

AMERICAN ARBITRATION ASSOCIATION

In the Matter of Arbitration Between:

CITY OF PHILADELPHIA

Employer

and

OPINION
AND
AWARD

AFSCME DISTRICT COUNCIL 47, LOCAL 2187

Union

AAA Case 01-17-0007-6679

APPEARANCES:

For the City: Erica Elizabeth Kane, Esquire
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For the Union: Peter H. Demkovitz, Esquire
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ARBITRATOR: Donald M. Spooner

OPINION

This case concerns a five-day suspension given to Grievant Ernest Barile III on August 31, 2017.¹ The Union filed a grievance over the suspension, which was submitted to arbitration. I was designated to serve as arbitrator, and an arbitration hearing was held before me in Philadelphia, PA, on March 19, 2019.

Both parties participated fully in the hearing and were given the opportunity to present testimonial and documentary evidence and to cross-examine witnesses presented by the other party. Although the parties declined the opportunity to file briefs, at the conclusion of the hearing each presented oral arguments in support of its position. In making my decision in this case, I have considered the entire record, including all the evidence and arguments presented by both parties, including that which is not specifically referenced in this Opinion.

ISSUE AND REMEDIES SOUGHT BY THE PARTIES

The parties stipulated that the issue in this case is:

Was the grievant suspended for just cause? If not, what shall the remedy be?

The Union seeks as a remedy to the grievance that the suspension be revoked, that Mr. Barile be awarded backpay for the period of the suspension, and that records of the discipline be removed from Mr. Barile's record, or in the alternative that a statement be placed in his file along with the award so that the suspension is not reflected in his record. The City requests that I uphold the suspension and deny the grievance.

RELEVANT CONTRACT PROVISIONS AND CIVIL SERVICE REGULATIONS

Contract Provisions:

Article 6, Section B.

CIVIL SERVICE REGULATIONS. Intending to recognize the Civil Service Regulation as the most viable means for translating operational procedures for employees in a uniform manner both parties acknowledge that the Civil Service Regulations apply to all employees under this agreement. Where the regulations are in conflict with this agreement, the Personnel Director will recommend to the Civil Service

¹ Unless otherwise indicated all dates referred to in this Opinion and Award are in 2017.

Commission an appropriate amendment of the Civil Service Regulations to implement the intent of the contract. Where there is a conflict as to whether language in the contract applies in the case of a particular grievance or whether Civil Service Regulation language applies, the contract language shall be assumed to prevail until otherwise adjudicated. Nothing in this paragraph shall be construed as interfering in any way with the right of the City to make selection decisions as described in the Management Rights Article, or as interfering in any way with the right of the City to make appointments to positions consistent with such regulations.

Article 16, Section A.

JUST CAUSE. It is agreed that management retains the right to impose disciplinary action or discharge provided that this right, except for an employee in probationary status, is for just cause only.

Article 16, Section C.

PROGRESSIVE DISCIPLINE. The City shall have the right to discipline or discharge any employee in the bargaining unit for just cause only. Disciplinary actions shall be progressive in nature where appropriate. The City and Local 2187 agree that discipline should be directed toward maintaining or improving the City's services. This clause does not apply to probationary employees.

Civil Service Regulations:

Section 17.01 - DISMISSAL, DEMOTION AND SUSPENSION. Any dismissal or demotion after the completion of the required probationary period of service, or suspension of any employee in the Civil Service shall be for just cause only.

At least ten (10) days before the effective date of dismissal or involuntary demotion, the appointing authority must notify the employee, in writing, of his or her intention to dismiss or demote. The notice to the employee must state the specific reasons for the dismissal or demotion and summarize the facts in support thereof with sufficient particularity to allow the employee to prepare a defense to the charges. A copy of such notice must be filed with the Director. Within ten (10) days following service of the notice, the employee may reply thereto in writing. At the same time the employee shall file a copy of such a reply with the Director.

