieutenant B__ and the Sheriff in matters of policy such as the Sheriff's proposed staff reorganization.

The County also notes that the grievant states that there was no investigation. It states that this issue was never raised in the pre-disciplinary hearing and is “false.” The County states that the Sheriff conducted an investigation into the circumstances of this memo and that the memo is a “direct attack” upon the Sheriff and “slander and disclosure of confidential personal information and opinions about his immediate supervisor Acting Lieutenant B__.” The County also states that the references to the no-discrimination clause by the Association was not properly before the Arbitrator because the collective bargaining agreement excludes claims of discrimination from the grievance-arbitration process.

The County maintains that the speech in question is not First Amendment protected speech under *Garcetti v. Ceballos*. [1] The County maintains that the concerns expressed in the memo were not voiced to “coworkers or the public (either at a public meeting or to other citizens generally) or in a letter to the editor of the Elko Daily Free Press Newspaper.” The County maintains that Sergeant P__ was solicited by the chain of command to give his views on restructuring and that his job description expressly provides that he “[a]ssists and advises the sheriff in formulating written administrative guidance for the department.” The County states that Sergeant P__’s comment that he was off-duty as a sergeant at the time and that his description duties do not apply is a contention that is without merit inasmuch as he did not tell Commissioner Williams that he was meeting with him as just a “off-duty private citizen” to present “personal public concerns.” Thus, the County maintains that the memo and meeting are “part and parcel of his official duties and ... not speech protected by the First Amendment” within the meaning of the Supreme Court's *Garcetti* decision.

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[1] 547 U.S. 410 [24 IER Cases 737] (2006).

The County also emphasizes the fact that the terms “public” or “concern” or “safety” never appear in the critical memo and that the intent of the memo was to undermine Sheriff J__ in a “non-public forum” and to

"destroy" the reputation of Acting Lieutenant B__. The "speech," states the County, "is analogous to the critical memo written by the Deputy District Attorney in *Garcetti* which was delivered to Ceballos' supervisor." Here the County contends that the speech contrasts with the landmark Supreme Court holding in *Pickering v. Board of Education*, [2] where there was no interference with the general regular operation of the schools. The public, states the County, has no interest or concern in "the grievant's 'alternative proposals' or the Personal Information relating to B__." States the County, even if some of the memo is protected free speech, there is no protection for "confidential personal information" regarding his immediate supervisor.

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[2] 391 U.S. 563 [1 IER Cases 8] (1968).

Additionally, the County maintains that the grievant's allegation that he could not raise the matter with J__ because of a fear of retaliation is false. There is no evidence, states the County, that the grievant was a whistleblower or in fear of retaliation notwithstanding his testimony that he had raised the matter of Undersheriff Keema's use of credit cards with Manager Minor. The County states that the concern with retaliation was raised for the first time at the arbitration hearing and was never expressed in the grievance or at the pre-disciplinary hearing.

Accordingly, the County states that the speech is unprotected criticism, outside the chain of command which is required by the grievant's job description and "slander" against the reputation of B__. The County asserts that the disciplinary demotion was progressive discipline inasmuch as there was a prior disciplinary suspension and that the grievance should be denied under the just cause clause.

For its part, the Association states preliminary that there was no proper investigation and that Sheriff J__ was simply "very angry" that Sergeant P__ had taken this matter to Commissioner Williams and felt that P__ had "stabbed him in the back." The Association states that during the initial meeting between the grievant and the Sheriff there was no indication

that the Sheriff viewed the content of the document or the off-duty communication with Commissioner Williams as violative of the policy or defamatory. Here the Association states that the County has violated its policy which requires it to investigate "*all* complaints" (emphasis supplied by the Association). Here the Association states that the Sheriff had an obligation to classify the complaint which was not followed. The Association contends that in any event the procedures were not followed, stating the following:

> Regardless of any recommended disposition of any complaint, when the investigation is completed the file shall be forwarded to the IAB for review who then forwards the matter to the Undersheriff or his designee for recommendation of disciplinary action.... The Undersheriff, upon receiving the adverse investigation, must review the same for completeness, *objectivity*, whether the evidence is *neutrally* presented and whether the findings are factually based. Only then does the matter proceed to the Sheriff with the Undersheriff's recommendations for the Sheriff's review and disposition.... In this case, none of these procedures were followed as required by the Internal Investigations Policy. The Sheriff intentionally ignored the very process expressly designated to be followed designed to ensure an "equitable [determination of whether the allegations are valid or invalid and to take appropriate action."... At the hearing in this matter, the Sheriff admitted he did not utilize or follow the Internal Investigations Policy.

