

FEDERAL MEDIATION AND CONCILIATION SERVICE  
UNITED STATES GOVERNMENT  
WASHINGTON, D.C. 20427

Case No. 06-56338  
(Discharge of Adam Nadelman)

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In the Matter of the Arbitration Between  
  
          **CITY OF NAPLES,**  
  
          Employer,  
  
and  
  
          **IAFF, LOCAL 2174,**  
  
          Union  
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**OPINION  
AND  
AWARD**

**BEFORE:** Michael J. Pecklers, Esq., Arbitrator

**HEARING:** October 10, 2006, Naples, Florida

**APPEARANCES:** For the Employer

Jon D. Fishbane, Esq. ROETZEL & ANDRESS, P.A.  
Denise Perez, Human Resources Director  
Joe Whitehead, Police Detective  
James McEvoy, Fire Chief  
John Maines, Police Lieutenant

For the Union

Richard P. Siwica, Esq. EGAN, LEV & SIWICA, P.A.  
Adam Nadelman, Firefighter/Grievant  
Omar Vishr, Firefighter  
Samuel A. Cadreau, Fire Lieutenant

**RECORD CLOSED:** January 20, 2007

**DATE OF AWARD:** March 5, 2007

## **BACKGROUND OF THE CASE**

The case before me challenges the November 21, 2005 termination of City of Naples, Florida, Firefighter Adam Nadelman on the charge of violating the Workplace Violence, City Policy Section 3-II. This related to a September 28, 2005 incident, and specifically alleged that, “possession of a firearm is not permitted at work or on City property when not a necessary and management approved job requirement.” See, City of Naples *NOTICE OF DISCIPLINARY ACTION*, Exhibit J-3 at page 3; see also, *MOORE MEMO, Id.*, at page 1.

On December 2, 2005, the Union filed a grievance contesting the termination, which argued that Firefighter Nadelman was discharged without just cause, and cited contractual violations not limited to Article 5 of the C.B.A. and City of Naples Policies & Procedures Manual §§ 3 & 20. See, Exhibit J-2, at page 2. By agreement of the parties, the grievance process was initiated at Step 3, the City Manager. See, *NADELMAN DECEMBER 2, 2005 LETTER TO CHIEF MOORE, Id.*, at page 1. By memo to Mr. Nadelman dated December 9, 2005, then City Labor Relations Manager Amy Shirvanipour notified him that the full evidentiary grievance hearing was scheduled for December 15, 2005 at 3:00 PM.

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An additional charge of violating the Drug Free Work Place; City Policy Section 3-V, was also initially brought against Firefighter Nadelman. This was based upon suspected possession of marijuana found in his locker, following an anonymous tip. However Chief Moore concluded that the investigation failed to discover sufficient evidence to clearly prove or disprove the allegation. This was based upon the fact that evidence, including a drug screen and the narcotic canine not alerting on the bag or the vehicle of Firefighter Nadelman, cast sufficient doubt as to the knowledge or personal possession of the marijuana on the part of Firefighter Nadelman. See, Exhibit J-3, at page 1.

Firefighter Nadelman acknowledged receipt of the same in writing on December 14, 2005. *Id.*, at page 3. On December 22, 2005, the City's *RESPONSE TO GRIEVANCE* was issued. This discussed the documentation provided to hearing Officer Victor Morales; cited Chief Moore's conclusion that possession of a firearm at work when not approved will result in termination; and concluded that the Chief's decision to terminate Mr. Nadelman was the correct choice. *Id.*, at pages 6-7; *see also, DECEMBER 15, 2005 STEP 3 MINUTES* at Exhibit ER-6.

Local 2174 then appealed this ruling to arbitration, before the Federal Mediation and Conciliation Service ("F.M.C.S."). Pursuant to F.M.C.S. regulations, I was subsequently duly appointed to serve as Arbitrator, to decide the dispute. Upon notice to all parties, a hearing was convened in Naples, Florida, on October 10, 2006, and proceeded before me in orderly fashion. At hearing, the parties were provided with a full opportunity for oral argument; for the introduction of relevant evidence; and for the examination and cross-examination of witnesses. All witnesses were sworn prior to testifying. At the conclusion of the hearing, a briefing schedule was set down, in lieu of closing argument.

Post-hearing briefs were originally scheduled to be postmarked November 13, 2006. However, by mutual agreement, this schedule was revised several times, due to the illness of the Union advocate. Following a conference call confirming the ultimate due date, the record was closed on January 20, 2007. By virtue of the revisions to the briefing schedule, and based upon my business

travel and vacation schedule, I requested additional time within which to render my award prior to the contractually prescribed due date. The parties graciously granted this request, pursuant to Article 8.12 of the C.B.A. In rendering the within award, I have carefully and fully considered all evidence of record; all arguments made; and the voluminous arbitral citation offered in support of the respective positions.

**RELEVANT CONTRACT LANGUAGE** [Exhibit J-1]

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**ARTICLE 5 MANAGEMENT RIGHTS**

5.01 The Union agrees that the City has and will continue to retain, whether exercised or not, the right to operate and manage its affairs in all respects. The powers or authority which the City has not officially abridged, delegated or modified by the express provisions of this Agreement are retained by the City. Such rights of the City, through its management officials, shall include but shall not be limited to, the right to determine the organization and efficiency of operations of the City; to set standards of service to be offered to the public; to direct the employees of the City, including the right to assign work and overtime; to hire, examine, classify, promote, train, transfer, assign, and schedule employees in positions within the City; to suspend, demote, discharge, or take other disciplinary action against employees for proper cause; to increase, reduce, change, modify, or alter the composition and size of the work force, including the right to relieve employees from duties because of



shall be final and binding upon both parties. It is contemplated that the City and the employee shall mutually agree in writing as to the statement of the matter to be arbitrated prior to a hearing, and if this is done, the arbitrator shall confine his decision to the particular matter thus specified. In the event of the failure of the parties to so agree on a statement of issue to be submitted, the arbitrator shall confine his consideration to the written statement of the grievance presented in Step One of the Grievance Procedure.

8.11 Each party shall bear the expense of its own representatives. The parties shall bear equally the expense of the impartial arbitrator. Any party requesting a copy of the transcript of such arbitration hearing shall bear the cost of same.

8.12 The times indicated on all steps may be extended by mutual agreement.

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**APPLICABLE CITY POLICIES & REGULATIONS**

**CITY OF NAPLES  
PERSONNEL POLICIES & PROCEDURES MANUAL** [Exhibit J-4 (a)]

**SUBJECT: EMPLOYMENT ISSUES:  
WORKPLACE VIOLENCE**

Section No. 3-II (Revised 01/14/98)

**WORKPLACE VIOLENCE:** It is the shared obligation of management, employees, law enforcement agencies, and employee organizations to individually and jointly act to prevent or defuse actual or implied violent behavior at work. Additionally, the City of Naples will provide a coordinated effort to manage critical workplace violence incidents. This includes but is not limited to a quick and thorough investigation and response to reports or incidents or threats, attempts, or actions of violence against an employee that were carried out or

believed to have been carried out in the workplace by an employee against another employee or citizen.

Violence, attempted violence, or the threat of violence, by an employee against another City of Naples employee or citizen during working hours is unacceptable and in violation of City policies. Any such action may subject the employee to possible criminal charges by the victim through the appropriate law enforcement agency. Additionally, any employee who is involved in such activity will be subject to serious disciplinary action up to an including termination. The City intends to fully cooperate with law enforcement personnel to assist in the prosecution of any person in or outside the organization who commits violent acts against an employee in the workplace or during working hours.

