

**Voluntary Labor Arbitration Tribunal  
Tammy Brynie, Esq., Arbitrator**

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In the matter between:

Warren Patrolmen's  
Association,  
NEPBA, Local 195

Gr: Shawn Morin

- and -

Town of Warren

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**Decision and Award**

**For the Town**

Timothy D. Zessin, Esq.

**For the Union**

Thomas E. Horgan, Esq.

**Background**

The hearing was held on August 21, 2018. At hearing,  
the parties submitted the following stipulated issues:

1. Is this grievance arbitrable?
2. If so, did the Town have just cause to terminate the employment of Shawn Morin?

3. If not, what shall be the remedy?

The Grievant, Shawn Morin, is a life-long resident of Warren, with children attending local schools. Union Exhibit #1, p.3. The Grievant began working, part-time, as a patrol officer in May of 2014. The Grievant then applied for a full-time position in December of 2015 and was appointed, at Town Meeting on May 24, 2016, to a full-time patrol officer position. Union Exhibit #1, p. 3. In June 2016, the Grievant received a temporary waiver from the Municipal Police Training Committee (Union Exhibit #2), that allowed the Grievant to perform the duties of a sworn officer, prior to graduating from a full-time police academy. The Grievant worked, in a full-time capacity, pursuant to the waiver, before enrolling in a full-time police academy -- to complete a six month course. The Grievant graduated from the police academy in June 2017 and, on June 6, 2017, the Town's Selectmen appointed him to a full-time position for a three year term. Joint Exhibit #5. The Grievant's employment was terminated effective May 18, 2018, Joint Exhibit #3, resulting in this dispute.

During the morning of May 2, 2018, there was an emergency response to a fire within the Town. The Town's Fire Department quickly posted on its Facebook page about its 9:22 AM fire response, with a second posting a few minutes later. The Grievant, in response to his observation of fire trucks on the road and related activity, posted a popular meme<sup>1</sup>. The Grievant posted the meme on the Fire Department's public page, shortly after an initial informational post. The Grievant testified that it was his intent to joke with the fire fighters (he testified that there had been a history of back and forth banter) and, at the time, he didn't know the extent of the fire, or its damage.

Fire Chief Adam Lavoie testified to the effect that he quickly became aware of a response to the Grievant's post and he saw potential for a back and forth discussion about the Grievant's post. As a result, he quickly made the decision, as an administrator of the Fire Department's page, to have the Grievant's post removed. Chief Lavoie estimated that the meme post was taken down within about thirty minutes. Lavoie testified that he handled the Grievant's post as

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<sup>1</sup> The Grievant testified that, after a quick search, he posted the

quickly as possible (to avoid a "back and forth" situation) and that the only question or complaint about the post came to his attention three to four hours later -- after the post had already been taken down.

Marc Richard, the Town's Board of Selectmen Chair, testified that he became aware of the Grievant's post, and reaction, on the same date -- May 2, 2018. According to Richard, he was advised by Rebecca Acerra, the Administrative Secretary for the Board of Selectmen of the on-line activity and response. After assuring that the Grievant's post had been removed, Richard testified that he spoke the other Selectmen about the situation. Richard also testified that, at the time, the Selectmen did not discuss the situation with the Police Chief. Indeed, Richard testified that Board did not have confidence that that Police Chief would handle the situation correctly or appropriately, and that he was personally "livid" about what he perceived to be the Grievant's "grossly inappropriate" response to the fire. According to Richard, they (the Board of Selectmen) were not comfortable with the Chief's

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first (and most popular) fire meme he found.

management, as he testified to the effect that there was a perception that the Chief had handled prior personnel and disciplinary situations poorly. As a result, Richard testified that the Board of Selectmen, acting as the Town's Personnel Board, took it upon themselves to handle the Grievant's situation.

The Grievant was informed that the Town's Board would convene, in executive session, on May 16, 2018 to discuss the post. Town Police Chief Bruce Spiewakowski, in a May 11, 2018 email to Selectman Richard, detailed several areas of objection or concern. The Chief indicated that, routinely, complaints relating to police department employees have been referred to his attention, to address.<sup>2</sup> Further, Chief Spiewakowski expressed his understanding that the Grievant was not a probationary employee (although the Town appeared to be treating him as such), and it was his understanding that the Grievant had "been off of probation for almost a year." Union Exhibit #6.

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<sup>2</sup> The Town had accepted the provisions of G.L. c. 41, Section 97A, with the general effect that the Police Department was to be under the supervision of the Chief.

