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 In the Matter of the Arbitration between )  
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**Local 1403 Metro Dade Fire Fighters, IAFF** )  
**International Association of Firefighters** ) BAR - Facebook Posting  
 )  
 and ) Grievant: John Grievant  
 ) FMCS# 121403.3173  
**Miami-Dade County** )  
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**BEFORE** : Mark I. Lurie, Arbitrator

**APPEARANCES**

IAFF Local 1403 : \*\*\*\*\* , Esq.

Miami-Dade County : \*\*\*\*\* , Esq.

This is a grievance arbitration decision issued pursuant to the collective bargaining agreement effective October 1, 2011 through September 30, 2014 (the "CBA") between the Miami-Dade County Fire-Rescue Department (the "Department" or the "Agency") and the Metro Dade Firefighters IAFF, Local 1403 (the "Union"), representing the Department's firefighting personnel in the ranks of Firefighter through Chief Fire Officer.

Upon due notice, the parties appeared at the prescribed arbitration hearing times and place: the Miami-Dade County Administrative Offices, 111 Northwest 1st Street, Miami, Florida at 9:00 a.m. on January 14 and February 5, 2013, where they presented their respective positions and the evidence in support of those positions. The hearing was transcribed; the transcription is the official record.

On March 26, 2013, the Arbitrator asked the parties to file briefs addressing what he identified as two threshold issues. The advocates timely submitted their briefs by email attachment on April 8, 2013, and the Arbitrator exchanged them between the advocates by email. The Arbitrator afforded the parties until April 22, 2013 to file motions for reply briefs. As of that date, no such briefs were filed, and the Arbitrator deemed the case, insofar as it pertained to the threshold issues, to be closed.

## BACKGROUND

The CBA sets forth those working conditions of employment not otherwise mandated by statute or ordinance.<sup>1</sup> CBA, Article 3 recognizes management's right to discipline for just cause.<sup>2</sup> Article 4.8 stipulates that County Administrative Order 7-3 ("A.O. 7-3") is to be the governing policy for all disciplinary procedures.<sup>3</sup>

A.O. 7-3 states that an employee may be reduced in grade – meaning demoted – for good and sufficient reason, and that the demotion shall be "by the head of his department or designee as approved in Administrative Order 7-16..."<sup>4</sup>

Administrative Order 7-16 ("A.O. 7-16") states that approval of a demotion "...shall continue to be exercised only by a Department Director" or, in the Director's absence, by the "acting director" who has been "officially designated" by the absent Department Director to act in his behalf. The Department Director must obtain approval of such delegation of the disciplinary authority. A.O. 7-16, *Part 1* states that the authority to demote is otherwise non-delegable.<sup>5</sup>

"Only the Department Director or, in his absence, the person officially designated by him to act in his behalf as 'acting director,' is authorized to dismiss an employee or reduce an employee in grade. These forms of discipline are non-delegatable."

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<sup>1</sup> ARTICLE 1 PREFACE

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1.2 It is the intention of this Agreement to provide, where not otherwise mandated by statute or ordinance in effect at the signing of this Agreement, for the salary structure, fringe benefits, and working conditions of employment of the employees covered by this Agreement, to prevent interruption of work and interference with the efficient operation of the County and to provide an orderly and prompt method for the handling and processing of grievances.

<sup>2</sup> ARTICLE 3 MANAGEMENT RIGHTS AND SCOPE OF THE AGREEMENT

3.1 The Union recognizes that the County possesses the sole right to operate and manage the Miami-Dade Fire Rescue Department and direct the work force and that the rights, powers, authority, and discretion which the County and the Department deem necessary to carry out its responsibilities and missions shall be limited only to the specific and express terms of this Agreement and not by implied obligations.

3.2 These rights and powers include, but are not limited to, the authority to:

... f) Discipline or discharge employees for just cause;

<sup>3</sup> ARTICLE 4 GRIEVANCE PROCEDURE

4.8 County Administrative Order 7-3, Disciplinary Action, will be the governing policy for all disciplinary procedures.

<sup>4</sup> ADMINISTRATIVE ORDER No. 7-3 (1981), *POLICY*, in relevant part. Underlining is the Arbitrator's:

Any employee may be... reduced in grade or dismissed by the head of his department, or designee as approved in Administrative Order 7-16, for any good and sufficient reason which will promote the efficiency of the County service. Negligence, dishonesty, insubordination, or conduct unbecoming a public employee are among such good and sufficient reasons. The aforementioned reasons should not be considered exclusive.

<sup>5</sup> ADMINISTRATIVE ORDER No. 7-16 (1981), *POLICY*, in relevant part. Underlining is the Arbitrator's:

In accordance with Section 2-47 of the County Code an employee may be... reduced in grade or dismissed by the Director of his department or the director's designee in the manner provided in an Administrative Order. This Administrative Order establishes the policy and procedure to effectuate such delegation. Department directors are specifically authorized to request approval of the delegation of disciplinary authority solely in accordance with this Administrative Order. Approval of the dismissal or demotion of an employee shall continue to be exercised only by a Department Director. Authority to suspend or reprimand may be delegated to an appropriate level of administration or supervision. The purpose of such delegation is to provide an appropriate distribution of administrative authority and an affirmation of specific responsibilities to supervisors in order to increase their accountability for disciplinary action. A closer proximity between lesser disciplinary offenses and the exercise of corrective action will improve the disciplinary system. Fairness to employees and effectiveness of the disciplinary system are consistent and important objectives of personnel management. Employees will have the right to discuss reprimands with Department Directors or Division Directors.

The Department Director can delegate the authority to issue lesser discipline to subordinate administrators, for the purpose of increasing those subordinates' accountability for such lesser discipline.<sup>6</sup> That authority to delegate down the chain of command is not relevant to the facts of this case.