The possession, use, threat of use, of a weapon, including firearms, is not permitted at work, on City property, or in a City vehicle, unless such possession or use of a weapon is a necessary and management approved job requirement.

**WORKPLACE VIOLENCE OPERATING PROCEDURES**

The following procedures should be used as a general guideline in the event of workplace violence. If you encounter a potentially violent or dangerous situation as a supervisor, you should always consider your personal safety and the safety of other employees and citizens first! If there is any possibility of harm, injury or death, seek safety immediately and call 9-1-1 for assistance.

A. DIRECTOR AND SUPERVISOR ACTION:

- 1. EMERGENCIES: (Current or potentially dangerous situations where harm, injury or death to an employee or citizen is occurring or is imminent. This situation includes stalking.)

\* \* \* \*

- 2. INCIDENTS: (Non-Life Threatening verbal or physical altercations)

\* \* \* \*

- 3. THREATS: (Threats of harm or injury at a future date or time)

\* \* \* \*

- 4. ADDITIONAL NOTIFICATION & DOCUMENTATION:

\* \* \* \*

C. DISCIPLINARY ACTION

It is the City's intent to administer disciplinary action up to and including termination to employees involved in any act, attempted act, or threat of any violence. The department director and the Human Resources Director must approve disciplinary action involving workplace violence incidents. Employees who incite or participate in any acts of workplace violence may also face criminal charges as a result of their actions.

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**PERSONNEL MEMO  
CITY OF NAPLES**

Exhibit J-4 (b)

**DATE** 9/26/94

**NO** 56

**RE: WORKPLACE VIOLENCE**

**POLICY:** It is the shared obligation of management, employees, law enforcement agencies and employee organizations to individually and jointly act to prevent or defuse actual or implied violent behavior at work. Additionally, the City of Naples will provide a coordinated effort to manage critical workplace violence incidents which includes a quick and thorough investigation and response to reports or incidents of threats, attempts, or actions of violence against an employee that were carried out or believed to have been carried out in the workplace by an employee against another employee or citizen.

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**II. GENERAL**

Violence, attempted violence, or the threat of violence, by any employee against another City of Naples employee or citizen during working hours is unacceptable and in violation of City policies. Any such action may subject the employee to possible criminal charges by the victim through the appropriate law enforcement agency. Additionally, any employee who is involved in such activity will be subject to serious disciplinary action up to and including termination. The City intends to fully cooperate with law enforcement personnel to assist in the prosecution of any person in or outside the organization who commits violent acts against an employee in the workplace or during working hours.

**CITY OF NAPLES**  
**PERSONNEL POLICIES & PROCEDURES MANUAL** [Exhibit J-5b]<sup>2</sup>

**SUBJECT: DISCIPLINE**

Section No. 20 (Revised 01/14/98)

**OPERATING PROCEDURES**

**I. GENERAL:**

City employees are expected to maintain high standards of conduct, and to perform their work safely, efficiently, ever mindful of the expectations the public has of its employees. Acceptable personal behavior in the workplace involves exercising good conduct, good judgment, and integrity at all time[s]. Discipline will be administered without regard to race, color, religion, national origin, age, sex, marital status or disability.

**II. DISCIPLINE:**

Discipline shall generally be administered in a progressive and constructive manner. Progressive discipline is defined as the administration of more severe discipline for violations of the same type or multiple offenses of the same or different type over a period [of] time.

Department directors have the authority to take disciplinary action up to and including termination of employment without administering progressive discipline based upon, but not limited to, consideration of the following factors: severity of behavior or offense; intervals between offenses; frequency of offenses; willingness to improve; and, length of City service. Eligible employees who have been disciplined shall be advised of their grievance rights. (See "Grievance" section in this manual for additional information.)

**III. GUIDELINES FOR DISCIPLINARY ACTION:**

Disciplinary action shall be progressive and corrective in nature to encourage employees to perform in an effective and efficient manner. Although discipline is meant to be administered progressively, it is not necessary to follow the progression if warranted by the severity of the action. The list of offenses warranting discipline is not all-inclusive and shall be used as a guide. Each

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The parties have stipulated that the City of Naples Personnel Policies & Procedures Manual § No. 20 was revised right after the incident. However, there are no substantive differences between the instant policy, and the new one, which appears at Exhibit J-5 (a).

department director may develop written departmental disciplinary policies unique to, and necessary for, the efficient and safe operation of the department. The departmental disciplinary policies shall be used in addition to the guidelines in this manual.

The guidelines for disciplinary action shall be used by management and supervisory personnel to provide standard and equitable treatment of employees. In determining the disciplinary action to be taken, a supervisor should take into consideration the employee's entire work history, disciplinary history, time intervals between each infraction, and the seriousness of the last infraction.

\* \* \* \*

**V. TYPES OF OFFENSES:**

The following are grounds for formal disciplinary action. The offenses listed below will serve as a guideline for department directors and supervisory personnel and is not all inclusive. Offenses committed which are not listed here shall not interfere with the right or duty of the department director or City Manager or designee to charge and terminate employees on other grounds which are considered justifiable and in the best interest of the City of Naples. This may include administering discipline outside the normal progression dependent upon the severity of the action. Examples of violations include:

\* \* \* \*

- 3. Violation of City policies or procedures, or departmental rules and regulations including safety regulations.

\* \* \* \*

- 20. Physical assault, attempted assault, or threatening to assault a supervisor, fellow employee, or public during working hours or on City property or any other violation of the City's Workplace Violence Policy.

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**FRAMING OF THE ISSUE**

*Whether the Grievant was terminated for just cause, and if not, what shall be the remedy?*

## **CONTENTIONS OF THE PARTIES**

### The City of Naples

After a comprehensive recitation of the material facts in the case, the Employer argues that the evidence is clear that Mr. Nadelman brought a loaded gun to work with him on City property. He testified that it was possible that he brought his gun on site before. However, he claimed he could not really remember if he had or had not done so. He also acknowledged that he regularly took his gun with him to work, but kept it locked in his car while he was at work. He testified that his car was routinely parked on City property while he was at work.

The Employer instructs that the City's Workplace Violence Policy clearly provides that "the possession, use, or threat of use, of a weapon, including firearms, is not permitted at work, on City property or in a City vehicle" unless related to a necessary and management approved job requirement. It emphasizes that Mr. Nadelman testified that he knew the policy. However, he testified that he did not pay much attention to it nor did he think that the possession of a loaded weapon on site or in his car while on City property was either (1) a problem; or (2) behavior that could be characterized as workplace violence.

The Employer urges that similarly, the Grievant testified that he had read and knew Naples Fire Department Regulation # 134.0 in preparation for his

Lieutenant's exam. Like the City's Workplace Violence Policy, paragraph 7 forbids "firearms... or weapons of any type" from being in a firefighter's locker, the Employer advises. In fact, paragraph 7 of the Regulations tracks the language of the City Workplace Violence Policy when it states that "City policy further prohibits the possession of weapons at work, on City property, or in a City vehicle."

On this basis, the Employer asserts that Mr. Nadelman thus knew these policies quite well, and admitted that he had violated them, but nevertheless claimed that because he believed that he posed no threat and had a good work record, termination was too severe a disciplinary action to have been taken against him. During the presentation of the Grievant's case, the argument was made that while he had a loaded .40 caliber Glock handgun there was no round in the chamber of the gun. Thus, there was no immediate threat or danger.