Moreover, the Association states that the Sheriff may not "initiate his own complaint" rather than to simply prepare a report on it which is then to be followed through the chain of command. The Undersheriff, states the Association, is required to carry out the process. The Association states that Sheriff J__ had a wrongful "direct conflict of interest" inasmuch as he "initiated, investigated, judged, and determined his own anger-based complaint against Sergeant P__." Accordingly, the Association states that there was no

just cause on such grounds.

The Association also states that P__ did not state that B__ “does not deserve to be a Sergeant” and that there was no testimony that anyone who had seen the document had the view that there was such a message. The Association states that there was no attempt to undermine the Sheriff and that P__ “never attempted to get the Commissioner to vote against the plan” and therefore J__’s authority was not undermined inasmuch as the “Commissioners have no power over Sheriff J__.” The essence of the “span of control concerns ... were public concerns.” At no time, states the Association, did P__ denigrate J__ and the Association refers to Williams's testimony to the effect that the document did not do so. The Association states that Williams is regularly provided information about the Department's operations, activities, and matters of law enforcement business by other members of the Department and that therefore the attempt to discipline P__ is “improper, discriminatory, and completely lacking in fairness, equity, or just cause.”

The Association notes that there is no allegation regarding the disclosure of confidential information, or that the grievant disclosed anything relating to complaints or arrest information to Commissioner Williams, and that the Sheriff testified that the operations and activities of the Department itself are not confidential. With regard to the contention that the grievant had engaged in “gossip” prohibited by a Department regulation, the Association states that the word is not defined anywhere and that no definition can apply to the memo in question. The Association contends that there was neither gossip about anyone else including B__ or disclosure of information which was confidential.

The Association also states that the policy regarding suggestions or grievances was not violated because it simply allowed employees to use the “chain of command” and does not compel them to do so. Accordingly, states the Association, this did not provide a basis for discipline.

The Association maintains that the policy appearing under “General Conduct” prohibiting “slander,” or detrimental speech about the Department or another employee, or speech meant to “unjustly criticize, ridicule, express hatred or contempt toward or otherwise defame the department, its policies, or other employees when to do so might disrupt operations or aversely affect morale or create disharmony in the workplace,” was not violated. The Association states that there was no evidence that the material given to Commissioner Williams was false and that there was no animus or “contempt” toward B__. Moreover, the Association focuses upon the fact that disruption, as a result of the memo and statements of the grievant, was not in evidence at the hearing. States the Association:

> There is not one witness or one document presented in this case that even so much as indicates [that there was any department-wide morale issue]. Sgt. P__ specifically testified that he had never heard, been told nor had it been indicated that the contents of his written documents or his contact with Williams had adversely affected morale or caused any disharmony in the department.

Moreover, the Association relies upon the fact that Sheriff J__ testified that he had no knowledge of how anyone else would have found out about the P__ document, though he gave it to Sergeant B__ because he thought that she should know about it. The Association emphasizes the fact that the record does not contain any information or evidence about disharmony or disruption as the result of this document.

The Association also argues that in any event the demotion was “disproportionate” and an improper penalty in connection with the progressive discipline policy which the County follows. The Association maintains that P__ accepted an earlier suspension for an e-mail which had been sent to the former sheriff which had been viewed as “disrespectful” because he wanted the matter “ended” and that in any event the matter was “nearly two years removed from its occurrence and approximately one year from the suspension date.” Moreover, the Association contends that the proper classification of the earlier charge was not provided and that since this demotion was a greater penalty than a suspension, which was the maximum relevant penalty, just cause could not be found.

On the free speech issue itself the Association relies upon the above-noted *Pickering* decision. Under the *Connick* [3] and *Garcetti* decisions, the Association contends that there is a five-part test to First Amendment free speech claims raised by government employees:

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[3] *Connick v. Myers*, 461 U.S. 138 [1 IER Cases 178] (1983).

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1. Did the employee's speech touch upon a matter of public concern?

2. Was the speech made as part of the employee's job duties?

3. Did the government take adverse employment action that was substantially motivated by the employee's speech?

4. Did the government's legitimate administrative interest in providing efficient and effective services to the public outweigh the employee's First Amendment rights?

5. Would the government have taken the adverse employment even in the absence of the protected speech?

The Association states that if there is enough evidence to support the affirmative answer to the first three question, the burden of persuasion shifts to the government for the remaining questions. The employee, states the Association, prevails if the government is unable to satisfy the burden on both questions.