A.O. 7-16 references County Code Section 2.47, SUSPENSION, DISMISSAL, REDUCTION IN GRADE AND APPEALS, which states, in relevant part,

“Any employee may be suspended or reduced in grade or dismissed by the head of his department or designee thereof as approved in the manner provided for in an administrative order for any cause which will promote the efficiency of the service...”

CBA Article 4.8 gives the Union the option to appeal a demotion through the CBA's arbitration procedure.<sup>7</sup> Article 5 states that the Arbitrator may not construe or apply the CBA in a way that amends or supplements its terms,<sup>8</sup> and may not rule on any matter that is not a grievance, as that term is defined in CBA Article 4; to wit, “...any dispute involving the interpretation or application of the terms of this Agreement.”<sup>9</sup>

On May 14, 2012, the grievant, John Grievant, was demoted two ranks, from Fire Captain to Fire Fighter, for an odious posting he made to his Facebook home page. By memorandum dated May 11, 2012, Assistant Chief for Operations, David Downey (who investigated the charges) issued his recommendation that Mr. Grievant be given “appropriate discipline.” On May 13, 2012, Assistant Fire Chief Fernando Fernandez interviewed Mr. Grievant and, the following day, noted on the DISCIPLINARY ACTION REPORT (the “DAR”) his recommendation of a 14-day suspension. The DAR passed to Fire Chief William W. Bryson who affirmed, in this arbitration proceeding, that it was his responsibility to determine the level of discipline.<sup>10</sup>

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<sup>6</sup> PART II • AUTHORITY TO DELEGATE

The Department Director may request approval of the delegation of authority to suspend an employee to a lower level of administration by making a specific request to the County Manager and placing on file with the Manager the exact title designation of those positions which shall be authorized to suspend.

<sup>7</sup> ARTICLE 4 GRIEVANCE PROCEDURE

4.2 A "Grievance" shall be defined as any dispute involving the interpretation or application of the terms of this Agreement... Disciplinary actions shall not be subject to the grievance procedure.

4.3 Each grievance when filed shall state with particularity the violation of the contract claimed, the facts of such violation, the Article of the contract violated and the remedy sought by the Union...

4.8 The parties agree that the Hearing Examiner System pursuant to Section 2-47 of the Code of Miami-Dade County shall be one method of disciplinary appeal. Except that the Union will have the option on behalf of a permanent status bargaining unit employee, to appeal the disciplinary actions of dismissal, demotion and suspension by utilizing the arbitration procedure contained in Article 5 of this Agreement...

<sup>8</sup> ARTICLE 5 ARBITRATION

5.6 The arbitrator shall have no authority to change, amend, add to, subtract from, ignore, modify, or otherwise alter or supplement this Agreement or any part thereof or any amendment thereto...

<sup>9</sup> ARTICLE 5 ARBITRATION

5.5 The arbitrator shall have no authority to consider or rule upon any matter which is stated in this Agreement not to be subject to arbitration or which is not a grievance as defined in Article 4...

<sup>10</sup> Transcript at pages 232-233

Q Now... one of your duties and responsibilities as the Fire Chief is to determine the level of discipline in the cases that come before you?

In conversations between the two men that began on about May 3, 2012, Chief Bryson initially informed Mayor Gimenez that he intended to issue Mr. Grievant a suspension. Mayor Gimenez told Chief Bryson to either demote or discharge Mr. Grievant.

Chief Bryson testified that he believed that if he countermanded the Mayor's instruction and issued the suspension, he – Chief Bryson – would have to resign: "I didn't have option [of issuing a suspension], I don't believe." [Tr 258] Asked whether he – Chief Bryson – had "objectively determined that demotion was appropriate," the Chief answered "I signed the letter." [Tr 258] Chief Bryson's testimony is more fully set forth in the accompanying footnote.<sup>11</sup>

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A That's correct.

<sup>11</sup> Chief Bryson testified that the Assistant Mayor contacted him and told him that the Mayor wanted Grievant discharged. Here are relevant portions of Chief Bryson's testimony on cross examination:

A ...I did get a call from the Mayor... and I said, "Are you telling me to terminate Grievant yourself and, if I don't do it, what's going to happen?" And the Mayor didn't tell me what's going to happen. He just said, "Yes, I'm telling you to terminate." And when I got off the phone, I wrote him the appeal [to not discharge Grievant]... [Tr 250]

A [On the morning of May 11<sup>th</sup>]... I got a call from the Deputy Mayor saying, "Demote Captain Grievant to firefighter."...

Q Okay... Now are the meetings that we discussed... ending with... Chip Iglesias telling you that the Mayor said to demote, is that what... was the motivator or whatever for your signature and the words, "Reduction grade to FF" on the DAR?

A Yes. [Tr 253-254]

Q Now, you did have another choice, didn't you, on this?

A Yes. I could have taken the choice of resigning.

Q You could of given him [a suspension]...

A No, I didn't have option, I don't believe. If I [had taken] that option, I would have just said to resign...

Q ...it was possible for you... to approve Chief Fernandez's [recommended] fourteen-day suspension...

A It would have been a choice. It would have been a choice of being insubordinate and, yes, I could have done that. And whether it would have been [my] resignation or termination, you're right, that would have been a choice.

Q ...isn't it true that if the Mayor and Deputy Mayor were not involved in this matter, that you would have approved Chief Fernandez's recommendations for fourteen-day suspension?

A Yes, that's true. [Tr 258]

Q And why did you, as the Fire Chief, ultimately, determine that a demotion was the appropriate level of discipline as established by your letter of May 14th, 2012.