From the Employer's perspective, such an argument is a red herring. Rather, a person familiar with guns certainly could put a round in the chamber quite quickly if he or she got possession of the gun and wanted to use it to fire at someone. And, according to the Internal Affairs report, the gun already contained a loaded magazine with 10 rounds of ammunition in it, with a back up magazine of 10 more rounds. Therefore, the danger was real and could not be minimized or cavalierly dismissed as much ado about nothing.

The Employer believes that essentially, Mr. Nadelman's argument is that he did not violate the City's policy because he did not intend to commit a violent act

with the weapon. It rejects the notion that intent is relevant when determining whether a rule prohibiting weapons has been violated, and buttresses this contention by reference to arbitral citation. See, Marathon Petroleum Co., 93 LA 1082 (Marlatt 1989).

The Employer recognizes that Lt. Cadreau testified on the Grievant's behalf that no one really paid any attention to the policy. In support of his position, he testified that he has been involved in weapons appraisal and weapons sales on site for years while on City time. He acknowledged that he knew the Workplace Violence Policy and had received copies of it during his many years of employment with the City. Yet, he also testified that he had never seen Fire Department Regulation # 134.0, which testimony the Employer submits is not credible.

The Employer counters that instead, as a lieutenant overseeing the work of other Fire Department personnel, including recommending discipline when necessary, he is presumed to know the policies and procedures he is called upon by his department and position to enforce. Mr. Nadelman knew of the policy immediately and testified that he needed to know it to become a lieutenant. It is therefore, hard to believe that Lieutenant Cadreau did not know it, the Employer suggests. This is especially true, given Chief McEvoy's testimony that the regulation is provided to Department personnel as part of their training.

The Employer recounts that on cross-examination, when asked whether he ever informed his chief about his weapon sales (and apparently those of others)

or gun possession on site, Lt. Cadreau responded that he never did. When asked if he understood the language of the policy which provided that the possession of guns at work or on City property was not permitted, he acknowledged that he did. However, he argued that he did not consider it workplace violence. Therefore, for Lt. Cadreau, having weaponry on site was acceptable.

The Employer chides that in the world according to Lt. Cadreau, he could decide whether a policy should be followed based upon his reading of it or if it suited his needs and purposes. It likewise accuses Lt. Cadreau of knowingly hiding his weapons deals with his peers from his chief and willfully evading the enforcement of the policy, because it was not in his personal interest to do so. The Employer goes on to reason that these actions by Lt. Cadreau helped to foster a climate in which other fire personnel, such as Mr. Nademan, who were similarly interested in weaponry, felt they did not have to worry about the Workplace Violence Policy.

Parenthetically, the Employer recalls that Firefighter Bashir played possum with respect to the policy by claiming he knew nothing about it until he was presented with his signed acknowledgment of receipt of it. It is hardly a defense to wrong-doing, and certainly incredible logically, to say that because the policy was consciously evaded and proper information not provided to the chief to enable him to enforce it, ongoing wrong-doing was acceptable because it showed that the policy was weak and not enforceable.

In this context, the Employer charges that Lt. Cadreau fully understood

what it meant if one was caught violating the policy. When asked why he did not come forward at the time of Mr. Nadelman's termination to inform Chief McElvoy or Chief Moore that Mr. Nadelman should not be terminated for something many others did, he evaded the answer by saying that was why he was appearing on Mr. Nadelman's behalf at the hearing. He knew quite well that had he supported Mr. Nadelman at the time of termination, he risked disciplinary action up to and including termination and he was not about to let that happen.

With the foregoing in mind, the Employer asserts that Chief Moore's conclusion was proper and appropriate. He wrote that "violation of the prohibition of possession of a firearm at work is a 'bright line' test. There can be no equivocation or rationalization. The policy is clear and the message must remain clear: possession of a firearm at work when not approved will result in termination." The Employer concomitantly counsels that Chief Moore's conclusions are supported by arbitral case law. See, Des Moines Ind. School District, 114 LA 1147 (Wiant, 2000); Airport Authority of Washoe County, 119 LA 920 (Staudohar, 2004).

In conclusion, the Employer reiterates that the Grievant Adam Nadelman violated the City's Workplace Violence Policy prohibiting the possession of a gun at work or on City property. It argues that he likewise knowingly violated the Fire Department's Regulation # 134.0, which makes clear reference to the City policy on weapons possession in paragraph 7. In fact, he violated these rules on multiple occasions. He testified that he knew both the Workplace Violence Policy

and Regulation # 134.0. He acknowledged under oath that he violated the rules. He testified that he just felt the decision to terminate him was not proper in light of his exemplary work record and the standards of progressive discipline.

The Employer cautions that the above cited Des Moines Iowa School District, (2000) and Airport Authority of Washoe County (2004) cases show otherwise, and underscore that Mr. Nadelman knowingly violated clear policies against gun possession by having a loaded weapon at work and in his vehicle on City property. The Employer submits that an exemplary work history and progressive discipline do not overcome the wrongfulness and dangerousness of the conduct. Rather, the City's disciplinary operating procedures (Policy Section 20) provide quite clearly that "although discipline is to be administered progressively, it is not necessary to follow the progression if warranted by the severity of the action." [*emphasis added by Employer*].

The Employer highlights that paragraph V of the disciplinary policy also identifies offenses that may be administered "outside of the normal progression" and includes the following: "21. Physical assault, attempted assault, or threatening to assault a supervisor or fellow employee, during working hours or on City property or any other violation of the City's Workplace Violence Policy," the Employer emphasizes. Upon the totality of the foregoing arguments, the Employer therefore submits that the City had proper cause to terminate the Grievant, pursuant to Article 5.01 of the Collective Bargaining Agreement and the above referenced City policies and procedures. Accordingly, it argues that the

grievance must be denied.

IAFF Local 2174

The Union endorses the application of Arbitrator Daugherty's "Seven Tests" of just cause, as articulated in Enterprise Wire Co., 46 Lab. Arb. (BNA) 359, and enunciates the same. It then goes on to focus on the four it believes are particularly relevant. Initially, the Union asserts that there was no forewarning, in contravention of the first test. As a threshold matter, the Union argues that the text of the PP & PM does not satisfy the City's clear burden to provide forewarning with respect to either permissible conduct or the probable consequences of any violations.

The Union avers that related to this, the PP & PM was not sufficiently communicated to employees, unlike other policies which they actually signed for. Further, the Union maintains that employees and supervisors, (e.g. Lieutenant Cadreau and Chief Vogel) did not understand the City to prohibit mere possession of a firearm, but rather understood the City to prohibit violence or threats of violence (with or without a firearm).

The Union counsels that excerpts from *ELKOURI & ELKOURI, HOW ARBITRATION WORKS (6th Ed.)* make clear that in mere possession cases, as here, the Employer's rules against possession must be consistently enforced and sufficiently communicated before discipline can be meted out. See, Goodyear Aerospace Corp., 86 LA 403 (Fullmer, 1985); Marathon Petroleum Co., 93 LA

1082 (Marlatt, 1989). The familiar principles of mitigation are also applied even in cases unlike the instant, where threats are made and/or weapons are actually discharged in the workplace in cases of a "mixed message" or lax enforcement. See, City of Tarpon Springs, Fla., 107 LA 230, 236 (Deem, 1996); Luxfer USA, 102 LA 783 (Kauffman, 1994); see also, Walt Disney World Company, FMCS Case No. 001117-1437M-7 (Byars, 2005).