At any time within twenty (20) days after the end of the ten (10) day period the appointing authority may notify the employee in writing of the effective date of the dismissal or demotion and the specific reasons

for the dismissal or demotion. The appointing authority must file a copy of this notice with the Director. If such a notice of dismissal or demotion is not sent within the twenty (20) day period, the original notice of intention shall lapse and be of no effect.

Section 17.04 – SUSPENSIONS. The appointing authority may suspend an employee without pay from his position at any time for just cause. Notice of suspension shall be given to the employee and at the same time to the Director. Each suspension without pay shall not exceed thirty (30) calendar days.

FACTS

Mr. Barile received a five-day suspension for alleged improper conduct in which he engaged at an [REDACTED] meeting conducted by [REDACTED] M [REDACTED] Y [REDACTED]. Mr. Barile was at the time a Local Area Network (LAN) Administrator working at the City’s prison facility located at 8201 State Road. The subject of the meeting was Mr. Barile’s asserted failure to comply with the proper procedures for calling off sick.

While Mr. Barile was disciplined for his conduct at the [REDACTED] meeting, some background is necessary to understand what occurred at that meeting. The City presented evidence that, in addition to the general notification requirements set forth in Sick Leave Rules and Regulations issued by the Office of the Managing Director on January 1, 1993 and Amended on July 1, 1994, employees at Barile’s work location were advised in April 2017 of the procedures they should use in calling out. Mr. Barile was absent from work on [REDACTED] and [REDACTED]. He called out sick on both days and apparently spoke only to Office Manager M [REDACTED] V [REDACTED]. On [REDACTED], Mr. Barile’s direct supervisor, PDP IJMS Project Manager C [REDACTED] M [REDACTED], apparently believing that Mr. Barile had not followed the correct call out procedure, initiated an email conversation on that question.²

The email conversation was forwarded to Mr. Y [REDACTED], who testified that he concluded that he needed “to sit down with everybody to resolve this” and “be sure that [Mr. Barile] fully understood it.” On [REDACTED], Mr. Barile received an email from J [REDACTED] B [REDACTED] requesting that he attend a meeting in Mr. Y [REDACTED]’s office on [REDACTED]. Mr. Barile contacted Ms. E [REDACTED] to ask the reason for the meeting. She said she would check with Mr. Y [REDACTED], and later informed Mr. Barile that the reason for the meeting was disciplinary, and that Mr. Barile should bring his Union representative with him. Mr. Barile attempted to arrange for Union Recording Secretary D [REDACTED] M [REDACTED] to attend the meeting, but he was not available. Mr. Barile so advised Ms. B [REDACTED].

² As the only issue before me concerns Mr. Barile’s subsequent suspension, it is not necessary for me to resolve whether or not he properly called out on [REDACTED] and [REDACTED].

and he subsequently learned that Mr. Y [REDACTED] had arranged for another Union official, E [REDACTED] B [REDACTED] to attend the meeting as a Union representative.

The [REDACTED] meeting took place at a conference room in Mr. Y [REDACTED]'s office at [REDACTED]. The attendees at the meeting were Mr. Y [REDACTED] IT Manager C [REDACTED] A [REDACTED] Mr. Barile, and Mr. B [REDACTED]. Because there are significant differences in the recollections of the witnesses who testified about the meeting, I will summarize them separately.