A Well, in all honesty, it came down to taking Captain Grievant down to firefighter or terminating him. Those were my choices. Transcript, pages 234-235

On redirect examination, Captain Bryson testified as follows:

Q ... the demotion that you signed... you wouldn't sign on anything that you believe was improper?

A It wasn't improper.

Q Or illegal?

A It wasn't illegal...

Q And you, ultimately, objectively determined that demotion was appropriate as set forth in your letter of May 14th, 2012?

A I signed the letter. [Tr 257-258]

Q Nothing in the County rules preclude you from discussing the level of discipline in any discipline case with the Mayor or the Vice-Mayor; is that correct?

A That's correct. [Transcript page 259]

Mayor Gimenez's testimony was that Chief Bryson had wanted to impose a level of discipline that he – Mayor Gimenez – had thought was insufficient.<sup>12</sup> He testified that, ultimately, Chief Bryson and he mutually agreed that Mr. Grievant should be demoted.<sup>13</sup> Mayor Gimenez testified that he interceded in the instant case because the news media had given Mr. Grievant's Facebook posting nationwide and intensive coverage. This had prompted the Mayor to become involved in "the kind of message we're sending to the country." [Tr 64] "The discipline in this case... is that... we're going to send a message, A, to the Captain; B, to the Fire Department; C, to the County; D, to the community, that we weren't going to tolerate this kind of behavior." [Tr 64-65]

The County Code empowers Mayor Gimenez to discipline Department Directors. The Mayor was questioned as to the source of his authority to discipline other County employees. He testified that, because he is in charge of Department Directors, it follows that he has ultimate authority over the discipline of every Miami-Dade County employee.<sup>14</sup> As for the limitations imposed by A.O. 7-3 and 7-16

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<sup>12</sup> Mayor Gimenez's testimony:

A ...And then once he got the facts together, he wanted a course of discipline that I didn't think was sufficient for us as a County. [Transcript, page 59]

Q [Initially]... did Chief Bryson give you his opinion of what the discipline should be?

A Yes.

Q What was that?

A He wanted some kind of suspension... I thought that that was too light. It was inappropriate... I, subsequently, met with some community leaders and folks, and we sat down and talked about this again. [Transcript pages 69-71]

<sup>13</sup> Transcript, Mayor Gimenez's testimony, page 72:

A As we discussed the issue, you know, and more, he and I, and at the end of the day, you know, I had to think about also the appropriate level. And so at the end, we sat down and we discussed it and we agreed on what the appropriate level should be.

<sup>14</sup> Mayor Gimenez's testimony:

Q Okay. As the strong mayor, what authority do you have now over employee discipline?

A Well, most employee discipline is handled at the departmental level, but the directors -- I mean, I'm in charge of the directors, and, basically, I guess, in charge of all of the departments. So, therefore, I believe I have the ultimate authority over discipline of every employee of Miami-Dade County.

Q And as a strong mayor, do you approve discipline that reaches your desk now and sign off on it?

A Yes, I do. [Transcript, pages 52-53]

Q ... did you say that you had the ultimate authority to discipline?

A Yes, I think I do.

Q Doesn't the Code say the department head disciplines?

A It may, but I think probably most of that Code was written under the old -- the old not strong mayor form of government. So at the end of the day, I think I do have the ultimate say and discipline of Miami-Dade County.

Q Even though the Code says that it's a department head that disciplines within the department?

A Yes.

Q By the express language of the Code that's in existence, isn't it true that your authority to discipline is limited to the department heads?

A I don't believe so. I think the department heads work for me. So at the end of the day -- the department heads work for me.

Q That's correct.

A Okay. So at the end of the day, you know, it's going to be my ultimate decision as to, you know, what happens in those departments.

Q Let me try it again. Isn't it true that the Code is written that it only expressly gives you the authority to discipline department heads?

A The Code is written -- I have to actually read the Code, you know, more directly. It absolutely allows me to discipline department heads.

as to who can decide upon the discipline to be issued Department employees, the Mayor testified, in substance, that because the adoption of those Administrative Orders in 1981 preceded the initiation of the strong-mayor form of government in about 2007, the latter superseded the former.

#### **THE ARBITRATOR'S INSTRUCTION**

In view of the foregoing, the Arbitrator instructed the parties to brief the following questions:

Assuming, *arguendo*, that Chief Bryson did not have the managerial discretion to do other than demote Mr. Grievant, as Mayor Gimenez instructed him to do, did this violate the CBA or County Administrative Orders?

If the alleged constraint of managerial discretion did violate Administrative Orders, had those Orders been superseded by the "strong mayor" form of government; if so, what documentation evidences that supersession? Argue the law, not the facts.

#### **THE COUNTY'S ARGUMENTS**

A 2006 County-wide referendum changed the Miami-Dade County Charter (the "*Charter*"), consolidating the authorities of the Mayor and County Manager (theretofore two individual positions) into the Mayor alone. Article 2, Section 2.02 of the *Charter* sets forth the powers of the Mayor. Section 2.02 of the amended *Charter* states, in relevant part, that the Mayor is responsible for the management of the County's administrative departments and that he has the powers to appoint, suspend, reprimand, remove and discharge any department director "with or without cause."<sup>15</sup> The Mayor thus has the authority to remove any director who does not follow his instructions.

The amendments to the *Charter* included the deletion of a Section that had prohibited the Mayor and County Commissioners from instructing the City Manager (or any of his subordinates) to fire a County administrative employee.<sup>16</sup> In its place, a new *Charter* Section imposed the same prohibition

Q The question was: Does it authorize you to discipline only department heads?