The Union suggests that the evidence is abundant and unrefuted that the City, prior to Nadelman's discharge, did not discipline employees for merely possessing a firearm at work. Indeed, the City presented no evidence of any employee ever being disciplined for possessing a firearm. The Union recalls that thirteen year Firefighter Omar Bishar kept a loaded pistol in the station bunkroom for approximately two years in the 1996 to 1998 time period. After an employee suggested that he keep it in his car instead of in the bunkroom, Bishar kept the loaded weapon in his car at work, and virtually every shift until Nadelman was fired. Bishar was unaware of any policy against weapons on City property.

The Union underscores that the most significant testimony about firearms in the workplace came from Lieutenant Cadreau. It urges that the lieutenant plays a supervisory role in the Department, and is responsible for knowing and enforcing the rules. And consistent with his understanding that until the instant case, there was no prohibition against firearms in the workplace, Cadreau testified about many instances – since the Workplace Violence PP & PM originally was issued in 1995 – where he and other employees had weapons at work without

repercussion.

The Union emphasizes that Lieutenant Cadreau testified that the weapons in each of these incidents were displayed in the presence of other unit personnel in the public areas of the station and while all involved employees were on duty. It then allows that perhaps the most noteworthy incident involving Lieutenant Cadreau involved the Grievant himself – which certainly informed Mr. Nadelman's "understanding" of what was and was not permitted. In that regard, the lieutenant testified that he brought a 12 gauge shotgun to work (Station 3) and sold it to Nadelman while both were on duty.

The Union next turns to the application of the Workplace Violence Policy, and offers that its research disclosed only two applications since its inception. It likewise accuses the City of presenting no evidence as to previous cases where it was applied. According to the Union, the most recent example occurred in 2001, and involved Firefighter Christensen, who received a two shift suspension after uttering threatening words to his supervisor. The other time involved a non-unit employee, Equipment Operator Ponce, who was found to have threatened to kill his supervisor. Notwithstanding his prior record of at least two reprimands, Mr. Ponce received a mere three day suspension; was reassigned to a different supervisor; and also was placed on six months of probation.

The Union easily distinguishes Adam Nadelman from these individuals. It instructs that in addition to having a perfect disciplinary record, Nadelman was an excellent worker. His most recent annual evaluation was completed three (3)

months prior to his termination. His "Overall Performance Rating" for his most recent year was "exceeds requirements." Evaluations going back through the 1999 – 2000 performance cycle were also introduced, and show that Nadelman exceeded the requirements each and every year. The Union maintains that Nadelman showed initiative at work, and at the time of his termination, was at the top of the promotion list for lieutenant. Besides these exemplary achievements as an employee, he served as Union president for the last four years.

The Union recognizes that the third and fourth Enterprise Wire tests inquire as to whether there was an investigation, and if so whether it was a fair investigation. Local 2174 casts a jaundiced eye upon the City's investigation of the Nadelman case, and notes that for some reason, the Employer chose to conduct its investigation of the issue via the Police Department personnel rather than the Fire Department personnel. This of course complicated matters, because the Police Department was, at the same time, investigating the source and ownership of the package found in the locker. In any event, the City's initial effort to speak with Nadelman occurred on October 31, 2005.

The Union submits that the very brief transcript of the "investigation" conducted by Police Lieutenant Maines confirms it was cancelled by the investigator, when Union counsel asked him to contact the Police legal advisor to clarify the difference between *Weingarten and Garrity*, after the Union urged the investigation to continue. A similar situation ensued on November 7th, when the interview was cancelled after Nadelman was willing to be interviewed without

Union representation, but did not want to sign a document waiving his right to representation. The IR at Exhibit ER-2 was therefore generated without the benefit of speaking with Nadelman.

The Union reports that after the Maines "investigation" was complete, Fire Chief Moore conducted a brief interview with Nadelman. While the focus was on the "locker" issue, the pistol in the bag was briefly discussed. Nadelman said, as he always had, "it was my gun, I had it there." The Union highlights that Nadelman explained that because of his separation, he had started taking his gun more because he was living in an apartment and did not have anywhere to secure it. It was never a regular practice to take it to work, it was more of an oversight.

Upon these facts, the Union teaches that it is well settled that the discharge of an employee should be reversed where the Employer fails to comply with basic notions of fairness and due process. Such misconduct by employers obtains where, as in the present case, the Employer fails to make a reasonable inquiry or investigation before assessing punishment. See, ITT Continental Baking Company, 79 Lab. Arb. (BNA) 167, 169-170 (Modjeska, 1982); Spartan Packing Company, 50 Lab. Arb. (BNA) 1263 (Bernstein, 1968); United States Steel Corporation, 29 Lab. Arb. (BNA) 272 (Babb, 1957). From the Union's perspective, it is also crucial to observe that, a failure of due process – without regard to whether the Grievant has actually engaged in wrongdoing – is sufficient in itself to sustain a grievance. See, Plantation Patterns, Inc., 78 Lab. Arb. (BNA)

647, 649 (Dallas, 1982); Aeronca, Inc., 71 Lab. Arb. (BNA) 452, 453-4 (Smith, 1978); Osborne & Ullad, Inc., 68 Lab. Arb. (BNA) 1146, 1151 (Beck, 1977); Cameron Iron Works, Inc., 64 Lab. Arb. (BNA) 67, 70 (Brown, 1975).

The Union reiterates that had the City tried to get to the truth of the matter before me, it would have learned that employees generally, and the Grievant in particular, were unaware of any gun prohibition. Moreover, the Employer would have learned that employees, including supervisors and at least one chief, had been bringing guns into the stations and carrying guns in their vehicles for years.

Further compounding the unfairness, the Union argues, was the apparent failure to consider the absence of any discipline ever received by other employees for similar conduct. At the same time it is clear that there was no application of the factors required to be considered in all cases, to wit: "[1] severity of behavior or offenses; [2] intervals between offenses; [3] frequency of offenses; [4] willingness to improve; [5] length of City service. Instead, Chief Moore asserted that this was a "bright line" rule that the policy is clear and the message must remain clear: possession of a firearm at work when not approved will result in termination.

The Union likewise accuses the Employer of disparate treatment, as proscribed by the sixth test of just cause. See, All American Gourmet, 88 LA (BNA) 1241 (Zobrak, 1987). On that count, the Union maintains that the evidence of discrimination is abundant and of two species. First, it is undisputed that employees and supervisors, including several other lieutenants and at least one

chief, had for years brought guns on property; yet discipline was never imposed. The Union suggests that this was a natural concomitant of no one having any idea that such was improper. Second, it is undisputed that as previously discussed, at least two other employees, Ponce and Christensen, actually violated the Workplace Violence Policy – and threatened fellow employees – but were not terminated.

Finally, the Union relies upon the proportionality considerations embodied in the seventh *Daugherty* test, as well as embraced by the award of Arbitrator Platt in *Wolverine Shoe & Tanning Corp.*, LA (BNA) 809, 812 (Platt, 1952). In that regard, the Union contends that the City's published disciplinary rules presume the propriety of progressive discipline in all cases, and require consideration, in every disciplinary case of the following factors: "[1] severity of behavior or offenses; [2] intervals between offenses; [3] frequency of offenses; [4] willingness to improve; and [5] length of City service."

Moreover, Local 2174 urges that the "Workplace Violence" PP & PM itself calls for discipline and not automatic termination in the following situations: "[i]t is the City's intent to administer disciplinary action up to and including termination of employees involved in any act, attempted act, or threat of any violence." The Union recognizes that possession alone is not even listed as a basis for discipline, let alone the ultimate sanction of termination. It contends that termination was certainly not a "required" penalty, even if the discipline was otherwise for a just or proper cause.

