

IN THE MATTER OF ARBITRATION BETWEEN

<u>AFSCME District Council 159</u>	*	AAA Case No.
	*	01-18-0000-7376
	*	
<u>Union</u>	*	Aquira Cheeks
	*	One-Day Suspension
	*	
AND	*	
	*	
<u>City of Philadelphia</u>	*	
	*	
	*	
	*	
<u>Employer</u>	*	

For the Union: James R. Glowacki, Esq.

For the Employer: Frank E. Wehr, II, Assistant City
Solicitor

OPINION AND AWARD

Dates of Hearing: July 19, 2019

Date of Award: November 12, 2019

Arbitrator: Samantha E. Tower, Esq.

BACKGROUND

Aqaira Cheeks (Grievant) started working for the City of Philadelphia (City) in the Philadelphia Prison System (PPS or PDP) as a Correctional Officer in 2005. Grievant was subsequently promoted to Lieutenant in PPS in 2016.

The City suspended Grievant for one day on December 13, 2017 for violating General Order/Policy: 55 (GO 55) for her conduct on [REDACTED] and [REDACTED]. (J2) AFSCME District Council 159 (Union) filed a grievance challenging Grievant's suspension. A hearing on this matter was held on July 19, 2019. The parties were given a full opportunity to present evidence and examine witnesses. Post-hearing briefs were filed on October 13, 2019.

The following General Order is at issue:

55. Any manuscript written for publication by any person employed in the PPS which in any way refers to the affairs of the PPS, the facilities or inmates shall before its submission to a publisher be authorized by the Commissioner.

(J2)

The Notice of Suspension states in relevant part:

Violation of General Order: 55

Specifically, on [REDACTED], an EEO Investigation was initiated due to allegations of Harassment by you against Lieutenant B [REDACTED] B [REDACTED], (PR# [REDACTED]).

Lieutenant B [REDACTED] stated that on [REDACTED], she called out extended FMLA. As she was browsing through Facebook a short time later that day, she came across your Facebook post that stated, *"So tired of being stuck at work because of people calling out. That's why I have no sympathy. Everyone has problems. I had a whole party yesterday and still made it to work. I can't even plan things for after work because I'm always getting hooked. So tired of these weekend warriors, just quit!"* She stated that she believed the post was about her because she called out extended FMLA approximately 40 minutes prior to the Facebook post being generated. She stated that she called out FMLA again on [REDACTED], and you generated another Facebook posting stating, *"They got my partner A [REDACTED] B [REDACTED] tonight, when is it going to end? We are exhausted."* She stated that she felt as though she was being bullied, and would be publicly humiliated on social media if a Lieutenant from the 3pm-11pm shift was drafted after she called out FMLA.

Lieutenant B [REDACTED] also stated that when she arrived for work on [REDACTED], she could not clock-in due to her timecard being stamped "FMLA" from Tuesday, [REDACTED] to Sunday, [REDACTED], which was the end of the pay period. When Lieutenant B [REDACTED] inquired about who stamped her timecard, she was informed that it was stamped by you. Furthermore, she stated when she entered Center Control on the same day, you were making comments about people starting trouble but not wanted to deal with the consequences, which made her feel as though she was being picked on and harassed.

During your OPC interview, you stated that on [REDACTED], you were the Shift Commander at RCF on the 3pm-11pm shift, and was informed by the Center Control Sergeant that Lieutenant B [REDACTED] called out extended FMLA. You admitted that during your lunch break at approximately 5:40 pm, you generated a post on your Facebook profile that stated, *"So tired of getting stuck at work because people wanna keep calling out. That's why I have no sympathy. Everyone has*

problems. I had a whole party yesterday and I still made it to work. I can't even plan things after work because I'm always getting hooked. So tired of these weekend warriors just quit!" You also admitted that you stamped "FMLA" on Lieutenant B [REDACTED]'s timecard because she called out extended FMLA, and that you did not know when Lieutenant B [REDACTED] was going to return to work.

Your Facebook post provided an audience of non-PDP employees with an insight of matters pertaining to the PDP. General Order #55 states that any manuscript written for publication by any person employed in the PDP, which in any way refers to the affairs of the PDP, the facilities, or inmates, shall, before its submission to a publisher or a publication, be authorized by the Commissioner. Although you were on your lunch break; you were still "on the clock" when you generated the Facebook post, and as a PDP employee, your tour of duty begins at the start shift and ends at the end of your shift and you are paid for your (30) minute lunch break.