Mr. Y [REDACTED] testified that he did not consider the meeting to be a disciplinary meeting. Rather, he said that the purpose of the meeting was "progressive counseling" as far as he was concerned. At the outset of the meeting he read aloud a memorandum he had previously prepared. The memorandum stated that Mr. Barile did not follow the proper procedures on [REDACTED] and [REDACTED] failed to contact his immediate supervisor, and gave indirect and evasive answers to the questions raised in the [REDACTED] email conversation. It also set forth the procedure Mr. Y [REDACTED] wanted employees to use for calling out sick, and stated that repeated violations of this nature would result in formal disciplinary action. Although the meeting had begun cordially, when Mr. Barile understood that a copy of the memorandum would be put in his personnel file, he stood up and started screaming and raving. Mr. Barile's face turned red, and he screamed that the memorandum should be taken out of his file, that Mr. Y [REDACTED] knew him personally as an umpire for his (Mr. Y [REDACTED]'s) son's baseball league. Mr. Barile continued that it was not fair, that there was more going on at the prison than Mr. Y [REDACTED] knew, and how could Mr. Y [REDACTED] do this to him. Mr. Barile walked back and forth with his arms flailing, and went on in this manner for "another 14 or 15 minutes." Mr. Y [REDACTED] said he was concerned for Mr. Barile's safety based on the way he was acting out and he characterized Mr. Barile's screaming as agitated, upset, very emotional, out of control and losing control of his faculties. Mr. Y [REDACTED] said that he had not previously participated in meetings where this kind of conduct occurred and that Mr. Barile was not violent and did not physically threaten him. Mr. Y [REDACTED] said he felt "mentally threatened" by Mr. Barile's conduct. He asked for Mr. A [REDACTED]'s and Mr. B [REDACTED]'s assistance in calming Mr. Barile down, and when they were unsuccessful in doing so, Mr. Y [REDACTED] terminated the meeting, left the conference room where the meeting was taking place, went down the hall to his office, and closed the door. Mr. B [REDACTED] later came back to his office without Mr. Barile, and Mr. Y [REDACTED] suggested that Mr. Barile get EAP assistance or counseling for anger management and offered to arrange for him to have the rest of the day off on vacation rather than return to work.

Mr. A [REDACTED] was Mr. Barile's second-level supervisor at the time of the meeting. He testified that the purpose of the meeting was to explain to Barile the procedure to be used when he called out sick.³ Mr. A [REDACTED] described Mr. Barile as

³ When Mr. A [REDACTED] was asked on cross-examination whether the purpose of the meeting was disciplinary or counseling, he said that the purpose of the meeting was "not even counseling," and that the meeting was "just" to explain to Mr. Barile the

a "calm and quiet" employee who normally "doesn't speak loudly," but that Mr. Barile responded to the memorandum given to him and the Union delegate by being very loud, yelling, standing up, and acting "out of control." Mr. Barile complained that it was not proper to call him to a meeting like this. A [REDACTED] was asked on both direct and cross-examination about the length of time that Barile continued to yell. He answered that he did not know exactly how long the yelling went on, but that it was "a couple" or "at least 3" minutes. Mr. A [REDACTED] said he had never had a subordinate employee react in this manner. Both the Union delegate and Mr. A [REDACTED] told Mr. Berile to calm down, but he did not. Mr. A [REDACTED] also testified that Mr. Barile did not make any threats of violence at the meeting and that, after Mr. Barile stood up, Mr. Y [REDACTED] ended the meeting.

M [REDACTED] R [REDACTED] is an Executive Assistant in the Office of Innovation and Technology. Her desk is located about 25 feet from the conference room in which the [REDACTED] meeting took place. She testified that, as she was seated at her desk during the meeting, she heard loud yelling from the closed conference room where the meeting was taking place. She could not make out the words, but wondered what was going on and whether she should call security. The yelling went on for a couple of minutes at a "pretty loud" volume that she had not ever heard in the office before. She left her desk and walked towards the conference room. As the yelling continued, she talked briefly with the receptionist about what was going on and whether she should call security, then continued to [REDACTED] S [REDACTED] R [REDACTED]'s office. She reported the yelling to R [REDACTED] and [REDACTED] C [REDACTED] P [REDACTED], who was meeting with R [REDACTED] at the time. R [REDACTED] and P [REDACTED] said that they would take care of the situation. Ms. R [REDACTED] returned to her desk, and no calls were actually made to security. Although employees in neighboring offices saw her reactions to the yelling coming from the conference room, they remained in their offices and did not say anything to her about it.

[REDACTED] R [REDACTED] testified that he was in his office meeting with [REDACTED] P [REDACTED] when Ms. R [REDACTED] reported to them that something was happening in the conference room. Ms. R [REDACTED] seemed panicked, and Ms. P [REDACTED] and he followed Ms. R [REDACTED] out of his office. Mr. R [REDACTED]'s office is about 50 or 60 feet from the conference room, and R [REDACTED] did not hear any yelling himself, but found that some people had gathered in Y [REDACTED]'s office.