In conclusion, the Union submits that in the circumstances of this case, termination was plainly excessive. The gun was not brandished or used in a threatening way. Instead, it was secured in a holster. And it plainly was an "oversight" in that Nadelman did not subjectively understand that mere possession of a pistol called for discipline, the Union stresses. Further, other employees received very minor discipline for threatening or threatening to kill their supervisors, despite relatively brief tenures of employment, or less than exemplary work records. Therefore, the City's decision to fire Nadelman in these circumstances was not merely unjust and improper, it was inexplicable.

As to remedy, the Union respectfully requests complete make whole relief. Concerning the promotion, the Union argues that inasmuch as Nadelman was at the top of the promotion list, and at least two promotions occurred in his absence, the City should be directed to retroactively consider the Grievant as part of the promotional process, as if he had not been terminated. The Union also requests that I retain jurisdiction over this issue.

In addition, the Union avers that the Grievant should be completely made whole for all losses. It recalls that in the grievance and at hearing, an award of interest on any make whole relief was requested, without objection. It argues that such an award of interest is appropriate, as advocated by Arbitrator Nolan in Atlantic Airlines, Southeast, 101 Lab. Arb. (BNA) 515, 525 (Nolan, 1993). See *also*, World Jai Alai, 104 LA (BNA) 1157, 1164 (Haemmel, 1995). For the foregoing reasons, the Union maintains that the grievance should be granted,

with the Grievant reinstated and made whole in every way, with interest.

Retention of jurisdiction over the remedy issues is further requested.

## **STATEMENT OF THE CASE**

The City of Naples, Florida, (“the City” or “the Employer”) and the Professional Firefighters of Naples, IAFF Local 2174 (“the Union” or “Local 2174”) are signatories to a Collective Bargaining Agreement (“C.B.A.”) covering the duration of October 1, 2005 through September 30, 2008, which has been entered into evidence as Exhibit J-1 herein. As previously discussed, the instant grievance proceeded through the grievance procedure without resolution, and is now before me for determination. Preliminarily, as no threshold challenges to arbitrability have been made, I find that the case is properly before me.

Based upon my analysis of all record evidence, coupled with consideration of the respective arguments supplemented by arbitral citation, I find that the grievance must be sustained in part. At the outset, an evidentiary ruling related to the City’s introduction of the Fire Department Regulation # 134.0 must be made. This regulation concerns lockers, and at # 7 states: “[f]irearms, knives, martial arts weapons, or weapons of any type are forbidden from lockers. City policy further prohibits the possession of weapons at work, on City property, or in a City vehicle.”

The City has argued that Mr. Nadelman was aware of the same, as he had studied it for his Lieutenant’s examination. The Grievant confirmed the same during his testimony. For its part, the Union properly maintains that only the City

policy was referenced in the *NOTICE OF DISCIPLINARY ACTION*, at page 3 of Exhibit J-3. Therefore, while the regulation may be relevant to the question of notice of the existence of the City policy (which is specifically referenced), it has not been considered in the context of the propriety of the discipline imposed upon Mr. Nadelman. The following findings of fact are made based upon all evidence of record:

1. Adam Nadelman has been employed as a firefighter by the City of Naples, since August 21, 1995, and has had no prior disciplinary action taken against him. His *CITY OF NAPLES PERFORMANCE PLAN AND EVALUATION* has also consistently rated his job performance as *COMPETENT* or *EXCEEDS REQUIREMENTS*. See, Exhibit U-4.
2. The events which served as the catalyst for the case before me are contained in a November 10, 2005, *NAPLES POLICE DEPARTMENT INTERNAL AFFAIRS INVESTIGATION REPORT* Police Lieutenant Jonathan P. Maines submitted to then Fire Chief Steven Moore. See, Exhibit ER-2. This stated in material part:

- at page 2 **1. Allegations:**

On September 28, 2005, at approximately 4 p.m. Det. Fletcher and Det. Whitehead received a tip (via CCSO - Kari Bastys) from Southwest Florida Crime Stoppers. The tip suggested that FF Adam Nadelman had a plastic bag that contained marijuana in his locker. The locker was located at the City of Naples Fire Station 1. Detectives Fletcher, Whitehead, and Deputy Chief of Fire McEvoy responded to Fire Station 1. (See Exhibit N). At approximately 4:30 p.m. Det. Fletcher searched FF Nadelman's locker (in his presence) and located a plastic ziplock bag which contained ten small plastic ziplock bags of marijuana (FTP) along with seven empty plastic bags that contained marijuana residue. D.C. McEvoy then transported FF Nadelman to Advanced Medical for a mandatory drug test which subsequently provided a negative result for the presence of marijuana.

- at page 13 **5. Summation:**

**Consistent Information:**

- On September 28, 2005 an anonymous caller contacted Southwest Florida Crime Stoppers (Exhibit H) and reported that FF Adam Nadelman had marijuana in his locker at Naples Fire Station 1. On September 28, 2005 Naples Police Detective Matthew Fletcher conducted a search of FF Nadelman's locker (in FF Nadelman's, D.C. McEvoy's and Det. Whitehead's presence) and located a clear ziplock plastic bag that contained 10 smaller ziplock bags each containing marijuana (Field tested positive by Det. Fletcher) along with 7 additional, smaller ziplock bags that contained marijuana residue (Exhibit B-1). Det. Fletcher Det. Whitehead (Exhibit H) and Dpty Chief McEvoy all advised that the marijuana was discovered in FF Nadelman's locker.
- On September 28, 2005 Det. Whitehead (Exhibit H) advised that FF Nadelman disclosed that he had a loaded .40 Calibre Glock model 23 handgun (serial number D1A294US) stored in his red duffle bag (located outside the locker next to his bed). Det. Fletcher advised (Exhibit N) there was one loaded magazine that contained ten rounds of ammunition located in the holster that contained the gun. There was no round in the chamber of the gun. Deputy Chief McEvoy observed the gun get removed from the red duffle bag.
- at page 13

**Inconsistent Information:**

\* \* \* \*

*see also, 09/30/05 SUPPLEMENTAL REPORT of Detective Joe Whitehead, at Exhibit U-1.*

3. Following the September 28, 2005 incident, a *NOTIFICATION OF CHARGES/ALLEGATIONS* was issued to Firefighter

Nadelman on September 30, 2005. *Id.*, at Exhibit A; see also, Exhibit U-2. This stated in relevant part:

Accordingly, you are hereby advised that the following illegal, or improper act(s), allegations, or violation of a Department or City rule, regulation or General Order has been attributed to you: Allegations:

- 1. Possession of Marijuana on City Property**
- 2. Possession of a Firearm on City Property**

[emphasis supplied in original documents]

4. On November 7, 2005, Lt. Maines scheduled an Internal Affairs Office interview with Firefighter Nadelman. The interview was terminated, however, after Mr. Nadelman agreed to the interview without the benefit of counsel, but refused to sign the *Garrity Rule* Form or *Waiver of Counsel*. *Id.*, at Exhibit M; see also, Exhibit ER-3 at page 6, and Exhibit U-2.
5. A prior interview was also prematurely terminated by Lt. Maines on October 31, 2005, due to a difference of opinion between Lt. Maines and Union Counsel Siwica regarding the scope of Mr. Siwica's participation under *Weingarten*. See, Exhibit U-3.
6. On November 18, 2005, Fire Chief Steven C. Moore issued a Memo to file re: *FINDINGS OF CC05-04*. See, Exhibit J-3. This stated in pertinent part.

