

AMERICAN ARBITRATION ASSOCIATION

In the Matter of Arbitration Between:

CITY OF PHILADELPHIA

Employer

and

OPINION
AND
AWARD

AFSCME LOCAL 159

Union

AAA Case 01-17-0004-4759

APPEARANCES:

For the City: Kia Ghee, Esquire
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For the Union: Jessica R. Brown, Esquire
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ARBITRATOR: Donald M. Spooner

OPINION

This case arose when Correctional Officer Sandra Faison received a 10-day suspension based on conduct that allegedly occurred on [REDACTED] and [REDACTED].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 February 22, 2019.

During the hearing, both parties were afforded the opportunity to present testimonial and documentary evidence and to cross-examine witnesses presented by the other party. At the conclusion of the hearing, the parties declined the opportunity to file briefs, but presented oral arguments in support of their respective positions. 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:

Whether or not there was just cause for the suspension of Sandra Faison.

The Union seeks as a remedy that the discipline be revoked, that records of the discipline be expunged from Officer Faison's records, and that she be awarded backpay. The City requests that I uphold the discipline and deny the grievance.

FACTS

The [REDACTED] and [REDACTED] incidents that led to Officer Faison's suspension took place at the Detention Center at 8201 State Road, Philadelphia. The witnesses presented by the parties were Correctional Officer Faison, Correctional Officer R [REDACTED] C [REDACTED], Correctional Officer G [REDACTED] S [REDACTED], Lt. Gerald Simmons, Management Trainee Staci Rice-Rozenblad, and Deputy Warden Patricia Powers.

Evidence Concerning the [REDACTED] and [REDACTED] Incidents:

Officer C [REDACTED] has been a Correctional Officer at the Detention Center for six years. At the time of the incidents that gave rise to this case, Officer C [REDACTED] was assigned to the 3 PM to 11PM shift. Officer C [REDACTED] testified that, after she clocked

¹ All dates referred to in this Opinion and Award are in 2016, unless otherwise noted.

in on [REDACTED], she was waiting near the time clock, where a number of employees had congregated, for her shift to begin. While she was waiting, Officer Faison shoved her as she moved through the group of congregated employees, telling her (Officer C [REDACTED]) that she should move out of the way, and that if she had moved out of the way, she (Officer Faison) wouldn't have to move her (Officer C [REDACTED]). Although Officer Faison did not ask Officer C [REDACTED] to excuse her, Officer C [REDACTED] did not report the incident at that time; she decided to try to resolve it privately first.

The next time Officer C [REDACTED] saw Officer Faison was at the beginning of her shift on [REDACTED]. As she was on her way to her assigned post in I Dorm, she saw Officer Faison at her post, a desk in the Social Service Corridor. Officer C [REDACTED] approached Officer Faison and asked if she could speak to her for a second. Officer C [REDACTED] then said that she would appreciate it if Officer Faison didn't put her hands on her again. Officer Faison responded that the incident Officer C [REDACTED] was referring to took place a week ago, took off her glasses and necktie, and began jumping around and yelling as though she wanted to fight. Officer Faison gave an address in North Philadelphia and said that Officer C [REDACTED] could meet her there. Officer C [REDACTED] did not raise her own voice. As Officer Faison continued fussing and loudly carrying on, other employees came into the hallway, and the incident ended without any physical interchange between the two Officers. Though she herself received a reprimand, Officer C [REDACTED] testified that she was scared and embarrassed by her interchanges with Officer Faison.

Officer S [REDACTED], a 12-year employee at the Detention Center, testified that she did not observe the beginning of the [REDACTED] interchange between Officers C [REDACTED] and Faison, but that she heard screaming and yelling in the Social Services Corridor, which continued after she entered the Corridor. She observed that Officer Faison had taken off her glasses and tie and was shouting more than Officer C [REDACTED], but Officer S [REDACTED] said did not pay much attention to what was being said. She could not hear what Officer C [REDACTED] said.