Mr. Barile was the last witness to testify about the [REDACTED] meeting. He stated that the meeting began with a question from Mr. B [REDACTED] asking what they were there for, to which Mr. Y [REDACTED] responded that he wished to speak, whereupon he read a memorandum to Mr. Barile. Mr. Barile said that he remained calm after Mr. Y [REDACTED] read the letter. He told Mr. Y [REDACTED] that he was a 33- or 34-year employee with no discipline for absenteeism or lateness, and asked why he had been called down to

procedure on how to call out when he would be absent. When he was then asked if a failure to call out properly would normally be something that he would put in someone's personnel file, he said that it would not be.

meet directly with Mr. Y [REDACTED] skipping five levels of management. Mr. Barile also asked why Mr. Y [REDACTED] wanted to meet with him, when he had previously told Mr. Barile he was too busy for Mr. Barile to send him emails, and why Mr. Y [REDACTED] was singling him out. Mr. Barile said that he had brought in a note for the [REDACTED] and [REDACTED] absences, that no one had called him or questioned the reasons for the absences, and that the secretary to whom he spoke when he called in had said that she would email every supervisor in the office about the absences. Mr. Barile stated that at the [REDACTED] meeting he asked Mr. A [REDACTED] if the email from the secretary was enough information for him, and that Mr. A [REDACTED] responded that it was. Mr. Barile testified that Mr. Y [REDACTED] appeared flustered by Mr. A [REDACTED]'s response, became agitated, and said that the meeting was over. Mr. Barile stated that he again asked why he had been called down to meet "for this," pointed out Mr. A [REDACTED]'s statement that the emails from the secretary were enough, and reminded Mr. Y [REDACTED] that they knew one another. Mr. Y [REDACTED] repeatedly said that the meeting was over, and as he and Mr. A [REDACTED] got up to leave the room, Mr. Barile got up also and continued to ask Mr. Y [REDACTED] to talk "man to man" and "iron this out." Mr. Y [REDACTED] and Mr. A [REDACTED] left the conference room despite Mr. Barile's pleas, leaving the door open. Mr. Barile stated that he is passionate and generally speaks loudly, but that he was not yelling during the meeting.

Mr. Y [REDACTED] testified that he met that afternoon with CIO Charles Brennan to discuss the situation and to consider what discipline Mr. Barile should receive. Mr. Brennan wanted to terminate Mr. Barile, but Mr. Y [REDACTED] recommended that the discipline be limited to a five-day suspension. In view of Mr. Barile's years of service, Mr. Y [REDACTED] believed that the city owed him the opportunity to rehabilitate himself. Mr. Y [REDACTED]'s recommendation was adopted, and on August 3 Mr. Y [REDACTED] issued a recommendation that Mr. Barile be suspended for five days.

A disciplinary hearing was held on August 14. The record does not contain detailed evidence about the disciplinary hearing, but it appears that the hearing was conducted by Mr. Brennan, and that at the hearing Mr. Barile stated that he had received a "cancer scare" from his doctor that might have affected his behavior during the [REDACTED] meeting. At the arbitration hearing before me, Mr. Barile testified that in response to Mr. Brennan's request for documentation, he provided some medical information, but that it was disregarded and "never paid any attention to." Mr. Y [REDACTED] testified before me that he did not know at the time of the [REDACTED] meeting that Mr. Barile was sick, and that, while he was not furnished with any evidence of Mr. Barile's sickness, he believes that information about it was sent to Mr. Richardson.

Following the August 14 disciplinary hearing, Mr. Brennan issued a Notice of Suspension on August 31, directing that Mr. Barile be suspended for five working days from Friday, September 1 through Thursday, September 17.