A I don't know the answer to that question. [Transcript pages 60-61]

#### <sup>15</sup> SECTION 2.02. - RESPONSIBILITIES OF THE MAYOR.

The Mayor shall serve as head of the county government with the following specific powers and responsibilities:

- a. The Mayor shall be responsible for the management of all administrative departments of the County government and for carrying out policies adopted by the Commission. The Mayor, or such other persons who may be designated by the Mayor, shall execute contracts and other instruments, and sign bonds and other evidences of indebtedness. The Mayor shall serve as the head of the County for emergency management purposes.
- b. ...
- c. Unless otherwise provided by this Charter, the Mayor shall have the power to appoint all department directors of the administrative departments of the County. Appointment of these department directors shall become effective unless disapproved by a two-thirds majority of those Commissioners then in office at the Commission's next regularly scheduled meeting. The Mayor shall also have the right to suspend, reprimand, remove, or discharge any administrative department director, with or without cause.

#### <sup>16</sup> ARTICLE 3.05 - RESTRICTION ON MAYOR AND COMMISSION MEMBERS

Neither the Mayor or any County Commissioner shall direct or request the appointment of any person to, or his removal from, office by the Manager or any of the Manager's subordinates, or take part in the appointments or removal of offices and employees in the administrative services of the County, nor shall any subordinate of the Manager accede to such direction or request.

on the County Commissioners but was silent about the Mayor.<sup>17</sup> The removal of that *Charter* restriction on the Mayor constituted tacit authorization for him to instruct any of his subordinates to fire County administrative employees. Given the Mayor's responsibility to manage the County's administrative departments (*Charter* Section 2.02) and the deletion of the proscription against his instructing the City Manager to remove any employee (*Charter* Section 3.05), Mayor Gimenez had the statutory authority to instruct Chief Bryson, his subordinate, to demote Mr. Grievant or himself face discharge.<sup>18</sup>

After the 2006 *Charter* amendments, there is no judicial ruling, arbitral ruling or County Attorney opinion that prohibits the Mayor from participating in matters concerning employee discipline. Nothing in the CBAs that came after the *Charter* amendment, and nothing in the language of Administrative Orders 7-3 or 7-16 expressly prohibits the Mayor from instructing a department director as to employee discipline.<sup>19</sup> The County complied with A.O. 7-3 when Chief Bryson issued the demotion letter after reviewing Mr. Grievant's personnel file and all of the pertinent facts pertaining to his misconduct.

As the Union construes the County *Charter*, if a County employee were to commit a heinous crime and the department director were to issue only a reprimand, there would be nothing that the Mayor could do to increase the discipline. On the other hand, if the Mayor has the authority to intercede, the disciplinary instructions he may give his department directors remain subject to arbitral and judicial review, thereby ensuring that the authority cannot be exercised arbitrarily.

County Administrative Orders are operating procedures issued by the Mayor.<sup>20</sup> Assuming that a conflict arose between the authority of the Mayor set forth in *Charter* Section 2.02 and an Administrative Order, the former would prevail. Nonetheless, no such conflict pertains in this case.

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<sup>17</sup> SECTION 5.09. - RESTRICTION ON THE COMMISSION MEMBERS.

A. No Commissioner shall direct or request the appointment of any person to, or his or her removal from, office by any subordinate of the Mayor, or take part in the appointment or removal of officers and employees in the administrative services of the County, nor shall any subordinate of the Mayor accede to such direction or request.

<sup>18</sup> The County cited a 1934 case, *Ellis v. Holcombe*, 69 S.W.2d 449, 456 (Tex. Civ. App.) in which the court ruled that an executive mayor had the authority to direct his department heads to take disciplinary actions against their employee subordinates. The Arbitrator notes that, unlike the instant case, *Ellis v. Holcombe* did not deal with the terms of a collective bargaining agreement that sought to constrain the authority granted by the external law. The Arbitrator also notes that those constraints are the fundamental purpose of public collective bargaining agreements.

<sup>19</sup> As precedent, the County cites a 1934 Texas case, *Ellis v. Holcombe*, 69 S.W.2d 449, 456 (Tex. Civ. App.). In *Ellis*, the Houston city charter was changed. Before the change, the mayor could directly appoint or remove any civil service employee. The amended charter created a civil service commission that, the court found, created "an independent and exclusive method for the removal of... [civil service] employees." The court concluded that, wherever the civil service charter amendments conflicted with the mayor's pre-amendment authority, the former superseded and repealed the latter. The court ruled that the mayor lacked the authority to directly discharge a civil service employee but also ruled that, under the facts of that case, the mayor could instruct a department head to take an adverse action against a subordinate, and could discharge a department head who refused to do so.

"This construction of the amendment in no way lessens the authority and duty of the mayor to be vigilant in requiring all officers and employees of the city to faithfully discharge their duties. If he learns, or is informed, that any of such employees are not so discharging their duties, he can, just as he did in this case, instruct the head of the department in which the employee is classified to make the removal or suspension, and such suspended employee could then appeal to the civil service commission for final decision of whether his removal should be made permanent. Under the civil service amendment the mayor or city council have power to remove any head of department when in their judgment the best interests of the city will be subserved thereby, and it follows that direction of the mayor to remove any employee for cause would be followed by any head of a department so directed who cared to retain his office."

<sup>20</sup> SECTION 5.02. ADMINISTRATIVE PROCEDURE.

CBA Article 4, GRIEVANCE PROCEDURE, states, in paragraph 4.8, that “County Administrative Order 7-3, Disciplinary Action, will be the governing policy for all disciplinary procedures.” Administrative Order 7-3 states, in relevant part, that “Any employee may be... reduced in grade or dismissed by the head of his department...”<sup>21</sup> These provisions do not expressly limit the Mayor’s powers. Under *Charter* Section 2.02, the Mayor is still “... responsible for the management of all administrative departments of the County government...” and has the right “... to suspend, reprimand, remove, or discharge any administrative department director, with or without cause.” With the removal of the earlier *Charter’s* restraint on the Mayor’s authority to instruct the City Manager (or any of his subordinates) to discharge a County administrative employee, Mayor Gimenez had the authority to instruct Chief Bryson to demote Mr. Grievant. Additionally, the Mayor had the authority to fire Chief Bryson if he refused to carry out that instruction. Quoting the County’s brief:

“No longer does the Charter prohibit the Mayor from directing a County department head to remove a County employee from office nor prohibit a department director from acceding to a Mayor’s directive as to employee discipline.”