The Association contends that clearly the subject matter is of public concern inasmuch as the reorganization plan was presented to the publicly elected Elko County Commission in public meetings for consideration, discussion, and approval, and that the information was released to the local newspaper which published it on January 16, 2012. The Association notes that the span of control issue is one which is a "valid area of concern for the health and safety of the county residents and the functioning of the department all of which may impact the health and safety of the communities the department serves." The same applies to Sergeant P__'s communications, states the Association, in response to the Sheriff's decision to "appoint someone to the position in violation of the vigorous consistent testing process mandated to be used for promotion for all Lieutenant positions as stated in the Elko County Sheriff's Promotional Policy." States the Association:

> [T]he communication or speech that touches upon a concern that existing mandatory testing requirements may be jettisoned for a "new lieutenant's position" is a substantial matter of public concern as it relates to the functioning of government which are core matters of inherent public concern.

In this connection, the Association states that the courts have historically looked to the subjective intent of the speaker and relies upon the grievant's testimony concerning the effects of the restructuring plan and his knowledge and awareness of the needs of deputies for supervision. States the Association: "When he saw the January 16, 2012 article in the Elko Free Press about the restructuring plan he was concerned that it would place a lieutenant at a disadvantage requiring him to travel to concurrently supervise deputies in Wells, Wendover and Jackpot which also placed the deputies at a disadvantage and could negatively impact public safety."

The Association contends that the information relating to Sergeant B__ was necessary because her name had been placed in the "public arena" by the Sheriff and his view that she could be promoted with

no testing process. States the Association: “It was to provide information to Commissioner Williams, not to denigrate Sgt. B__, illustrating that the mandated testing process is critical and is there to vet out these issues and select the best candidate for the important lieutenant's position.” The Association also states that P__’s speech was not required by his job duties within the meaning of *Garcetti*. The contention is that P__’s duties as a Patrol Sergeant “did not require him to produce and/or communicate the speech at issue herein.” The Association notes that the County did not contend that P__’s duties “required” speech and that thus this is a clear concession that his activity is not unprotected by virtue of the Supreme Court's view of the First Amendment in *Garcetti*. The job duties of a Patrol Sergeant do not include meetings with members of the Elko Count Commission, nor do they require contact with the Commissioners. The Association also notes that when the grievant met with Commissioner Williams he was “not in uniform, not speaking on behalf of the department, nor did he indicate that his position or concerns voiced in the speech were that of the department.” Further, the Association argues that the demotion was the direct result of protected speech. It notes that the record is clear about the fact that the adverse action, i.e. demotion, was taken because of the speech and memo in question.

The Association contends that the balancing process weighs heavily in favor of Sergeant P__’s free speech protection, particularly inasmuch as the meeting with Commissioner Williams was in private, “no one else was present and there is no evidence in this case that anyone else heard their discussion.” Accordingly, inasmuch as the meeting took place off-duty and out of uniform, the Association states, the grievant was acting as a private city and not an individual who had special responsibility for and “unique access” to the Department's operations and functions and personnel matters. The Association emphasizes that Sergeant P__ did not “denigrate Sheriff J__” at the meeting, and points to Commissioner Williams's testimony to the effect that P__ did not do so. States the Association: “In short, Sgt. P__ kept the information contained seeking only to inform his elected representative, who was also the liaison to the department, particularly interested in the efficient operation of the same, about concerns already in the public forum.” The Association emphasizes the time, place, and manner of the communication and, citing Supreme Court authority, [4] states that under the circumstances the balance tips heavily in favor of protected speech.

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[4] *Givhan v. Western Line Consolidated Sch. Dist.*, 439 U.S. 410 [18 FEP Cases 1424] (1979).

The Association contends that on policy which the grievant is alleged to have violated, i.e. communication to “an individual who is not an employee of the department any information concerning operations, activities, or matters of law enforcement that is prohibited by law or which may have an adverse impact on the department image, operations or administration” suffers from overbreadth. Here the Association notes that even malfeasance in the department would be suppressed by such a rule. The Association cites the testimony of Sheriff J__ to the effect that the information released was not prohibited by law, and states that the claim that Acting Lieutenant B__’s position was undermined is “unsupportable” given the fact that the message contained in P__’s speech did not indicate that B__ would have to be retrained. Moreover the Association states that there was no attempt on the part of P__ to get Commissioner Williams to vote against J__’s plan, and that the speech did not undermine his authority within the department.