[o]n Friday, November 18, 2005, at 10:00 am, a pre-disciplinary hearing was held concerning CC05-04. This complaint involved firefighter Adam Nadelman, with the charges and allegations contained within the internal affairs report of November 10, 2005.

This hearing was held in compliance with the pre-disciplinary hearing provisions of City Policy Section 20. FF Nadelman was served with notice of the hearing on 11-15-05. This hearing was recorded and held in accordance with the Firefighter Bill of Rights, FFS 112.

Findings:

**Charge # 1:** Violation of Workplace Violence Policy Section 3-II specifically, possession of a firearm is not permitted at work or on City property when not a necessary and management approved job requirement.

**SUSTAINED:** The firearm was located in station # 1. FF Nadelman had advised a detective of the presence of the weapon. The weapon was in an unsecured bag and had ammunition (2 magazines) present. FF Nadelman admits to having the firearm on City property and, when asked during the hearing, possibly possessed it previously on City property.

**Charge # 2:** Violation of the Drug Free Work Place; City Policy Section 3-V, specifically, the City prohibits the possession of controlled substances (drugs, in this case marijuana) in the workplace unless a necessary and management approved job requirement.

**NOT SUSTAINED:** Although the marijuana was located in the locker of FF Nadelman after an anonymous tip, the investigation failed to discover sufficient evidence to clearly prove or disprove the allegation. Evidence, including a drug screen and the narcotics canine not alerting on the bag or vehicle of FF Nadelman, casts sufficient doubt as to knowledge or personal possession of the marijuana on the part of FF Ndelman.

**CONCLUSION:** Based on the Workplace Violence [*policy*], possession of a firearm at work, charge being sustained, my recommendation is termination. Although there are enhancing and mitigating factors within the investigation, I strongly believe that violation of the prohibition of possession of a firearm at work is a “bright line” test. There can be no equivocation or rationalization. The policy is clear and the message must remain clear: possession of a firearm at work when not approved will result in termination.

The fact that Nadelman possibly possessed the firearm previously at work, that the firearm was unsecured in a building where children often tour, and the fact that he carries the gun due to a previous restraining order and that his car recently being keyed, only greatly heightened my level of concern.

7. On November 21, 2005, a *NOTICE OF DISCIPLINARY ACTION* Form was perfected by the City, discharging Mr. Nadelman. See, *Id.*, at page 3. This charged a violation of City Personnel Policies & Procedures Manual Workplace Violence 3-II, which prohibits the possession of weapons, including firearms, at work, on City property, or in a City vehicle.
8. The City of Naples Employee Guidebook includes the Workplace Violence Policy, and was routinely issued to all new firefighters, who were required to read it from cover to cover. On October 8, 1997, Mr. Nadelman acknowledged receipt of the same. See, Exhibit ER-7.
9. As part of required retraining, in January 2005, Denise K. Perez, Human Resources Director issued a memo to all employees. This notified them of the Annual Policy and Notification packet, and advised that they were no longer required to sign for the individual policies. It continued that however, please initial on the space before the notification of policy to acknowledge that each one has been received and read. On December 17, 2004, Mr. Nadelman signed for the same, and checked next to "Work-Place Violence Policy." See, Exhibit U-5.
10. The Workplace Violence Policy Section 3-II provides *inter alia*, that the possession, use, or threat of use, of a weapon, including firearms, is not permitted at work, on City property, or in a City vehicle, unless such possession or use of a weapon is a necessary and management approved job requirement.
11. On September 28, 2005 as previously detailed, a search of Mr. Nadelman's locker at Fire Station 1 was conducted pursuant to an anonymous tip that it contained a CDS. At the time, Firefighter Nadelman voluntarily informed Detective Whitehead of the existence of the registered firearm in his gym bag in the bunk house. The possession of the same on City property violated the Workplace Violence Policy.
12. Per City of Naples Personnel Policies & Procedures Manual, Section No. 20, II. **DISCIPLINE**, discipline shall generally be administered in a progressive and constructive manner. Department directors have the authority to take disciplinary action up to and including termination of employment without administering progressive discipline based upon, but not limited to, consideration of the following factors: severity of behavior or offense; intervals

between offenses; frequency of offenses; willingness to improve; and, length of City service.

13. III. **GUIDELINES FOR DISCIPLINARY ACTION** provides that disciplinary action shall be progressive and corrective in nature to encourage employees to perform in an effective and efficient manner. And although discipline is meant to be administered progressively, it is not necessary to follow the progression if warranted by the severity of the action.
14. V. **TYPES OF OFFENSES** lists offenses, which may be grounds for formal disciplinary action as a guideline. The listed offenses shall not interfere with the right or duty of the department director or City Manager or designee to charge and terminate employees on other grounds which are considered justifiable and in the best interest of the City of Naples. This may include administering discipline outside the normal progression dependent upon the severity of the action. Examples of the violations include: # 3 Violation of City policies or procedures, or departmental rules and regulations including safety regulations; # 20 Physical assault, attempted assault, or threatening to assault a supervisor, fellow employee, or public during working hours or on City property or any other violation of the City's Workplace Violence Policy.
15. The Workplace Violence Policy has not been applied before to the possession of a firearm. Moreover, the only instances of the application of the policy related to minor discipline meted out to two individuals for threatening their superiors.
16. Since at least the late 1990's, firearms have been bought into the fire stations and bunk room by some firefighters and superior officers alike and kept in their cars parked on City property. Firearms were also evaluated and sold on occasion while on duty. On one occasion, Firefighter Nadelman bought a 12 gauge shot gun from Lt. Cadreau at the fire station.

The issue to be decided asks the standard disciplinary question, of whether the Gievant, Firefighter Adam Nadelman was terminated for just cause. Like most C.B.A.s, the contract contains no definition of "just cause." The Union has advocated the application of the seven tests, as endorsed by Arbitrator Carroll

Daugherty in *Enterprise Wire Company and Enterprise Independent Union*, 46 LA 359, 363-364 (Daugherty, 1966), to answer this question. Notice is taken that there is a split opinion among arbitrators as to the utility and the applicability of the same, particularly in light of the alternative view later expressed by John Dunsford. See generally, *Arbitral Discretion: The Tests of Just Cause: Pt. I*, NAA 23 (1990).

I decline to apply a mechanistic application of the seven tests, but nevertheless believe that they often provide a useful framework for analysis. As found by Arbitrator Daugherty, a “No” answer to any test, indicates that there was not just cause for the disciplinary action taken by management. The tests and the application of the facts of the instant case to the same are as follow:

- *Did the company give the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee’s conduct?*

Chief McEvoy testified without contradiction that all new firefighters receive copies of the City of Naples Employee Guidebook, which they are required to read cover to cover. This is additionally covered during retraining, he said. Exhibit ER-7 is Mr. Nadelman's *ACKNOWLEDGEMENT OF RECEIPT*, which is dated October 8, 1997. Exhibit U-5 is a January 2005 memo from Denise K. Perez, Human Resources Director, which Mr. Nadelman signed for on December 17, 2004.