Officer Faison has been employed in the Philadelphia Prison System for 24 years. She has worked the 7 AM to 3 PM shift at the Detention Center since 2014. At the end of her shift on [REDACTED] Officer Faison had an errand to do in the Warden's office, which required her to walk through the area where other employees had gathered near the time clock. Officer C [REDACTED] was involved in a conversation with Officer B [REDACTED] in front of the door through which Officer Faison was going on her way to the Warden's office. Officer Faison admitted that she brushed up against Officer C [REDACTED] as she squeezed between her and Officer B [REDACTED] and maintained that she said, "Excuse me" to Officer C [REDACTED] when she brushed up against her.

On [REDACTED] Officer Faison was leaving the bathroom near her post when she was approached by Officer C [REDACTED]. Officer C [REDACTED] told her that the next time Officer Faison touched her, she (Officer C [REDACTED]) would hit her in the mouth. Officer Faison responded that Officer C [REDACTED] was "not going in my mouth," and admitted that an argument ensued. She said that, though both she and Officer C [REDACTED] were

loud, she herself was louder. She denied taking off any clothing or her glasses, or challenging Officer C [REDACTED] to come to an address in North Philadelphia, noting that she resides in West Philadelphia.

Evidence Concerning the City's Investigation and the Suspension:

Lt. Simmons investigated the [REDACTED] and [REDACTED] incidents. He spoke to and obtained written statements from six individuals, including the three correctional officers who testified at the arbitration hearing. Based on Lt. Simmons' investigation, he issued an Employee Violation Report (EVR) to Officer Faison on January 7, 2017. The Employee Violation Report described Officer Faison's conduct as follows:

[O]n [REDACTED] you were involved in a verbal altercation with [Officer C [REDACTED]] at the Detention Center during the 3pm-11pm shift. You submitted a memorandum stating that you had a dispute about a previous incident that you both acknowledged became physical (pushing) on [REDACTED]. As a result of the physical incident taking place and not being reported led to (*sic*) you and Officer C [REDACTED] once again being engaged in a hostile and unprofessional work environment. At no time is Work Place Violence condoned or tolerated.

Lt. Simmons testified that he had been instructed to give EVR's to both Officer Faison and Officer C [REDACTED] based on the [REDACTED] and [REDACTED] incidents.

A formal disciplinary hearing was held before the Disciplinary Board on March 24, 2017. The Disciplinary Board heard testimonial evidence from both Officer Faison and Officer C [REDACTED] and also considered the Investigation Report prepared by Lt. Simmons. Deputy Warden Powers testified that the Disciplinary Board did not find Officer Faison to be credible, and that she believes that Officer Faison was the aggressor. Following consideration of all the evidence presented to it, the Disciplinary Board concluded that the charges should be sustained. It then reviewed Officer Faison's file and found that it included an Employee Warning Record dated January 4, 2017. Accordingly, relying on the remedies suggested in the 2nd Offense column of the Disciplinary Matrix for Represented Employees, the Disciplinary Board concluded that Officer Faison should be suspended for 10 days. Summarizing its conclusions in a Memorandum dated March 24, 2017, the Disciplinary Board found that Officer Faison violated General Orders 1, 2, 5, 6, and 25, and the Employee Code of Conduct and recommended a 10-day suspension. The Disciplinary Board's recommendation was adopted, and a Notice of Suspension was issued to Officer Faison on April 21, 2017, advising her that the suspension would be served beginning on May 1, 2017.

Deputy Warden Powell explained the Disciplinary Board's conclusion that Officer Faison's conduct violated General Orders 1, 2, 5, 6, and 25, and the basic expectations set forth in the Employee Code of Conduct. General Orders 1 and 2 are

general in nature and are automatically included in disciplinary findings. General Order 5 requires that employees “cooperate in maintaining the security and good order of the institution,” and General Order 6 makes employees responsible for “maintaining professional deportment” and refraining from “unprofessional or illegal behavior.” General Order 25 requires employees to “demonstrate mutual respect.” The Disciplinary Board concluded that Officer Faison’s physical contact with Officer C [REDACTED] loud screaming and yelling, removing her glasses and tie, and posturing violated these General Orders and the Employee Code of Conduct.