The County acknowledges that, under Administrative Orders 7-3 and 7-16, only a department director can discipline or discharge a civil service employee. It asserts, however, as the County’s chief executive officer, the Mayor has the authority, *inter alia*, to give directions to his subordinates and to remove those directors who fail to comply with those directions.

#### **THE UNION’S ARGUMENTS**<sup>22</sup>

The CBA states “County Administrative Order 7-3, Disciplinary Action, will be the governing policy for all disciplinary procedures.” A.O. 7-3 gives the power to demote employees to the Fire Chief. A.O. 7-3 incorporates A.O. 7-16 by reference, and A.O. 7-16 states that “only” the department director or his designee may reduce an employee in grade and that the authority is non-delegatable. The Mayor’s imposition of a demotion violated these County policies.

The consolidation of the offices of the Mayor and the County Manager into the Mayor alone did not invest the Mayor with powers beyond what each office had previously possessed separately.<sup>23</sup> The

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The Mayor shall have the power to issue and place into effect administrative orders, rules, and regulations. The organization and operating procedure of administrative departments shall be set forth in regulations, which the Mayor shall develop, place into effect by administrative orders, and submit to the Board.

<sup>21</sup> The same language appears in the Miami-Dade County Code. Charter Article 1, board of county commissioners, states that the Board of County Commissioners (“the Board”) “...shall be the legislative and the governing body of the county.” Section 2-47 of the County Code, suspension, dismissal, reduction in grade and appeals, states, *inter alia*,

“Any employee may be suspended or reduced in grade or dismissed by the head of his department or designee thereof as approved in the manner provided for in an administrative order for any cause which will promote the efficiency of the service...”

<sup>22</sup> In its brief on the threshold issues posed by the Arbitrator, the Union offered arguments regarding (1) whether Mr. Grievant’s demotion had been for substantive just cause and (2) whether Mayor Gimenez had complied with the AO 7-3 requirements for the deciding official’s review of the complete investigation and of the employee’s work record. The Arbitrator will not consider those arguments in this decision but shall address solely the question of whether, assuming *arguendo* Mayor Gimenez and not solely Chief Bryson made the decision to demote, his doing so violated the CBA.



*Charter* gives the Mayor defined and thus limited disciplinary authority: he can "suspend, reprimand, remove, or discharge any administrative department director, with or without cause."

The issue of whether the "strong mayor" form of government supersedes Administrative Orders 7-3 and 7-16 is not properly before the Arbitrator. The Arbitrator may consider only the meaning of the CBA and of Administrative Orders 7-3 and 7-16, and he can consider those Orders only because they have been made a part of the CBA. The Arbitrator may not add to the terms of the CBA and, especially, may not add a new disciplinary role for the Mayor.

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<sup>23</sup> This was confirmed by the Third District Court of Appeal of Florida in *Citizens for Reform v. Citizens v. Open Government v. South Florida AFL-CIO and TWU Local 291* (2006), (hereinafter, "*Citizens*"). Here are relevant excerpts:

The Florida Constitution of 1885 provides, with respect to Miami-Dade County, that:

The electors of Dade County, Florida, are granted power to adopt, revise, and amend from time to time a home rule charter of government for Dade County, Florida, under which the Board of County Commissioners of Dade County shall be the governing body.

The issue presented on appeal is whether the proposed amendment to the Charter effectively removes the Miami-Dade County Commission as the "governing body." ... "Indeed, the proposed changes to the Miami-Dade Charter would transfer to the Mayor a great deal of control over the administration of County government. Appellees suggest that subsumed within the issue of whether or not the proposed amendment effectively removes the Miami-Dade County Commission as the "governing body" lies the question: Who controls the administration of county government? It is suggested that the answer to this latter question ultimately decides the issue before us. Thus, Appellees argue that the proposed amendment takes control over the administration of county government away from the County Commission and, as a result, removes the Commission as the "governing body."

However, such administrative powers have never rested with the County Commission and, in any event, are not the source of the Commission's governing authority. Instead, the proposed amendment primarily alters the administrative powers of the Mayor and those of the County Manager.

These powers of administration, which are currently held by the County Manager, are not "governing body" powers. Otherwise, the County Manager and not the County Commission would be the "governing body." Under the present Charter, the County Manager is not a member of the Commission but is responsible for "carrying out policies adopted by the Commission." Similarly, under the proposed amendment, the Mayor would not be a member of the Commission but would be responsible for "carrying out policies adopted by the Commission." Although undoubtedly important, the powers of administration serve to carry out and implement the decisions of the "governing body." Therefore, almost by definition, the proposed transfer of administrative duties from the County Manager to the Mayor would not alter the status of the Commission as the County's "governing body." ...

Under both the Charter and the proposed amendment, administrative powers exist to carry out the policies adopted by the Commission. Thus, it is clear that the powers of administration must conform to the dictates and policies of the County Commission and not vice-versa. ...

Appellees' constitutional challenge is premised upon a flawed comparison between the proposed "Executive Mayor" and the Executive branches of the federal and state governments. Appellees contend that the proposed amendment would effectively equip the Mayor with Executive branch-type powers and, thereby, remove the County Commission as the governing body. However, when analyzed closely, that would not be the case. As we have noted earlier, the proposed Executive Mayor would only be acquiring administrative powers that currently reside with the County Manager. These powers pale in comparison to powers exercised by the Executive branches of federal and state governments.