The Association states that there is no serious contention that the information on reorganization constituted “other official business” which was confidential within the meaning of the confidentiality policy cited by the County. The Association also states that even if the rule regarding confidentiality could apply to the speech in question, this kind of information is routinely shared. In any event, the Association states that the matter is one of “public concern” within the meaning of *Pickering* and that the balance contemplated by that holding must therefore be tipped against the County. The same holds true, states the Association, with regard to the County's reliance upon the argument that the information is “gossip.”

With regard to the County's argument that the grievant violated the policy on Suggestions or Grievances, the Association states that the policy is permissive, i.e. that members of the Department are “allowed” to use the “chain of command” for suggestions, grievances, or concerns. Here the Association relies upon Sheriff J__’s testimony to the effect that Sergeant P__ was not required to bring these communications through the chain of command. Here the association states that even if the policy was mandatory it would unconstitutionally tread on free speech rights, and that in any event there is no showing that departmental authority was undermined.

The Association also states that the policy prohibiting so-called “slander” or detrimental speech about the department or another employee, and which similarly prohibits unjust “criticism, ridicule, express hatred or contempt toward or otherwise [meant to] defame the department, its policies, or other employees when to do so might disrupt operations or adversely affect morale or create disharmony in the workplace,” is similarly unconstitutionally vague and overbroad. Here, where the County contends that Sergeant P__ communicated “contempt” and defamation toward Sergeant B__, the Association argues that the policy “unconstitutionally infringes upon P__’s First Amendment right and is void for vagueness independently outside of the *Pickering* analysis.” The Association here states that in order for a claim that Sergeant P__ defamed anyone to be made out there would have to be a showing of falsity or knowledge of falsity and that there is no evidence to that effect in the record.

The Association states that there is no evidence to support the argument that Sergeant P__’s speech constituted “contempt” toward Sergeant B__. Again, with regard to morale and disruption issues, the Association states that P__ did not distribute his memo to anyone other than J__ who, himself, delivered the document to B__ and who stated that her morale was affected and disharmony created. In this regard, the Association reiterates its argument that there is no evidence showing that discipline or harmony were interfered with, or that the speech had a “detrimental impact on the working relationships in the department, impeded the performance of the speaker's duties, or interfered with the regular operation of the enterprise.” Finally, the Association, citing both Supreme Court and Ninth Circuit authority, [5] says that there can be no claim that Sergeant P__’s speech was not the but-for cause of the adverse employment action, i.e. the demotion in question.

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[5] *Mt. Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274 [1 IER Cases 76] (1977); *Eng v. Cooley*, 552 F.3d 1062 [28 IER Cases 1139] (9th Cir. 2009).

Opinion

[1] My analysis applicable to the issue at hand starts with two assumptions. The first is that, notwithstanding the considerable debate of many decades over the relationship between arbitration and public law, [6] this is not a case in which the matter requires considerable attention. The parties have granted me not only the authority to frame the issue—and I have done so, as indicated in Part II—they have provided their submissions, testimony, exhibits, and argument, based upon the assumption that law, particularly the provisions of the First Amendment of the Constitution, are properly before me in this case. Thus, it is clear that the constitutional standards of the First Amendment as interpreted by the Supreme Court, are subsumed within the just cause clause of the collective bargaining agreement which is before me.

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[6] I've expressed my views on this subject in William B. Gould IV, *Labor Arbitration of Grievances Involving Discrimination*, 118 U. Pa. L. Rev. 40 (1969); William B. Gould IV, *Judicial Review of Employment Discrimination Arbitrations*, *in Labor Arbitration at the Quarter-Century Mark: Proceedings of the Twenty-Fifth Annual Meeting of the National Academy of Arbitrators* 114 (1972); William B. Gould IV, *A Half Century of the Steelworkers Trilogy: Fifty Years of Ironies Squared*, *in Arbitration 2010: The Steelworkers Trilogy at 50: Proceedings of the Sixty-Third Annual meeting of the National Academy of Arbitrators* (2011). *See generally Alexander v. Gardner-Denver Co.*, 415 U.S. 36 [7 FEP Cases 81] (1974); *14 Penn*

Plaza LLC v. Pyett, 556 U.S. 247 [105 FEP Cases 1441] (2009).