Police Chief Spiewakowski met with Selectman Richards on May 14, 2018. Spiewakowski expressed his displeasure at the Board of Selectmen was handling a situation that, as he explained, was within his area of responsibility (as detailed within his job description, which he provided). As a result of their meeting, Chief Spiewakowski testified that he understood, from Richards, that he was to handle the matter involving the Grievant. Richards, however, had a different perspective, testifying, in effect, that Spiewakowski had permission to speak with the Grievant, but that there was no understanding that the scheduled May 16th Board executive session would be postponed or cancelled.

The Grievant, on the other hand, received a different message. It appears that Chief Spiewakowski may have (incorrectly) assumed that, in the aftermath of his meeting with Richards, that the Executive Sessions was cancelled, and that he would be handling the 'Facebook Post' situation. As a result of this communication confusion/misunderstanding, neither the Grievant and/or his Union representative attended the scheduled May 16th Executive Session.

At arbitration, the Grievant credibly testified to his understanding that the Session had been cancelled, and that the Chief had been given the authority to deal with the situation. The Grievant testified that, except for the miscommunication, he certainly would have attended the scheduled Executive Session. In addition, the Grievant indicated that, when he made the post, he intended it to be a bit of back-and-forth joking with his friends and colleagues at the Fire Department. At the time, the Grievant testified, he did not know the extent of the fire, or its consequences. The Grievant testified that he now realizes that the post was unprofessional, and he understands why it could, and did, cause complaints.

Despite the Grievant's absence, the Board of Selectmen met in Executive Session on May 16, 2018. The result of that meeting was communicated to the Grievant in a May 17, 2018 letter, stating, in pertinent part:

This correspondence shall serve as notification that the Board of Selectmen, after careful consideration of the evidence presented during the executive session convened on May 16,

2018... voted to terminate your employment with the Town of Warren, effective May 18, 2018.

On May 10, 2018, you received notice of the Board of Selectmen's intent to convene an executive session ... to discuss complaints against you ... based on allegations that on May 2, 2018 you posted an unprofessional, sensitive and highly inappropriate online comment in response to a post on the Facebook page of the Warren Fire Department regarding a structure fire on that same date that tragically displaced the family that resided there ... it was determined that the comment was in fact posted by you less than one hour after the Fire Department officials initially published the informational post at 9:29 a.m. on May 2, 2018. A review of Town records established that you were not on-duty at the time the post was published. Records further show that the Fire Department officials removed your post approximately 30 minutes to an hour after it was published after they deemed it was offensive and inappropriate. Prior to its removal, however, several individuals observed your post and complained to Town officials regarding its offensive and insensitive nature.

It is apparent from the context of the post and the meme that you intended to make light of the structure fire and its impact on the buildings' inhabitants. There is no evidence that you attempted to apologize or explain your post at any point after it was published and subsequently removed.<sup>3</sup>

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<sup>3</sup> It is clear, even within the Town's termination letter, that the Grievant's meme was posted less than an hour after the Fire Department's initial post about the blaze -- when the Grievant could not have known that the blaze had 'tragically displaced the family that resided there.' Then, the Town concedes that the post was removed within 30 minutes to an hour of its publication. The timing detailed within the termination letter itself fails to support the Town's conclusion that the Grievant "intended to make light of the structure fire and its impact on the building's inhabitants." Finally, although it seems that the Grievant was faulted for failing to apologize for, and provide an explanation about, his post, it is also clear that the pre-disciplinary executive session was subject to a critical misunderstanding -- with Chief Spiewakowski under the impression that he had successfully asserted his right, as a 'strong chief,' to deal with

A review of your personnel file indicates that you graduated from the Massachusetts Police Training Council's academy in June 2017 and thereafter began actually performing the duties of the position of a full-time basis on June 23, 2017.<sup>4</sup> Therefore, it is the Town's position ... that your 12-month probationary period does not end until June 23, 2018.

Despite the fact that you remain in a probationary status, the evidence presented to the Board in this cause overwhelmingly demonstrates that there is just cause to terminate your employment as a patrol officer for the Town's police department. You have failed to comport with the most basic standards of conduct that the Town reasonably expects from its law enforcement officials. Our community places a significant amount of trust in the police department and its officers. Your conduct in this instance severely threatens to erode and violate that trust, straining that critical relationship at a time when cooperation is needed most. This is undoubtedly conduct that is unbecoming an officer in violation of the Department's policies and procedures, and further violates Section 2(5) of the Town's Social Networking Policy... Joint Exhibit #3.