There are no regulations or administrative orders that allow the Mayor to discipline all County employees. Instead, the Mayor must follow the "dictates and policies of the County Commission."<sup>24</sup> Section 2-47 of the County Code states that "[a]ny employee may be ...reduced in grade ...by the head of his department..." Both before and after the *Charter* amendment, the right to demote civil service employees resided with the department directors and not with the County Manager, and not with the County Commissioners, and not with the Mayor. The County's claim as to the Mayor's authority would permit him to disregard every ordinance, order, or regulation governing County administration.

The Mayor made the decision to demote Mr. Grievant, and Chief Bryson carried out the Mayor's decision by signing the demotion letter. Chief Bryson did so only because he believed that he had no discretion to do otherwise. If Mayor Gimenez had possessed the authority to demote Mr. Grievant, as the County claims, he could have issued the discipline himself, rather than have the pretense of Chief Bryson's participation in the decision. The "strong mayor" amendments do not supersede the CBA and the Administrative Order incorporated therein by reference.

#### **DECISION**

The Union's appeal of the demotion of Mr. Grievant is under the auspices of CBA Article 4.8. The issue is whether there was just cause for his demotion. The term "just cause" encompasses three questions: whether the substantive charges have been proven; whether the severity of the discipline was grossly disproportionate to the severity of the proven infractions; and whether the CBA's procedural requirements for the issuance of the adverse action have been complied with.<sup>25</sup> In this instance, the last of these questions – whether CBA Article 4.8 has been complied with – is a threshold question. It is a threshold question because if three things are proven –

- (1) that under CBA Article 4.8 Chief Bryson *alone* was to have made the decision to demote,
- (2) that Mayor Gimenez instructed Chief Bryson to demote Mr. Grievant and
- (3) that, *but for* the Mayor's instruction, Chief Bryson would have imposed a 14-day suspension

– then Article 4.8 will have been breached, the breach will have been material, and the demotion will therefore not have been issued for just cause.

CBA Article 4.8 incorporates A.O. 7-3 which states, in relevant part, that "Any employee may be... reduced in grade or dismissed by the head of his department, or designee as approved in Administrative Order 7-16..." [Underlining added] A.O. 7-16 establishes the policy and procedure

<sup>24</sup> SECTION 5.02. - ADMINISTRATIVE PROCEDURE.

The Mayor shall have the power to issue and place into effect administrative orders, rules, and regulations. The organization and operating procedure of administrative departments shall be set forth in regulations, which the Mayor shall develop, place into effect by administrative orders, and submit to the Board.

<sup>25</sup> Even where the cba contains no formal procedures, just cause requires due process. On the other hand, formal procedures that may be breached but that constitute only harmless error are generally ignored.

under which a department head can delegate certain discipline to a supervisor (i.e., a subordinate of the department head). The policy underlying such delegations is to “increase [the supervisor’s] accountability for disciplinary action.” (That is, delegation is to the person *down* the chain of command closer to the affected employee.) However, A.O. 7-16 states that demotion “shall continue to be exercised only by a Department Director.” More precisely,

“Only the Department Director or, in his absence, the person officially designated by him to act in his behalf as ‘acting director’, is authorized to dismiss an employee or reduce an employee in grade. These forms of discipline are non-delegatable.”

The County argues that the Mayor has the statutory right to demote civil service employees and that this statutory right supersedes the language of A.O.s 7-3 and 7-16. The County’s arguments consist of both the intent of the external law pertaining to the strong mayor form of government, and the operational risk of not empowering the Mayor to countermand a department director who exercises poor judgment.

The Arbitrator finds as follows. The meanings of A.O.s 7-3 and 7-16 are unambiguous. The Administrative Orders have been incorporated into the CBA in Article 4.8 and, under CBA Article 5.6, and the Arbitrator must apply them:

“The arbitrator shall have no authority to change, amend, add to, subtract from, ignore, modify, or otherwise alter or supplement this Agreement or any part thereof or any amendment thereto.”

The Arbitrator’s sole responsibility, and the limit of his jurisdiction as prescribed by the CBA, is to interpret and apply the terms of the Agreement. This means that the Arbitrator must consider A.O.’s 7-3 and 7-16, but he must do so only for their contractual intent.

The Arbitrator deems it self-evident that the A.O. 7-3 and 7-16 directives – that the demotion decision must be made by a Department Director – refers to who must make the decision and not to who must sign the paperwork. The latter without the former would be an empty clerical gesture, unworthy of memorialization in the CBA. The concern of the two Administrative Orders is with the “accountability for disciplinary action” (quoting A.O. 7-16) and not with clerical regimen.

Constraining managerial discretion as to the terms and conditions of employment is the fundamental purpose of a collective bargaining agreement. The Administrative Orders that were incorporated into this CBA define and limit who can make decisions about discipline. Assuming, *arguendo*, that the Mayor has the managerial authority attributed to him by the County, by signing the CBA, the County abjured the use of that authority for the members of this IAFF bargaining unit.