The other starting point for analysis in the instant case is that, as a broad proposition, employee speech about matters of public concern is protected by the First Amendment. [7] The protection of speech, including employee

speech, is worthy of the greatest solicitude. [8] The starting point in modern jurisprudence is *Pickering v. Board of Education*, [9] where the Court instructed the judiciary (and in this case the arbitrator) to employ 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 a employer in promoting the efficiency of the public services it performs through its employees." [10] As the Court has said more recently:

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[7] *See generally* Helen Norton, *Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression*, 59 *Duke L.J.* 1 (2009); Elizabeth Dale, *Employee Speech & Management Rights: A Counterintuitive Reading of Garcetti v. Ceballos*, 29 *Berkeley J. Emp. & Lab. L.* 175 (2008); Thomas Keenan, Note, *Circuit Court Interpretations of Garcetti v. Ceballos and the Developments of Public Employee Speech*, 87 *Notre Dame L. Rev.* 841 (2011); Comment, *Leading Cases, Constitutional Law: Public Employee Speech*, 120 *Harv. L. Rev.* 273 (2006).

[8] *NAACP v. Alabama*, 357 U.S. 449 (1958); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Rankin v. McPherson*, 483 U.S. 378 [2 IER Cases 257] (1987); *cf. NLRB v. Magnavox Co.*, 415 U.S. 322, 326 [85 LRRM 2475] (1974); *Novotel New York*, 321 NLRB 624 [152 LRRM 1201] (1996); *Caterpillar, Inc.*, 321 NLRB 1178, 1184 [153 LRRM 1049] (1996) (Gould, Chairman, concurring).

[9] 391 U.S. 563 [1 IER Cases 8] (1968).

[10] *Id.* at 568.

> Underlying the decision in *Pickering* is the recognition that public employees are often the members of the community who are likely to have informed opinions as to the operations which are of substantial concern to the public. Were they not able to speak on these matters, the community would be deprived of informed opinions on important public issues.... The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it. [11]

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[11] *City of San Diego v. Roe*, 543 U.S. 77, 82 [22 IER Cases 1] (2004).

The Supreme Court jurisprudence thus attempts to fashion a balance between free speech on matters of public concern, [12] on the one hand, against the employer interest in efficiency, the provision of services, morale, and production, on the other. Subsequent to *Pickering* itself, which involved First Amendment protection against the dismissal of a high school teacher for openly criticizing the Board of Education in its allocation of school funds between athletics and education, and its method of informing tax payers about the need for additional revenue, [13] the Court, after holding that First Amendment protection includes

private communication with an employer as well as the public expression involved in *Pickering*, [14] addressed the question of whether the First Amendment's applicability to an employee questionnaire distributed by an individual who was objecting to her transfer in *Connick v. Myers*. [15] Here, the Court, noting that public employee speech was unprotected where the individual spoke "not as a citizen upon matters of public concern, but instead as a employee upon matters only of personal interest," [16] stated that the question must be resolved by "content, form and context of a given statement revealed by the whole record." [17] A divided Court [18] concluded that the distributed questionnaire, arising out of an individual employee grievance, was not designed to "evaluate the performance of the office bur rather to gather ammunition for another round of controversy with her superiors." [19] All of the questions, said the Court, carried "the clear potential for undermining office relations." [20] The fact that the distribution of the questionnaire took place at the office and required the individuals to leave work to complete it, suggested to the Court that the speech at issue "at the office supports Connick's fears that the functioning of his office was endangered." [21]

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[12] For instance, the Courts of Appeals for the Third and Fourth Circuits have held that protest about sexual harassment, real or alleged, is a public concern within the meaning of *Pickering*. *Montone v. City of Jersey City* (3d Cir. Mar. 8, 2013); *Campbell v. Galloway*, 483 F.3d 258 [104 FEP Cases 1756] (4th Cir. 2007).

[13] *See Connick v. Myers*, 461 U.S. 138, 145 [1 IER Cases 178] (1983).

[14] *Givhan v. Western Line Consolidated Sch. Dist.*, 439 U.S. 410 [18 FEP Cases 1424] (1979); *cf.* William B. Gould IV, *The Supreme Court and Labor Law: The October 1978 Term*, 21 *Ariz. L. Rev.* 621, 622-25 (1979).

[15] 461 U.S. 138 [1 IER Cases 178] (1983).

[16] *Id.* at 147.

[17] *Id.* at 147-48.

[18] *Id.* at 156 (Brennan, J., dissenting) (joined by JJ. Blackmun, Marshall, and Stevens).

[19] *Id.* at 148.

[20] *Id.* at 152.

[21] *Id.* at 153.

In *Connick*, the Court noted that there was no coincidence involved in the preparation and distribution of the questionnaire immediately "upon the heels of the transfer notice" and stated: "When employee speech concerning office policy arises from an employment dispute concerning the very application of that policy to the speaker, additional weight must be given to the supervisor's view that the employee has threatened the authority of the employer to run the office." [22]

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[22] *Id.*

Expressing concern that a contrary conclusion would "constitutionalize the employee

grievance" [23] the Court was of the view that the questionnaire was a matter of public concern within the meaning of *Pickering* in only the most limited sense. The Court was of the view that it would be a mistake to confuse the "great principles of free expression" regarding a public employee's discussion of public affairs, with the above-noted constitutionalization of an employee grievance. [24]

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[23] *Id.* at 154.