POSITIONS OF THE PARTIES AND ANALYSIS

The City asserts that the grievance must be denied. Mr. Barile's uncontrollable anger turned what should have been a professional and calm meeting into an unprofessional and out of control one. Mr. Barile's disruptive behavior and loud and boisterous yelling was so serious that Ms. R [REDACTED] immediately brought it to the attention of office management and considered whether to call security to control the situation. The volume and content of Mr. Barile's screaming and raving was extremely alarming and concerning to Mr. Y [REDACTED]. Mr. A [REDACTED]'s testimony that he had never seen this type of outburst in the workplace corroborated Mr. Y [REDACTED] and made it clear that he was not exaggerating. The conduct was so severe that Mr. Brennan rightly considered whether Mr. Barile should be discharged, but adopted Mr. Y [REDACTED]'s recommendation of a five-day suspension. The City believes that the five-day suspension given to Mr. Barile was entirely reasonable, even lenient under the circumstances.

The Union asserts that in the [REDACTED] meeting Mr. Barile was defending himself against unjust discipline. Although the City denies that the meeting was a disciplinary meeting, the memo Mr. Y [REDACTED] prepared before the meeting says that repeated violations would result in discipline, and Mr. Y [REDACTED] said that the memo would be put in Mr. Barile's employee file. This rose to the level of discipline. There is no question about the things Mr. Barile said in the meeting, and they are the kinds of things he would be expected to say to defend himself. Mr. Barile should be believed when he says he didn't yell. He is a loud man, and he was responding to Mr. Y [REDACTED]'s telling him that the memo would be put in his file. But even if he did yell, his yelling stuck to the subject of defending himself as he was being disciplined. He didn't engage in or threaten violence, and he didn't call people names like "jerk" or "idiot." It must also be noted that when Mr. Y [REDACTED] left the room Mr. Barile stayed in the conference room and didn't follow him down the hallway. While Ms. R [REDACTED] was concerned about her safety and knocked on the door to interrupt a meeting of higher-level managers, the managers did not observe any misconduct, and the situation was never serious enough for anyone to actually call security. In evaluating Mr. Y [REDACTED]'s credibility and his judgment about Mr. Barile's answers to the questions he was asked by email, the arbitrator should note that during the hearing Mr. Y [REDACTED] was evasive in his answers to some questions from Union counsel, and had to be asked three times whether he was friends with Mr. Brennan before he admitted that Mr. Brennan's wife and his own wife are cousins. Mr. Y [REDACTED]'s version of events is hyperbole and overstatement, and Mr. Barile should not lose pay for that reason. Finally, it must be noted that during the [REDACTED] meeting there was no warning that Barile was engaging in conduct that could itself lead to discipline. The City has jumped the gun in suspending Barile, and it should not be permitted to use a sledge hammer to hit a gnat.

The collective bargaining agreement and Civil Service Regulations clearly set forth “just cause” as the appropriate standard for analyzing the suspension of Mr. Barile that is the subject of this case. In labor arbitration, the burden of establishing that there was just cause for the discipline generally rests on the employer who administered the discipline, and that is the principle I will apply in analyzing this case.

While all the circumstances of each case must be considered, the basic questions which must be answered are whether the employer has presented sufficient proof that the employee engaged in conduct which warranted discipline and whether the discipline was commensurate with the misconduct. Following careful consideration of all the evidence and arguments presented by both parties, I have concluded that, although Mr. Barile’s conduct warranted a written warning, it did not warrant the suspension he received.

The August 3 Recommendation for Disciplinary Action and the August 31 Notice of Suspension described Mr. Barile’s responses in the [REDACTED] email conversation as “at best insufficient” (August 3 document only) and “evasive, disrespectful, and [close to insubordination]” (both documents). The language of both documents appears to base the suspension in part on the [REDACTED] email conversation. Despite the quoted language, the City did not argue this point in detail at the hearing; in fact, it argued that the [REDACTED] meeting which resulted from the email conversation was not disciplinary in nature. I have evaluated the nature of the inquiry and Mr. Barile’s responses, and concluded that no discipline was warranted based on Mr. Barile’s email responses.