You defaced Lieutenant B [REDACTED]'s timecard by stamping "FMLA" on it for the remaining eight (8) days of that pay period, after acknowledging that you did not know when Lieutenant B [REDACTED] was going to return to work. According to the 3:00 pm- 11:00 pm roster for Monday, [REDACTED], Correctional Captain J [REDACTED] G [REDACTED] (PYR # [REDACTED]) was assigned as the Shift Commander, and she was capable of stamping Lieutenant B [REDACTED]'s timecard for the remaining days as necessary.

After review by Commissioner Blanche Carney, though Lt. Cheeks does not identify the Department of Prisons by name, she does identify A [REDACTED] B [REDACTED], who is a lieutenant assigned to the Riverside Correctional Facility, being "hooked" and "call outs." Such references pertain to Lt. Cheeks' workplace and is therefore in violation of General Order # 55 and the charge is upheld for that violation. Taking into consideration Lt. Cheeks disciplinary history, she will serve a one day suspension.

Therefore, after a review by Commissioner Blanche Carney, you are hereby suspended for One Working Day.

(J1)

The City implements discipline in accordance with a Disciplinary Matrix which sets forth a range of discipline for violations of each General Order. Grievant had prior discipline in her record which made her alleged violation of General Order 55 a "Second Offense" for purposes of determining discipline. (J2) After a Full Board Hearing, the Board did not recommend discipline; however, Commissioner Blanche Carney reviewed the record of the full board and made the final decision to sustain the violation of GO 55 and to suspend Grievant for one day. Commissioner Carney testified that she considered Grievant's prior discipline and wanted to hold her accountable but chose to impose a one-day suspension, despite the permitted 20 to 30 days, because she wanted to give Grievant an opportunity accept responsibility and to self-correct. Commissioner Carney explained that she has "the ultimate responsibility to either approve, modify or disapprove the recommendation" of the Board. (T. Carney at p. 19)

Commissioner Carney testified that the Facebook post could affect security in the prison. "Bad actors" can find out information from public posts and take advantage if the prison is understaffed or if the staff is exhausted.

Commissioner Carney said that when inmates know there is conflict it compromises the safety of the institution. She explained that the publication of a Facebook post falls under GO 55 because it is a public posting that discusses prison staffing and identifies prison staff. Commissioner Carney said that she believed that others had been disciplined for social media postings but could not recall their names. She described a manuscript as any written form of publication and a publisher as an intermediary that receives the publication and then publishes it. Commissioner Carney has authorized manuscripts in the past but has not authorized online postings.

Commissioner Carney explained that prison staff is trained on profession conduct but social media is not specifically discussed. When asked about who has ultimately authority to discipline employees when her opinion differs from the Board's recommendation, Commissioner Carney answered that she did.

Lieutenant E [REDACTED] testified that she believed Grievant's Facebook posts were addressed to her when she called out on FMLA. She said she felt threatened and harassed.

Sergeant Miquel Rios from the Internal Affairs Unit testified that he investigated the Equal Employment Opportunity (EEO) Complaint filed by Lieutenant B [REDACTED], including reviewing evidence and conducting interviews, after which he created a report. (C7) He also was present at the preliminary hearing and the Full Board hearing. Sgt. Rios said that he has investigated social media posts before, and he concluded that Grievant had violated the social media policy. He added that GO 55 is the only General Order that is implicated with respect to social media.

Grievant testified that she was tired and frustrated when Lt. B [REDACTED] called in FMLA on [REDACTED] [REDACTED], and she vented during her break on her phone. She also admitted making the second posting on [REDACTED], when she was off duty and had plans to go out to dinner with her partner before her partner had to stay at work. (C4)

Grievant testified that it was her understanding that only prison employees could see her post because there

is a prison Facebook page. She said that people have to members to see posts placed on that particular page.

EMPLOYER POSITION

The City contends that there was just cause for Grievant's suspension. It insists that the record shows that Grievant's Facebook posts violated GO 55.

The City asserts that Grievant was on notice of GO 55 and that it is reasonably related to the orderly, efficient and safe operation of the PDP. It insists that the General Orders, including GO 55, are published and disseminated to personnel and there is no evidence to suggest that Grievant was unaware of the rule or did not understand she was not permitted to publicly publish information related to the affairs, facilities or inmates of the PDP. Commissioner Carney provided compelling testimony regarding the safety risks that result when information about the operations of a prison facility is published to the public.