[24] *Id.*

The plot's thickening has emerged in the wake of the most recent Supreme Court pronouncement in *Garcetti v. Ceballos*. [25] Here, the Court, again deeply divided, [26] confronted a case that involved a government attorney's investigation of a defense attorney's request that he, as calendar deputy, determine the accuracy of an affidavit. Ceballos, the calendar deputy, was of the view that the affidavit in question contained serious misrepresentations and subsequent to expressing concern about this to his superiors and to a meeting with defense counsel, was called to testify and reiterated his concerns about the affidavit. Claiming in the aftermath that he was subjected to a series of retaliatory employer actions, Ceballos initiated an employment grievance, was denied on the grounds that he had not suffered retaliation. The issue thus in *Garcetti* was whether Ceballos's concerns and a memorandum based upon them were protected free speech.

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[25] 547 U.S. 410 [24 IER Cases 737] (2006).

[26] *Id.* at 426 (Stevens, J., dissenting); *id.* at 427 (Souter, J., dissenting) (joined by JJ. Stevens and Ginsburg); *id.* at 444 (Breyer, J., dissenting).

Here the Court propounded with more emphasis a demarcation between employee speech on "matters of public concern" as citizens, as opposed to employee grievances, quoting *Connick* to the effect that they could not be constitutionalized. An examination of the themes articulated in *Garcetti* alongside of the facts of the instant case is critical to determining the just cause issue here.

In the first place, the Court noted that the question of where the activity took place was not "dispositive." [27] Sometimes, noted the Court in *Garcetti*, the First Amendment free speech protection was afforded in the workplace itself. Thus an assumption arguably derived from *Connick*, i.e. that discussions in the workplace were more inherently disruptive, was not the key element. Here, of course, the memo and speech between Sergeant P__ and Commissioner Williams took place away from the workplace and whatever concerns might have been articulated in *Connick* about interference with efficiency, do not apply to the instant case. The fact that the speech in question took place privately and that it was not the grievant who distributed the memo to others, as well as the fact that he was not in uniform, [28] indicates that this particular feature, while again not dispositive, weighs in favor of protected free speech.

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[27] *Id.* at 420.

[28] *See City of San Diego v. Roe*, 543 U.S. 77, 81 [22 IER Cases 1] (2004) ("The use of the uniform ... brought the mission of the employer and the professionalism of its officers into serious disrepute."). As noted above, this contrasts with the instant fact situation.

Second, *Garcetti* focused upon the subject matter of the expression, noting that the mere fact that employment was involved was "nondispostive" inasmuch as the First Amendment "protects some expression related to the speaker's job." [29] The Court noted that this was true of not only the teachers involved in *Pickering* but also "many other categories of public employees." [30] Here, again, the subject matter of the memo essentially concerns reorganization and not the employment of Sergeant P__, though his comments about Sergeant B__ have been highlighted by the County in this case.

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[29] *Garcetti*, 547 U.S. at 421.

[30] *Id.*

The *Garcetti* "controlling factor" was the fact that "his expressions were made pursuant to his duties as a calendar deputy." [31] Said the Court:

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[31] *Id.*

> That consideration—the fact that Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case—distinguishes Ceballos' case from those in which the First Amendment provides protection against discipline. We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline. [32]

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[32] *Id.*

But what do the words "pursuant to their official duties," which removes the speech from First Amendment protection, mean? Some indications are provided in *Garcetti*

itself. Noting that the question of whether the employee "experienced some personal gratification from writing the memo" and the irrelevance of his "job satisfaction," the Court's significant point was that this memo was written pursuant to the calendar deputy's official duties. [33] Here the Court said that restricting

speech owes its existence to “a public employee's professional responsibilities” and that this does not interfere with liberties that he or she might possess as a private citizen. [34] The Court noted that the memo in question was written as part of the attorney's daily professional activities, and through the proper disposition of a pending criminal case, thus allowing his supervisors to evaluate his performance.