Contrary to the position taken by the City, I find that the [REDACTED] meeting was disciplinary in nature. Mr. Barile’s un rebutted testimony was that, after checking with Mr. Y [REDACTED], J [REDACTED] B [REDACTED] told him that the meeting was disciplinary and that he should bring his Union representative. The memorandum given to Mr. Barile at the meeting spoke of “formal discipline” in the event of any recurrence, and Mr. Y [REDACTED] said a copy would be put in Mr. Barile’s personnel file.⁴ These are sufficient to overcome Mr. Y [REDACTED]’s and Mr. A [REDACTED]’s assertions that the meeting was only “progressive counseling” or “not even counseling.”

There were considerable differences between the recollections of Mr. Y [REDACTED], Mr. A [REDACTED], Ms. R [REDACTED], and Mr. Barile as to just what happened in the [REDACTED] conversation, and the matter is not free from doubt. The critical testimony about the meeting, I believe, is that of Ms. R [REDACTED], the witness who was least involved in the

⁴ Mr. A [REDACTED]’s testimony at the hearing that he would not normally put a failure to call out properly in someone’s file gives added weight to my conclusion regarding the disciplinary nature of Mr. Y [REDACTED]’s statement at the meeting that he would put a copy of the memorandum in Mr. Barile’s file.

actual dispute. Mr. A [REDACTED]'s outline of the meeting matches Ms. R [REDACTED]'s description of events better than Mr. Berile's assertion that he remained calm throughout the meeting. Mr. Y [REDACTED]'s description of the meeting was significantly more dramatic than Mr. A [REDACTED]'s, and Mr. Y [REDACTED]'s estimation of the time was considerably longer than Mr. A [REDACTED]'s and Ms. R [REDACTED]'s. However, that does not require the conclusion that neither Mr. Y [REDACTED] nor Mr. A [REDACTED] is telling the truth, and the outline of the stories Mr. Y [REDACTED] and Mr. A [REDACTED] told about the meeting is similar. Mr. Barile's outline of the meeting is very different and, on balance, I believe the outline described by Mr. A [REDACTED] is more accurate than either Mr. Berile's or Mr. Y [REDACTED]'s. I conclude that, although the substance of the arguments raised by Mr. Barile was not improper, his yelling for the two or three minute period described by both Ms. R [REDACTED] and Mr. A [REDACTED] was a significant outburst and caused a significant disturbance in the working area. The Union's argument that the words spoken by Mr. Barile did not include any name-calling or threats, and that some latitude should be allowed because Mr. Barile was protesting what he believed to be unfair discipline, is correct. However, the length of the outburst, the fact that it took place in a professional office setting, and the reality of the disturbance it caused, lead to my conclusion that it warranted some discipline.

I find insufficient basis to sustain the City's contention that a suspension is warranted. While Ms. R [REDACTED]'s testimony was sufficient to convince me that Mr. Barile's conduct created a disturbance warranting discipline, it is clear from her testimony that a number of the employees who were present did not react as strongly as she did to the disturbance. Thus, there was no violence or threat of violence, it never became necessary to call security, and the length of the disturbance was limited to two or three minutes. This aspect of her testimony, coupled with Mr. Barile's long service with the City and the lack of any prior discipline for similar conduct,⁵ convince me that the suspension given to Mr. Barile should be reduced to a written warning.

Based on the above discussion, I find that the City has not met its burden of establishing just cause sufficient to sustain the suspension that was given to Mr. Barile. My Award, set forth below, will grant the grievance in part and deny the grievance in part.

AWARD

Having carefully reviewed all of the evidence and arguments presented by the parties, and for the reasons set forth above, the grievance is granted in part and denied in part.

⁵ There is also insufficient evidence to find that Mr. Barile's conduct during the [REDACTED] meeting was based on concerns he may have had about any medical condition.

The five-day suspension given to Mr. Barile is reduced to a written warning, and he is awarded full backpay calculated based on his wage and benefit rates at the time of the suspension.

I hereby affirm that the foregoing is my Opinion and Award in this case.

Dated: April 18, 2019

A handwritten signature in cursive script, appearing to read "Donald M. Spooner", is written over a horizontal line.

DONALD M. SPOONER
Arbitrator
Wayne, Pennsylvania