A timely grievance challenging the termination of the Grievant's employment was filed on May 21, 2018 and processed, without resolution, to arbitration Joint Exhibits #4A-4G. At the conclusion of the hearing,

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the personnel/disciplinary issue, with the result that the executive session would not be needed, while Richard testified to his understanding that there was no postponement, rescheduling or other alteration to the set executive session, and that the Board of Selectmen would be exercising their personnel action authority.

<sup>4</sup> As previously noted, however, the Grievant began the duties of a full-time officer, pursuant to the applicable, appropriate waiver, in June of 2016. Union Exhibit #2.

both parties filed comprehensive post-arbitration written submissions.

### **Contentions of the Parties**

The Town, as a preliminary matter, asserts that this matter is not arbitrable, as the Grievant was a probationary employee when his employment was terminated. The contract provides that employees remain in a probationary status "during the first twelve (12) months of service." The Grievant was not fully trained and certified until he graduated from the full time police academy in June 2017. Accordingly, his 12-month probationary period did not begin until that time and would not have expired until June 2018, a month after his termination. As a result, Morin was an at-will employee, who lacks recourse to the contract's grievance and arbitration procedures.

Even if it is determined that Morin had completed his probationary period as of May 17, 2018, the evidence establishes that there was just cause to terminate his employment. The Grievant's Facebook post

was offensive and unprofessional, and eroded the public's trust in the Town's public safety departments.

High standards of conduct are demanded of members of the law enforcement community. Warren is a small, tightly-knit community, where police officers are known, public figures. The Grievant's Facebook post must be viewed and understood in this context. Here, the Selectmen reasonably concluded that, after his insensitive post about a fire that had displaced an entire family, including a handicapped individual, it would be extremely difficult for the Grievant to regain the public's trust. The Grievant's argument that at the time he made the post he did not know the seriousness of the fire -- when the public information clearly indicated that it was a working structure fire with a second full alarm -- is not persuasive.

In defense of his admittedly poor decision to post the meme, the Grievant testified that it was meant as a joke or banter with members of the fire department. Had he wanted to joke, the Grievant should not have used a public Facebook page. The public post was incredibly insensitive and the Board of Selectmen, as the hiring

and firing authority for all positions within the Police Department, had the statutory authority to impose discipline. Here, as Selectman Richard explained, the Board asserted its authority, because it had lost faith in Chief Spiewakowski's ability to address the matter and expeditiously discipline the Grievant. Overall, the termination decision is supported by just cause.

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The Union contends, at the outset, that the grievance is arbitrable, as the Grievant had successfully completed his probationary period and, as a result, was entitled to just cause protection at the time of his May 17th termination. It is clear that the Grievant had performed more than 12 months of service as a full-time officer for the Town prior to his termination. Indeed, on June 8, 2017 the Grievant received a re-appointment letter, re-appointing him to a three year term as a full time officer. It is clear that the Grievant was a full-time vested and permanent employee with the Town, with just cause protection. As a result, the matter is procedurally arbitrable.

The Town did not have just cause to terminate the Grievant's employment. First, the Town failed to conduct a thorough investigation into the matter, including a failure to collect any written statements from alleged complainants about the single Facebook post. An aspect of the Town's rationale for its discharge decision was an understanding that the Grievant was unapologetic about the post. However, the Grievant was never interviewed prior to the termination decision, nor was he asked for any written statement about the situation. Nor did the Grievant have an opportunity to address the matter prior to the termination decision, as there was a misunderstanding about whether or not the May 16th executive session meeting would occur. Overall, arbitration evidence demonstrates procedural and substantive unfairness in the termination of the Grievant's employment.

In addition, the Town has failed to adhere to the recognized principles of progressive discipline and has failed to offer any reasonable justification for doing so. Here, the Town has failed to present clear and articulable facts to support their decision to not

utilize progressive discipline in this case. The Grievant made a poorly timed and insensitive post, that he regretted and for which he apologized. The Grievant has a clean disciplinary record and the discipline imposed, the termination of his employment, is a disproportionate penalty for one social media post. The termination decision is not supported by just cause.

As remedy, the Grievant should be reinstated to his position and made whole for all lost pay and benefits.