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[33] *Id.*

[34] *Id.*

What kind of a record will provide the proper resolution of this case? For instance, the Court of Appeals for the Sixth Circuit has concluded that the “quintessential employee beef” means that the matter is not one of public concern and thus unprotected. [35] The Court of Appeals for the Ninth Circuit has held that statements made outside the ordinary chain of command are to be factored in favor of free speech protection, [36] as opposed to the Sixth Circuit's arguably wooden and inflexible conclusion that statements made by a public employee “only to her immediate supervisors” are employment related and thus protected within the meaning of both *Connick* and *Garcetti*. [37] The Sixth Circuit has relied upon the conclusion of the Fifth Circuit to the effect that the employee's utilization of the chain of command is an indication that the speech is unprotected. [38]

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[35] *Fox v. Traverse City Area Public Schs.*, 605 F.3d 345, 349 [30 IER Cases 1264] (6th Cir. 2010); *Barnes v. McDowell*, 848 F.2d 725 [3 IER Cases 829] (6th Cir. 1988).

[36] *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121 [28 IER Cases 385] (9th Cir. 2008).

[37] *Fox*, 605 F.3d at 350; *id.* at 349 (“Because the plaintiff officer reported his employer's illegal acts to an outside law enforcement agency, rather than solely to his supervisors, we held that those statements were obviously not made pursuant to the plaintiff's official duties.” (citing *See v. City of Elyria*, 502 F.3d 484, 493 [26 IER Cases 1330] (6th Cir. 2007)); *see also Handy-Clay v. City of Memphis*, 695 F.3d 531 [34 IER Cases 577] (6th Cir. 2012) (emphasizing the facts where the individual employee was speaking to a payroll department, a human resources employee, and a city councilman, as distinguishing the situation from a case where the speech is only to one's immediate supervisors).

[38] *Fox*, 605 F.3d at 350 (citing *Davis v. McKinney*, 518 F.3d 304, 313 [27 IER Cases 396] (5th Cir. 2008))

The application of these principles to the instance case involves consideration of the Suggestion and Grievance procedures, and whether they are mandatory or permissive, and the provision referenced by the County that P__ is to give administrative guidance to the Sheriff. Presumably, the existence of a mandatory procedure through which Sergeant P__ would be compelled to pursue this matter internally would place his activity on the unprotected side of the equation within the meaning of the relevant Supreme Court jurisprudence. This is critical because of the Supreme Court's reference to “duties.” The Court of Appeals for the Ninth Circuit appears to have provided what has come to be characterized as an unhealthy perverse incentive to avoid utilization of the chain of command as a basis for concluding that speech is only unprotected if the speaker had an “official duty” to make the questioned assignments or was performing tasks for which he was “paid to perform.” [39] The Court of Appeals for the Tenth Circuit has concluded that if there is no evidence that the employee was “assigned” to attend meetings, the speech is protected. [40]

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[39] *Freitag v. Ayers*, 468 F.3d 528 (9th Cir. 2006); *Marable v. Nitchman*, 511 F.3d 924 [27 IER Cases 14] (9th Cir. 2007); *Posey*, 546 F.3d at 1127.

[40] *Casey v. W. Las Vegas Independent Sch. Dist.*, 473 F.3d 1323, 1332 [25 IER Cases 1153] (10th Cir. 2007).

For its part, the Court of Appeals for the Second Circuit, however, has held that speech "pursuant to" a public employee's official job duties need not be required or included in the employee's job description, or in response to a request by the employer. [41] According to the Second Circuit, "[c]ourts must examine the nature of the plaintiff's job responsibilities, the nature of the speech, and the relationship between the two." [42] But sometimes, by the nature of the job, a requirement to perform it is not a *sine qua non*, inasmuch as it is "related to his job duties." [43]

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[41] *Weintraub v. Bd. of Educ.*, 593 F.3d 196, 203 [30 IER Cases 353] (2d Cir. 2010); *Ross v. Breslin*, 693 F.3d 300, 305 [34 IER Cases 449] (2d Cir. 2012).

[42] *Ross*, 693 F.3d at 306.

[43] *Williams v. Dallas Independent Sch. Dist.*, 480 F.3d 689, 693 [25 IER Cases 1268] (5th Cir. 2007).

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[2] The issue is not resolved by mere reference to the speaker's legal obligations or job

description. [44] On the basis of the record in this case, while it might have been desirable for Sergeant P__ to take this matter up through what the County has characterized as the "chain of command," I conclude that this was not related to his normal job duties, was not part of his assignments present in this record and therefore it was not obligatory for him to do so. And thus *Garcetti* and the post-*Garcetti* progeny oblige me to conclude that his speech was legally protected under the First Amendment. True, the plaintiff bears the burden of showing that the speech was engaged in his or her capacity as a private citizen and not a public employee, [45] though in the context of the instant arbitration proceeding these borders are clouded by the fact that the employer bears the burden of establishing just cause within the meaning of the collective bargaining agreement. But judged by either standard, i.e. either plaintiff or defendant burden, I find that the evidence supports the conclusion that there was no mandatory duty present in this employment relationship. Accordingly, inasmuch as neither duty nor responsibility was involved, this consideration is to be weighted in favor of protected free speech.