The City stresses that it conducted a thorough, unbiased, and objective investigation. Sergeant Rios

testified about the steps of the investigation and the substantial evidence and proof that lead to the Department's findings against Grievant. The City points out that the only potentially disputed fact in this case is whether Grievant published her post to her own Facebook page or on some sort of private, prisons-employees only Facebook page. The City questions Grievant's self-serving testimony that the post was made on a private page and points out that the Union presented no evidentiary support for Grievant's testimony that she posted on a private, prisons-employees only Facebook page. It also stresses that neither Grievant nor the Union raised this issue prior to the arbitration hearing. Even if the Arbitrator gives this testimony weight, the City insists that the post still violated the rules because GO 55 refers to "any publication" and Grievant does not dispute that she made the posts in question.

The City contends that the discipline was applied fairly, without discrimination, and proportionately to the offense. The Union failed to provide any evidence of other employees who made similar posts and were treated differently, and Commissioner Carney testified that she believed she had previously disciplined PDP employees under

GO 55 for social media conduct. Moreover, Grievant received discipline that is less severe than that proscribed in the disciplinary matrix.

The City requests that the grievance be denied and the one-day suspension be upheld.

UNION POSITION

The Union argues that Grievant was unjustly suspended, which not only resulted in the loss of one day's pay but also precluded her from rejoining the Correctional Emergency Response Team. It asserts that the suspension is not supported by just cause. It stresses that Grievant's Facebook posts should be considered protected speech because both Federal and State authorities give public employees the right to engage in protected concerted activity which includes the right to discuss the terms and conditions of employment.

The Union also contends that Grievant did not have notice that her conduct could result in discipline and that the Department engaged in disparate treatment by

failing to investigate or discipline other employees engaged in similar conduct.

The Union cites numerous judicial awards related to the First Amendment rights of employees. It asserts that Grievant's posts fall under the protection of the First Amendment because they addressed a public concern, specifically the chronic understaffing of correctional personnel at Riverside. The Union disagrees with Commissioner Carney's justification for restricting Grievant's speech because there is nothing to suggest that the Commissioner's fear of giving "bad actors" or inmates information about the affairs of the prisons is more than speculation. According to the Union, Commissioner Carney failed to consider Grievant's fundamental constitutional protections.

The Union insists that the City disciplined Grievant for her discussion of the terms and conditions of employment with coworkers, which is conduct protected by the Pennsylvania Public Employee Relations Act (PERA). It points out that Grievant considered the Prisons' Facebook group a venue where correctional staff could freely discuss the affairs of the Department. Grievant testified, "What

is the Prison Facebook page for if we can't talk about our issues? That's what we thought it was for, to get information, to stress- it's a prison Facebook page. It's not public." (T. p. 155)

The Union contends that Grievant did not know that her Facebook posts violated a Department rule and could result in discipline, and it asserts that such notice is a required element of just cause. The Department does not maintain its own social media policy, and the plain language of GO 55 gives no notice that a social media post about working conditions will result in discipline. It is clear to the Union that Grievant's awareness of GO 55 does not mean she was on notice that posting about staffing at Riverside to a private group on Facebook would result in discipline. Moreover, even if it is foreseeable that an employee's Facebook post could implicate the City's general Social Media Policy, the undisputed evidence shows that the Social Media Policy never was considered here. Additionally, Commissioner Carney's testimony makes it clear that GO 55 was the improper policy to apply. When asked if she had ever had an employee submit a proposed online posting for approval, Commissioner Carney said "[n]ot online postings, but some manuscripts, yes." (T. at

p. 50) According to the Union, Commissioner Carney's answer suggests that GO 55 is not frequently implicated in addressing posting on social media.

The Union also points to Commissioner Carney's testimony that no training is given to employees regarding appropriate posting on social media. (T. at p. 61) Additionally, neither Commissioner Carney nor Sergeant Rios could recall any specific correctional employees who violated GO 55 with respect to social media activity. The Union stresses that the Department's confusion about GO 55 and the City's Social Media Policy, as well as the Department's failure to provide any training on appropriate social media activity, clearly show that Grievant did not have notice that her Facebook postings would result in discipline.

The Union asserts that no other employees who commented on Grievant's Facebook posts were investigated or disciplined. These other posts appear to "refer to the affairs" of the Department, but there is no indication they were submitted to the Commissioner for approval per GO 55. It argues that evenhanded application of rules also is a required element of just cause.

Finally, the Union contends that the Department cannot show just cause given its heavy reliance on the mistaken belief that Grievant's posts were viewable by the public. Grievant's posts were on the private Facebook group which consists of Prison employees. The Union insists that it is inaccurate to base a suspension on the charge that non-PDP employees were given an insight into the affairs of the prison.

The Union asks the Arbitrator to sustain the grievance and order the City to make Grievant whole and to expunge the discipline from her record.