This document explains that employee signatures were no longer being

required on individual policies. It continued, "[h]owever, please initial on the space before the notification or policy to acknowledge that you have received and read each one." Included *inter alia* on the list was the Workplace Violence Policy. Similar documents were also produced for Firefighter Bashir. See, Exhibits ER-4 & ER-5. Exhibit U-5 also undercuts the Union's argument that individual policies were not signed for, as was the case with the Harassment Policy at Exhibit U-6

That said, the record conclusively establishes that there is a "gun culture" within the Naples Fire Department. I credit the City's argument rhetorically asking why Lt. Cadreau did not come forward when Mr. Nadelman was originally charged with gun possession. The fact remains, that the lieutenant provided unrebutted testimony covering the entire duration of the Workplace Violence Policy. This detailed repeated possession of firearms in fire stations, as well as on City property in automobiles. Firefighter Bishr also added his voice to the chorus, notwithstanding credibility concerns raised by his initial contention that he had seen the operative policies for the first time at the hearing.

Lieutenant Cadreau additionally testified to firearm inspections and sales he conducted at fire stations on City time, with firefighters, lieutenants, and in one instance, a battalion chief. Most significantly, as the Union has loudly argued, the lieutenant said that he brought a 12 gauge shotgun to work and sold it to the Grievant in the firehouse. Therefore, regardless of Mr. Nadelman's knowledge of the City Workplace Violence Policy, the environment in which he functioned and

his personal dealings with a superior officer, could not have reasonably forewarned him of the possible or probable disciplinary consequences of possessing a firearm in his gym bag. And while I do not impute the personal actions of fire superiors to City officials charged with policy enforcement, at best a mixed message is sent to the rank and file under such a scenario. See generally, *In re City of Tarpon Springs*, 107 LA 230, 235 (Deem, 1996); *In re Ross-Meehan Foundries and United Steelworkers of America*, 55 LA 1078, 1081 (King, 1970); *In re Goodyear Aerospace Corp.*, 86 LA 403 (Fullmer, 1985); *In re Luxfer Usa, Ltd. and United Steelworkers of America, District 39, Local 6703*, 102 LA 783, 785-786 (Kauffman, 1994); *In re Bright-O Inc.*, 54 LA 498 (Mullin, 1970).

- *Was the company's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the company's business, and (b) the performance that the company might properly expect of the employee.?*

No serious argument can be made that the City's Workplace Violence Policy's prohibition of weapons possession and use is not reasonably related to the orderly, efficient, and safe operation of the City of Naples Fire Department, as well as the performance that might properly be expected of Firefighter Nadelman. The Union would apparently seek to limit the application of this policy to instances of actual threats and violence in the workplace. A fair reading of the same clearly encompasses gun possession. In *Marathon Petroleum Co. and Oil Chemical & Atomic Workers International Union Local 4*, 93 LA 1083, 1085

(Marlatt, 1989), Arbitrator Marlatt's conclusion is equally applicable herein:

[i]n the present case, the employer has committed itself to creating a drug-free, alcohol-free, gun free work place. This is a legitimate, even vital management objective. These prohibited items can cause great danger in a petroleum refinery. Drunk or drugged employees can cause accidents which kill people. Guns kill people. A loaded gun accidentally dropped on the ground may go off and cause a fire or an explosion in such a volatile environment. Management must be able to say, 'No drugs, no alcohol, no guns, on the premises. There is no fine print. There are no exceptions. This means You.'

- *Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?*

The facts of the case are not in dispute as to whether Firefighter Nadelman had a loaded handgun in his possession in his red gym bag in the bunk room. By his own admission, he alerted Detective Whitehead to this fact during the search of his locker. I also believe that the policy makes no distinction between a loaded and unloaded handgun, as the operative words "possession" and "firearm" are used. See, *In re USS*, 196 LA 708, 714 (Neyland, 1996); The Union has suggested that the fact that no bullet was in the chamber is somehow germane to my deliberations, and elicited testimony from Lt. Cadreau along the lines that the weapon could not have fired.

However, I share the City's position that these arguments are essentially red herrings, and believe they obliquely attempt to minimize the gravity of the issue of Mr. Nadelman's weapon possession in the workplace. And while I accept the Grievant's credible testimony as to the reasons he brought the gun to

work, I reject the Union's position that his intent should be an appropriate consideration. See, *In re Marathon Petroleum Co. and Oil, Chemical & Atomic Workers International Union, Local 4*, *supra*, at 1085 (Marlatt, 1989); *In re Gardner-Denver Cooper Industries and International Association of Machinists and Aerospace Workers, Lodge No. 822*, 76 LA 26 (Witney, 1980). The notion that the policy could somehow be interpreted to not allow discipline for the "mere" possession of a weapon because that is not workplace violence is also discounted.

- *Was the company's investigation conducted fairly and objectively?*
- *At the investigation did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?*

As Lt. Maines conceded on cross-examination, this constituted a somewhat unusual assignment, in that it involved a firefighter. Because of this circumstance, there may have been somewhat of a blurring of the distinction between *Garrity* and *Weingarten* at the interviews the lieutenant attempted to conduct on both October 31, 2005 and November 7, 2005. The result was that Mr. Nadelman was not permitted to offer his version of the events. The Union has properly characterized this as blatantly unfair, and further argued that the disciplinary action should be set aside on this basis alone.

The record confirms that prior to the imposition of discipline, however, Chief Moore conducted a pre-disciplinary conference with Mr. Nadelman on November 18, 2005, which was held in compliance with the disciplinary provisions of City of

Naples Personnel Policies & Procedures Manual Section No. 20. See, Exhibit J-3; see *a/so*, Exhibit J-5B, at pages 8-9 (pre-termination meeting). At that time, the Grievant had an opportunity to offer his side of the story. In my view, this cured any procedural infirmities concerning Lt. Maines' investigation. Parenthetically, from the outset of this charge, no facts have been disputed.

The gravamen of the Union's argument on this point appears to be, that had the City undertaken a proper investigation, it would have discovered that firefighters and superiors were bringing firearms into the stations and carrying guns in their vehicles for years. The problem with that contention is that Mr. Nadelman never raised this affirmative defense until the arbitration hearing. The City has further understandably questioned why Lt. Cadreau did not offer his historical perspective at an earlier date, and appear at the Step 3 Meeting. Based upon these considerations, the City could not investigate in a vacuum.

A close reading of the Union's cited cases on this issue also convinces me that they are factually distinguishable and do not require the instant grievance to be sustained purely on procedural grounds. See, *In re USS*, *supra*, (Neylan, 1974); *In re Spartan Printing Company*, 50 LA 1263, 1265 (Bernstein, 1968); *Walt Disney World and Craft Maintenance Council*, F.M.C.S. Case No. 001117-1437M-7 (Byars, 2001); *In re Plantation Patterns, Inc.*, 78 LA 647, 649. (Dallas, 1982); *In re United States Steel Corporation*, 29 LA 272, 275 (Babb, 1957); *In re Cameron Iron Works, Inc.*, 64 LA 67, 69 (Brown, 1975); *In re Aeronica, Inc.*, 71 LA 452, 454 (Smith, 1978); *In re Osborn & Ulland, Inc.*, 68 LA 1146, 1151 (Beck,

1977).

- *Has the company applied its rules, orders, and penalties even-handedly and without discrimination to all employees?*

The issue of a firearm possession charge in Naples Fire Station No. 1 is a matter of first impression. The Union accuses the City of failing to enforce its Workplace Violence Policy against those individuals identified by Lt. Cadreau over roughly the past 10 years. The lieutenant was clear in his testimony on cross-examination, that he had never found it necessary to inform the chief of the proliferation of firearm possession and sales at the stations. No mention was made of the fact that the Workplace Violence Policy was not being applied either.