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[44] *McArdle v. Peoria Sch. Dist. No. 150*, 705 F.3d 751 [34 IER Cases 1607] (7th Cir. 2013).

[45] *Eng v. Cooley*, 552 F.3d 1062, 1071 [28 IER Cases 1139] (9th Cir. 2009).

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[3] But this is not the end of the analysis, for the County states that morale was disrupted and thus

efficiency interfered with, a consideration always present since *Pickering* itself, and a factor which is weighted in favor of an unprotected status for the speech in question. In this connection, the Court of Appeals for the Ninth Circuit has said that First Amendment rights cannot be interfered with "unless there is evidence that the employee's actions actually disrupted the workplace or are reasonably likely to do so in the future. Simply saying that there has been or will be disruption, without supporting evidence, is not enough. In the face of *Pickering*, the 'because I said so' approach is insufficient to establish a reasonable prediction of disruption, let alone actual disruption." [46] Said the same court: "An employer must provide some evidence by which we can measure whether its claims of disruption are reasonable." [47]

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[46] *Nichols v. Dancer*, 657 F.3d 929, 931 (9th Cir. 2011).

[47] *Id.* at 934.

There are two additional considerations that are relevant to analysis of this particular issue. The first is that the department in question has law enforcement responsibilities and thus could argue for greater discretion for the employer. Yet even in a prison context, when issues relating to confidentiality have been raised, criticisms of the actions of a public safety official did not lead to the conclusion that "public safety employers have a greater weight placed on their interests in order and discipline than other employers have in their institutional interests." [48] When the speech concerns public issues, and quite clearly the speech of Sergeant P__ did so, an argument supporting deference to efficiency in the employer's operation, whether police or prisons are involved, is present. Though the County's argument and testimony supporting the demotion in question was based upon interference with morale, there was no evidence to support it. I find that the speech in question created a feeling of anger by Sheriff J__, not interference with morale and the like. This is not sufficient to rebut the protected status of the speech in question.

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[48] *Mosholder v. Barnhardt*, 679 F.3d 443, 451 [33 IER Cases 1409] (6th Cir. 2012); *Brown v. City of Trenton*, 867 F.2d 318 (6th Cir. 1989).

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[4] There are, however, portions of P__'s speech which do give rise to concern, i.e. his focus upon the fact that the County would be "stuck" with Sergeant B__. But, "[a] public concern/private interest analysis does not require that a communication be utterly bereft of private observations or even expressions of private interest," [49] and thus the mere fact that, in my view, some of the comments by Sergeant P__ were inappropriate and themselves unprotected, does not render his speech to be unprotected *in toto*. However, I am nonetheless concerned about this aspect of it. [50] Of course, the mere reference in speech to the employer's hiring or firing of particular employees itself is not the dispositive factor—otherwise employees would be precluded, for instance, from protesting racial or sexual discrimination under *Garcetti* and this is not the

case under extant precedent. [51] Nonetheless, the reference to the County being "stuck" with Sergeant B__ was gratuitously insulting and demeaning to her. While the grievant's speech *in toto* is protected, and thus the just cause clause, incorporating *Garcetti*, *Connick* and their progeny, has been violated, I am of the view that back pay shall not be provided under the circumstances of this case.

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[49] *Mosholder*, 679 F.3d at 450-51.

[50] *See Nixon v. City of Houston*, 511 F.3d 494 [26 IER Cases 1665] (5th Cir. 2007) (condemning derisory and insulting remarks, in this case made to a community as a whole).

[51] *Garcia v. Hartford Police Dept.*, 706 F.3d 120 [117 FEP Cases 137] (2d Cir. 2013); *see also* note 12, *supra*.

Accordingly, the grievance is sustained and the demotion must be rescinded. The Elko County Sheriff's Department is therefore obliged to reinstate Sergeant P__ to his former position, to provide him with seniority from the date of his demotion. Back pay as well as benefits for this time period are not awarded.

AWARD

The County has violated Article 27 and is obliged to reinstate the grievant, Sergeant P__, with appropriate seniority to his former position within five working days of receipt of this Opinion and Award. Back pay and benefits for the period of time in question are denied for the reasons stated in the Opinion.

- End of Case -