FINDINGS

The stipulated issue to be decided is: Was the one day suspension of Aquira Cheeks on December 13, 2017 for just cause? And, if not, what shall the remedy be?

A determination as to whether there was just cause for an employee's discipline must be made on a case-by-case basis, in light of the relevant facts and circumstances which pertain in each case. The initial

inquiry is whether the evidence establishes that the employee committed the misconduct with which he or she was charged at the time the discipline was issued. If so, it is necessary to consider whether the employee had adequate notice of the work rules or policies she was disciplined for violating, whether the employer applied the discipline in a fair and even-handed manner and whether the penalty imposed was proportionate to the misconduct committed.

Here, the facts underlying the grievance are not in dispute. Grievant admits making the two Facebook posts that led to her discipline and that she made the posts without getting prior permission from the Commissioner.

Based on those facts, the City alleges that Grievant committed a violation of GO 55. On the totality of the evidence, however, I am not convinced that Grievant had proper notice that GO 55 applied to her posts on Facebook and that she could be disciplined for the posts.

Grievant presented detailed, unrebutted testimony that she posted on the prison Facebook page. Grievant said, "...what's the point of the prison having a prison Facebook page if you can't discuss prison business? What is

the prison Facebook page for if we can't talk about our issues? That's what we thought it was for, to get information, to stress - it's a prison Facebook page. It's not public." (T. Grievant at p. 155) When asked who set up the prison's Facebook page, Grievant answered, "I don't know, but you have to be approved by administration." (Id.)

I am unpersuaded by the City's assertion that Grievant's unrebutted testimony should be given no weight, especially since the City, which bears the burden of proof in this case, presented no evidence that reliably establishes where Grievant made the two posts. Moreover, although Commissioner Carney testified that the publication of a Facebook post falls under GO 55 when it is a public posting that discusses prison staffing and identifies prison staff, the explicit text of GO 55 bears repeating here:

Any manuscript written for publication by any person employed in the PPS which in any way refers to the affairs of the PPS, the facilities or inmates shall before its submission to a publisher be authorized by the Commissioner.

The Commissioner described a "manuscript" as any written form of publication and a "publisher" as an intermediary that receives the publication and then publishes it. But

the City has suggested no sound basis for a finding that Grievant should have been expected to know from a reading of the text of GO 55, alone, that she would subject herself to discipline for violating that rule if she made the two posts in issue on Facebook.

Moreover, the Commissioner testified that a post "becomes public when it's shared outside of that thread of the group and it's now public knowledge." (T. Carney at p. 55) But there is no evidence -- and no claim -- that the City has informed employees, including Grievant, that a posting on social media such as Facebook will be considered to be a "manuscript" for purposes of the application of GO 55.¹ Indeed, the Commissioner testified that the Department provides training that addresses professional conduct, but social media is not specifically brought up and discussed during that training. (T. Carney at pp. 60-61)

Grievant was not charged with a violation of a departmental social media policy, and no such policy was introduced into the record or cited in Grievant's Notice of

¹ It is also worth noting that Commissioner Carney testified that she has authorized manuscripts in the past, but she has not authorized online postings.


Suspension. While the Commissioner's testimony regarding the importance of security and the possibility that a Facebook post can lead to a security issue is compelling, the City still is required to make sure its employees are trained on the rules and policies of the Department, including the kinds of conduct that is prohibited under rules and policies and that such violations can result in discipline. Commissioner Carney testified that she believed other unidentified employees have been disciplined for social media postings, but there is no evidence in this record that any employee previously has been disciplined under GO 55 for making a posting on social media.

This record is insufficient as the basis for a finding that Grievant was the victim of disparate treatment when she was disciplined for making the two social media posts in issue. Based on the totality of the record, however, I find that the evidence fails to sufficiently establish that she was on notice when she made those posting that they would be considered to be "manuscripts" under GO 55 and, thus, her conduct could result in discipline under application of that rule. Accordingly, I do not find that the evidence establishes that there was just cause for Grievant's one-day suspension or December

13, 2017, and the grievance will be sustained in the Award below.²

AWARD

The grievance is sustained. The City did not have just cause to suspend Grievant. The City shall reimburse Grievant for her one day suspension. The City shall expunge the one day suspension from Grievant's record. I retain jurisdiction for six months to resolve any dispute relating to the implementation of this remedy that the parties are unable to resolve.


Samantha E. Tower, Arbitrator
November 12, 2019

² Given this finding, there is no need to address the Union's claim that Grievant's posts constituted constitutionally protected speech.