### **Opinion**

First, the instant grievance is arbitrable. The Grievant was appointed to a full-time position on May 24, 2016 and, thereafter, worked as a patrol officer, prior to basic police recruit training, as a result of waiver from the municipal police training committee. Union Exhibit #2. Then, on June 28, 2017, the Grievant received a re-appointment letter to a three year term as a full-time police officer. Joint Exhibit #5. I have no doubt that the Grievant successfully fulfilled his probationary period -- a period clearly and specifically defined at Article XXIV as "the first

twelve months of service." By the time of his discharge, the Grievant had worked in a full-time capacity for almost two years, after having worked for the Town in a part-time basis beginning in May of 2014.

The Town's argument, that the twelve month probationary period did not commence until the Grievant graduated from the police academy in June 2017, is not supported by the governing contract language. Moreover, Chief Spiewakowski testified that the situation had been addressed and reconsidered in recent contract bargaining, with a specific decision made to leave the language unchanged, due to the waiver situation. Indeed, Chief Spiewakowski noted, in a May 11, 2018 email to Selectman Richard, that the Grievant had been off of probation for almost a year, at that point. Union Exhibit #6. The Grievant had the benefit of just cause protection with respect to disciplinary action, and the ability to enforce that provision, and seek redress, through contractual grievance and arbitration procedures. The grievance is arbitrable.

To meet the contractual just cause requirement, I must be convinced that the Grievant committed the

misconduct alleged and that the termination of his employment is an appropriate disciplinary penalty for his substantiated misconduct. I am convinced that, while off-duty, the Grievant posted an insensitive meme on the Town's Fire Department public Facebook page, in connection with an on-going structure fire. I am not, however, convinced that the one post warranted the termination of the Grievant's employment. Instead, termination is an excessive response, and it is inconsistent with the progressive discipline obligation detailed at Article XII (B).

I have no hesitation in finding that the Grievant's post was insensitive. An aspect of the disciplinary decision, however, was the Town's determination that the Grievant "intended to make light of the structure fire and its impact on the building's inhabitants." Joint Exhibit #3. It is clear that the Grievant acted in a thoughtless manner, and used poor judgment, when he posted a popular meme referring to a fire on the fire department's page. But, the Grievant was never interviewed or questioned about the situation, his thought process (or lack thereof) or his intent. The Town's finding that the Grievant intended to make light

of the building's inhabitants' distress and displacement was not substantiated. Indeed, according to Fire Chief Lavoie, the extent of the situation, as detailed in Town Exhibit #4, was not even available when the Grievant made his post.

I am convinced that, as a local resident and police officer in a small town, the Grievant's thoughtless, insensitive post warranted a disciplinary response. The Town, however, had a contractual obligation to follow progressive discipline, "unless clear and articulable facts can be presented to support other action." Article XI, (B). In the termination letter the Town asserts that the Grievant's conduct severely threatened to erode and violate the public trust. Yet, clear evidence of the erosion of public trust with respect to the Grievant in particular, and the Police Department in general, was not presented.

Instead, the Grievant, who had a clean disciplinary record, made an error in judgment with a Facebook meme post. Fire Chief Lavoie testified to the effect that he quickly realized that the Grievant's post could foster a back and forth exchange on Facebook and, as a

result, he made the decision to have the post removed. Lavoie testified that he believed that the post was removed within about thirty minutes, and that he handled the matter as quickly as possible. Thus, the evidence at arbitration demonstrated that an insensitive post was briefly posted on the Fire Department's Facebook page, and that it was quickly removed. Under the circumstances, the termination of the Grievant's employment, for a ill-considered post, that was promptly removed from public view, is an excessive and overly harsh disciplinary penalty.

The situation was well-suited for a progressive, corrective disciplinary response. In light of the Grievant's prior clean record I, like Chief Spiewakowski, determine that the issuance of a letter of reprimand is an appropriate, proportional disciplinary penalty. Indeed, the Grievant credibly testified that he now understood why the post may have led to complaints, and he now realizes that it was unprofessional.

In conclusion, the Town did not have just cause to terminate the employment of Shawn Morin. As remedy,

the termination will be reduced to a Letter of Reprimand. The Grievant shall be reinstated to his former position, and made whole for all lost wages and contractual benefits, less any interim earnings.

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**AWARD**

1. This grievance is arbitrable.
2. The Town did not have just cause to terminate the employment of Shawn Morin.

As remedy:

The termination shall be reduced to a Letter of Reprimand.

The Grievant shall be restored to his former position, and made whole for lost wages and contractual benefits, less interim earnings.

I will retain remedial jurisdiction for an initial 60 day period, subject to renewal.

/s/ Tammy Brynie

Tammy Brynie

Arbitrator

October 29, 2018