Against this factual backdrop, it is difficult to conclude that the Fire chief somehow condoned wholesale firearm violations of the policy when it was never brought to his attention. Notice is taken that the Union has failed to provide any evidence that the chief or City officials were aware of this situation, and somehow turned a blind eye. Instead, superiors like Lt. Cadreau and Battalion Chief Vogel embraced the subjective legal fiction that "mere" gun possession without attendant violence was not a violation of the Workplace Violence Policy, because it suited their personal purposes.

The Union's second related argument that disparate treatment is present in this case must also fail. I agree with the Union that the City failed to identify any other disciplinary action taken for violations of the policy. It is also clear that as

the Union has correctly argued, the only other individuals who were disciplined, Christensen and Ponce (a non-unit employee), both received minor discipline for "uttering threatening words," and "threatening to kill" their supervisors, respectively. See, Exhibit U-8.

Article 5.1 of the C.B.A. bestows broad but not unfettered discretion upon the City of Naples to manage its operations and to discharge or take other disciplinary action against employees for proper cause. As such, the City was free to determine that the offenses committed by Christensen and Ponce did not present the same potential danger to the City community, as a loaded handgun unsecured in the fire station. Possession of a firearm is therefore distinguishable from other types of violations of the policy. See, *In re Gardner-Denver Cooper Industries and International Association of machinists and Aerospace Workers, Lodge No. 822*, *supra*, at 31. In so finding, I have considered and rejected the disparate treatment reasoning utilized by Arbitrator Zobrak in *All American Gourmet Company and United Food & Commercial Workers Local 23*, 88 LA 1242 (Zobrak, 1986), as the employees treated differently were similarly situated as to their offenses. Such is not the case in the instant matter.

- *Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee's proven offense; and (b) the record of the employee in his service with the company?*

The final test of just cause examines the proportionality of the discipline imposed for the established violation of the cited policy. The Employer has adamantly argued that Adam Nadelman violated the City's Workplace Violence policy prohibiting the possession of a gun at work or on City property. The City goes on to submit that Chief Moore's "bright line" test warrants termination, and urges that an exemplary work record and progressive discipline do not overcome the wrongfulness and dangerousness of the conduct. See, Des Moines Ind. School District, 114 LA 1147 (Wiant, 2000); Airport Authority of Washoe County, 119 LA 920 (Staudohar, 2004).

The City's position is buttressed by reference to the Disciplinary Policy No. 20, which clearly provides that although discipline is to be administered progressively, it is not necessary to follow the progression if warranted by the severity of the action. The Employer finds further support for this argument in Paragraph V. of the Disciplinary Policy, which also identifies offenses outside of the normal progression, including # 21: Physical assault, attempted assault, or threatening to assault a supervisor or fellow employee, during working hours or on City property or any other violation of the City's Workplace Violence Policy. Therefore, coupled with the language of Article 5.1, the discipline was proper.

The Union vigorously argued that discharge in this case is excessive, and emphasized Mr. Nadelman's unblemished record and exemplary work ethic. It further contends that as a threshold matter, the discharge is not countenanced by the Disciplinary Policy. This argument relies upon the language of Paragraph II,

which states that directors have the authority to take disciplinary action up to and including termination of employment without administering progressive discipline based upon, but not limited to, consideration of the following factors: severity of behavior or offense; intervals between offenses; frequency of offenses; willingness to improve; and length of City service.

Resolution of this final question requires that the tension between paragraphs III & V of the Disciplinary policy be harmonized with paragraph II. Viewed in the light most favorable to the Union, a fair reading of the relied upon language lends a conclusion that this refers to non-cardinal violation cases. Otherwise, why would it speak of "intervals between offenses," "frequency of offenses," and "willingness to improve." The application of the language of paragraph V would then become a nullity. Therefore, the specific language of paragraph V must prevail over the general language of paragraph II.

The Union additionally cites Wolverine Shoe & Tanning Corp., 18 LA 809 (1952, Platt), however, reliance on the same is inapposite. Wolverine involved an employee who was discharged for violating the company rule prohibiting employees from parking their automobiles on the public street in front of the plant. In reinstating without back pay, Arbitrator Platt appeared to accept that the employee believed that the rule was unreasonable and violative of his rights as a private citizen.

In conclusion of this discussion, the Employer presented persuasive arbitral citation to underpin its contention that the possession of a firearm in the work

place standing alone, is a sufficient basis to terminate an employee. Moreover, the facts need not contemplate a scenario where the weapon is used to threaten co-workers and discharge the gun in their direction, as in the cases cited by the Union for comparison purposes. See, Brown & Williamson Tobacco Corp., 50 LA 403 (Willingham, 1968); International Harvester Co., 50 LA 766 (Doyle, 1968).

Viewed in evidentiary terms, the foregoing findings indicate that the City has made its *prima facie* showing that there was just cause for the discharge by a preponderance of the credible evidence. Upon the shifting of the burden to the Union, Local 2174 then established its affirmative defense that there was not sufficient notice of the possible or probable disciplinary consequences of possessing the firearm at work. As previously discussed, the testimony of Lieutenant Cadreau served as a potent counterbalance to the City's argument that the possession of a firearm on City property operates as a cardinal violation.

By virtue of this fact, the discharge may not stand, as there is no just cause to support the same. The grievance will appropriately be sustained in part, with Firefighter Nadelman entitled to be reinstated to his prior position with full seniority. No back pay is awarded in light of the seriousness of the proven offense. As to Mr. Nadelman's standing and entitlement with regard to the Lieutenant's promotional list, that determination is for City officials to make, in light of the applicable statutory and regulatory authority. In the event the Grievant disagrees with the ultimate decision, that question is for another arbitrator another day. My retention of jurisdiction for a limited period is therefore intended

to solely ensure that Mr. Nadelman is returned to his previous position as a firefighter. All other relief is denied.

## **CONCLUSION**

The City has failed to demonstrate by a preponderance of the credible evidence that the Grievant Adam Nadelman was terminated for just cause. The within relief shall therefore be implemented immediately.

**AWARD**

THE GRIEVANCE IS SUSTAINED IN PART. MR. NADELMAN SHALL BE IMMEDIATELY RETURNED TO HIS PRIOR POSITION AS A FIREFIGHTER WITH FULL SENIORITY AND AT THE APPROPRIATE PAY RATE. NO BACK PAY IS AWARDED, AND THE PERIOD FROM 11/21/05 UNTIL HIS REINSTATEMENT SHALL BE CARRIED AS A SUSPENSION WITHOUT PAY. ALL OTHER REQUESTED RELIEF IS DENIED. JURISDICTION SHALL BE RETAINED FOR A PERIOD OF THIRTY (30) DAYS SOLELY TO ASSIST WITH ANY REMEDIAL ISSUES. THIS CONSTITUTES THE ENTIRE AWARD.

Dated: March 5, 2007

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MICHAEL J. PECKLERS, ESQ., ARBITRATOR

STATE OF NEW JERSEY  
SS:  
COUNTY OF HUDSON

ON THIS 5<sup>th</sup> DAY OF MARCH 2007, BEFORE ME PERSONALLY CAME AND APPEARED **MICHAEL J. PECKLERS, ESQ.**, TO BE KNOWN TO ME TO BE THE INDIVIDUAL DESCRIBED HEREIN AND WHO EXECUTED THE FOREGOING INSTRUMENT, AND HE DULY ACKNOWLEDGED TO ME THAT HE EXECUTED THE SAME.

-----  
NOTARY PUBLIC