The foregoing answers, in the affirmative, the first of the three factual questions pertaining to the threshold question of compliance with CBA procedure: Under CBA Article 4.8, Chief Bryson *alone* was to have made the decision to demote. The evidence as to the second and third factors – whether Mayor Gimenez made the decision to demote and whether, but for that decision, Chief Bryson would have issued a 14-day suspension – resides in the testimony of the two men. The following are the

portions of that testimony that the Arbitrator deems be the most relevant. The fuller contexts in which the statements were made appear in the accompanying footnotes:

### Chief Bryson

- A ... it came down to taking Mr. Grievant down to firefighter or terminating him. Those were my choices.<sup>26</sup>
- Q Well, when you testified on direct that you had two choices, was that termination or demotion?
- A Those were the two choices that I had with the Mayor, that's right.
- Q So where did the fourteen-day suspension or the suspension go?...
- A I had two choices. I didn't have that as a choice... I knew I only had two choices.
- Q Well, who gave you the two choices?
- A Well, first of all, the Deputy Mayor told me to terminate Mr. Grievant. And I said I want -- I didn't feel that was the right thing to do. I said, is this a direct order? And he said, yes. And I said, well, I prefer it coming from the Mayor...
- So... I did get a call from the Mayor after that, and I said "Are you telling me to terminate Grievant yourself and, if I don't do it, what's going to happen?" And the Mayor didn't tell me what's going to happen. He just said, "Yes, I'm telling you to terminate." ...
- Q Now, you did have another choice, didn't you, on this?
- A Yes. I could have taken the choice of resigning.
- Q You could have given him... [a] suspension?...
- A No, I didn't have option, I don't believe. If I would have taken that option, I would have just had to resign.<sup>27</sup>

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<sup>26</sup> Direct examination of Chief Bryson by the County: (Transcript, starting at page 232)

- Q ... one of your duties and responsibilities as the Fire Chief is to determine the level of discipline in the cases that come before you?
- A That's correct.
- Q Okay. And did you do that in this case?
- A Yes, I did.
- Q And do you believe that Captain Grievant should have been disciplined for the reasons set forth in the DAR and in the report?
- A I thought Captain Grievant should have been disciplined, yes...
- Q And why did you, as the Fire Chief, ultimately, determine that a demotion was the appropriate level of discipline...?
- A Well, in all honesty, **it came down to taking Captain Grievant down to firefighter or terminating him. Those were my choices.**
- Q During this process, this discipline process, did you happen to speak with Mayor Carlos Gimenez?
- A Yes.
- Q And during those conversations, did you discuss this case?
- A Yes.
- Q And did you discuss the level of discipline in this case?
- A Many times.
- Q And after your discussions with Mayor Gimenez, what did you, ultimately, decide?
- A I decided on the demotion versus the termination.

<sup>27</sup> Cross examination of Chief Bryson by the Union: (Transcript, starting at page 241)

- Q Now... did you have communication with Mayor Gimenez?
- A Yes, I did... I said, the Grievant case is progressing and we're getting close. And he asked me what I thought as far as a recommended or what I was going to do for discipline? And I told him that I felt, after looking at work record of Grievant and his tenure with the Department, that I felt that a suspension would be in order...
- Q Was there anything else exchanged?
- A Yeah. That date was April, the 30<sup>th</sup>... [H]e said, we have to terminate Captain Grievant.
- Q What'd you say?
- A I said I don't agree with termination... He said, well, you go think about it...

Q ...you, ultimately, objectively determined that demotion was appropriate as set forth in your letter of May 14th, 2012?

A I signed the letter.<sup>28</sup>

Q ...Isn't it true that if the Mayor and Deputy Mayor were not involved in this matter, that you would have approved Chief Fernandez's recommendations for fourteen-day suspension?

A Yes, that's true.<sup>29</sup>

### Mayor Gimenez

Q ...As the strong mayor, what authority do you have now over employee discipline?

A Well, most employee discipline is handled at the departmental level, but... I'm in charge of the directors and, basically, I guess, in charge of all of the departments. So, therefore, I believe I have the ultimate authority over discipline of every employee of Miami-Dade County...

Q Now, ultimately, are you aware of what Fire Chief Bryson decided as to the level of discipline in this case?

A Well, the ultimate decision was the demotion of Mr. Grievant back to firefighter.<sup>30</sup>

Q Well, when you testified on direct that you had two choices, was that termination or demotion?

A Those were the two choices that I had with the Mayor, that's right.

Q So where did the fourteen-day suspension or the suspension go ...?

A I had two choices. I didn't have that as a choice... I knew I only had two choices.

Q Well, who gave you the two choices?

A Well, first of all, the Deputy Mayor told me to terminate Captain Grievant. And I said I want -- I didn't feel that was the right thing to do. I said, is this a direct order? And he said, yes. And I said, well, I prefer it coming from the Mayor...

So... I did get a call from the Mayor after that, and I said "Are you telling me to terminate Grievant yourself and, if I don't do it, what's going to happen?" And the Mayor didn't tell me what's going to happen. He just said, "Yes, I'm telling you to terminate." And when I got off the phone, I wrote him the appeal --

Q Now, you did have another choice, didn't you, on this?

A Yes. I could have taken the choice of resigning.

Q You could have given him... [a] suspension?...

A No, I didn't have option, I don't believe. If I would have taken that option, I would have just said to resign.

Q ...[I]t was possible for you to write to approve [a]... fourteen-day suspension...? ...

A It would have been a choice. It would have been a choice of being insubordinate, and, yes, I could have done that. And whether it would have been resignation or termination [meaning Bryson's resignation or termination], you're right, that would have been a choice...

<sup>28</sup> Redirect examination of Chief Bryson by the County: (Transcript, starting at page 257)

Q Now, you wouldn't sign on anything that you believe was improper?

A It wasn't improper.

Q Or illegal?

A It wasn't illegal.

Q And this was a difficult decision for you... is that fair to say?

A Absolutely.

Q And did you factor into the final decision the reaction from the community?

A Yes, I did, but I will tell you that I tried not to get overly involved in reactions and try to keep myself objective to make sure that the punishment fit the crime.

Q And you, ultimately, objectively determined that demotion was appropriate as set forth in your letter of May 14th, 2012?

A I signed the letter.

<sup>29</sup> Recross examination of Chief Bryson by the Union: (Transcript, starting at page 258)

Q ...Isn't it true that if the Mayor and Deputy Mayor were not involved in this matter, that you would have approved Chief Fernandez's recommendations for fourteen-day suspension?

A Yes, that's true.

<sup>30</sup> Direct examination of Mayor Gimenez by the County: (Transcript, starting at page 52)

Q ...As the strong mayor, what authority do you have now over employee discipline?

Q ...Did you say that you had the ultimate authority to discipline?

A Yes, I think I do... [At] the end of the day, I think I do have the ultimate say on discipline of Miami-Dade County... [The] department heads work for me. So at the end of the day... it's going to be my ultimate decision as to... what happens in those departments.

Q ... when did Chief Bryson's decision change from thoughts of suspension to demotion?...

A ... at the end, we sat down and we discussed it and we agreed on what the appropriate level should be.<sup>31</sup>

In sum, Chief Bryson testified that he had decided to suspend Mr. Grievant but that Mayor Gimenez instructed him to issue either a discharge or demotion, and that he – Bryson – demoted Mr. Grievant because he believed that, if he were to do otherwise, he would be fired or have to resign. Asked whether he had “objectively determined” that demotion was appropriate, Chief Bryson conspicuously evaded answering the question; he instead testified “I signed the letter.” Mayor Gimenez did not testify that the decision to demote Mr. Grievant had been solely Captain Bryson’s, and reiterated that he – Mayor Gimenez – possessed the authority to have made the demotion decision himself. The only testimony in which Mayor Gimenez attributed the demotion decision to Captain Bryson was his statement that, “...we agreed on what the appropriate level should be.” Again, A.O 7-16 states that “Approval of the dismissal or demotion of an employee shall continue to be exercised only by a Department Director.”

The Arbitrator finds the testimony of both Mayor Gimenez and Chief Bryson to have been truthful and credible. Based upon their testimony, the Arbitrator finds that Chief Bryson believed that if he did not fire or demote Captain Grievant, he would be discharged. That constraint upon Chief Bryson’s independent judgment constituted a violation of the parties’ CBA contractual intent for A.O. 7-3 and A.O. 7-16.

The Arbitrator makes no finding as to whether the Mayor possesses the authority, under the *Charter* or regulations of Miami-Dade County, to discipline civil service employees. Nor does the

A Well, most employee discipline is handled at the departmental level, but... I'm in charge of the directors and, basically, I guess, in charge of all of the departments. So, therefore, I believe I have the ultimate authority over discipline of every employee of Miami-Dade County...

Q Now, ultimately, are you aware of what Fire Chief Bryson decided as to the level of discipline in this case?

A Well, the ultimate decision was the demotion of Captain Grievant back to firefighter.

<sup>31</sup> Cross examination of Mayor Gimenez by the Union: (Transcript, starting at page 52)

Q ...Did you say that you had the ultimate authority to discipline?

A Yes, I think I do.

Q Doesn't the Code say the department head disciplines?

A It may, but I think probably most of that Code was written under the old -- the old not strong mayor form of government. So at the end of the day, I think I do have the ultimate say on discipline of Miami-Dade County...

Q By the express language of the Code that's in existence, isn't it true that your authority to discipline is limited to the department heads?

A I don't believe so. I think the department heads work for me. So at the end of the day... it's going to be my ultimate decision as to... what happens in those departments.

Q ... when did Chief Bryson's decision change from thoughts of suspension to demotion?...

A ... at the end, we sat down and we discussed it and we agreed on what the appropriate level should be.

Arbitrator attribute to the Mayor any purpose other than to have done what he believed to have been the right and necessary thing.

The Arbitrator observes that there was substantial public attendance at each day of the arbitration hearing. Most of those present were there to see justice done. The Arbitrator has neither the responsibility nor the authority to do justice. Nor was he engaged for that purpose. His role is to apply the terms of the collective bargaining agreement. Were he to stray from that role in pursuit of justice, the victory would be short-lived; his decision would be overturned by the first reviewing court.

The remedy for a breach of contract is to make the injured party whole. Under the CBA, Mr. Grievant, as a member of this IAFF bargaining unit, had the contractual right to have Chief Bryson alone determine whether demotion was warranted.

If the answer to the question of how Chief Bryson, if uncoerced, would have made that decision were unclear, the Arbitrator would remand the case to Chief Bryson with the instruction that he issue discipline as prescribed by the CBA. But the hearing transcript of how Chief Bryson would have ruled, but for the Mayor's instruction, is clear:

Q ...Isn't it true that if the Mayor and Deputy Mayor were not involved in this matter, that you would have approved Chief Fernandez's recommendations for fourteen-day suspension?

A Yes, that's true.

The Arbitrator finds that Mr. Grievant's misconduct constituted, *prima facie*, just cause for such a 14-day suspension.<sup>32</sup>

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<sup>32</sup> The Arbitrator does not have the authority, under the CBA, to increase discipline. Grievances of penalty are a one-way street; employers don't get to grieve disciplinary actions that they believe to be too lenient. CBA's don't contain such provisions, likely because discipline is issued by an agent of the employer who is vested with the authority to make the decision.

**AWARD**

The grievance is sustained. Mr. Grievant is to be restored to the rank of Captain effective as of the date of his demotion and made whole of all corresponding wages and benefits of employment, but shall serve a 14-day unpaid suspension commencing as of such date as the County shall determine. The Arbitrator retains jurisdiction as to remedy.

Pursuant to CBA Article 5.6, the Arbitrator's fees and expenses will be paid by the County, which, for purposes of that Article, the Arbitrator finds to be "the loser of the arbitration proceeding."



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Mark I. Lurie, Arbitrator

April 23, 2013