POSITIONS OF THE PARTIES

The City’s Position:

The City believes that the suspension of Officer Faison must be upheld and the grievance denied. The City carefully investigated both incidents. In addition to interviewing Officer Faison and obtaining a statement from her, it interviewed and obtained statements from five additional witnesses. Officer Faison’s conduct on both [REDACTED] and [REDACTED] warrants discipline. Officer Faison was the aggressor in the [REDACTED] incident. Officer Faison admitted that, as she plowed through the group of employees, she initiated contact with Officer C [REDACTED]. Her statement that Officer C [REDACTED] should have gotten out of the way misplaces the responsibility for the physical contact initiated by Officer Faison towards another employee.

Discipline is also warranted concerning the [REDACTED] incident. Both Officer C [REDACTED] and Officer S [REDACTED] testified about Officer Faison’s loud arguing and aggressive gestures, including taking off her glasses and undoing her tie. As with the [REDACTED] incident, no witness stated that Officer Faison was not the aggressor. Deputy Warden Powell’s testimony indicates that the Disciplinary Board carefully considered the credibility of both Officer Faison and Officer C [REDACTED] and concluded that Officer Faison’s version of the facts was not credible.

The Disciplinary Board properly concluded that Officer Faison violated General Orders 1, 2, 5, 6, and 25, and the Employee Code of Conduct. Officer Faison’s screaming and threatening conduct occurred inside the Detention Center’s secure perimeter, in a location where it could easily have been seen or heard by inmates. The confrontation with Officer C [REDACTED] could easily have turned into a physical confrontation. The suspension was based on the City’s strict enforcement of its rules against workplace violence, and the 10-day suspension given to Office Faison is in the range of appropriate discipline set forth in the Disciplinary Matrix for second offense violations of General Orders 5, 6, and 25.

The Union's Position:

The City has not proven that there was just cause for suspending Officer Faison. The [REDACTED] incident involved only accidental brushing against Officer C [REDACTED] by Officer Faison, for which she apologized. The [REDACTED] incident was initiated by Officer C [REDACTED], who admits that she approached Officer Faison. Officer C [REDACTED] physically threatened Officer Faison as she approached. While an argument ensued, Officer Faison is just a louder talker than Officer C [REDACTED]. Even if some discipline of Officer Faison is appropriate, there is no warrant for the 10-day suspension Officer Faison received.

The City did not prove that Officer Faison violated General Orders 2 and 25. General Order 2 deals with lack of knowledge as an excuse, and General Order 25 is concerned only with discriminatory conduct against another employee. Neither of those is an issue in this case.

It was inappropriate to use the January 4, 2017 warning to increase the level of discipline given to Officer Faison. The incidents for which Officer Faison was suspended occurred before January 4, 2017. As set forth in the Represented Employee Disciplinary Procedures memorandum dated April 8, 2016, the reckoning period begins on the date the first offense was committed.

ANALYSIS

The parties stipulated that their collective bargaining agreement provides that "just cause" is the standard for discipline of bargaining unit employees. It is well settled that, with few exceptions, in labor arbitration, the burden of demonstrating that just cause existed for the discipline is on the employer. This principle is based on the fact that it was the employer, not the union, who administered the discipline in question. I have concluded the principle should apply in this case.

In making determinations of whether the burden has been met, all the circumstances of each case must be considered. Consideration must be given to whether the employer has presented sufficient proof that the employee engaged in improper conduct warranting discipline. In cases where, as here, the incidents leading to the discipline have been the subject of a pre-disciplinary investigation and hearing, consideration is frequently given to appropriate due process considerations. Whether the conduct warrants the particular discipline imposed by the employer must of course also be considered.

Careful consideration of all the evidence presented by the parties convinces me that in this case the City has shown that the conduct in which Officer Faison engaged was serious enough to warrant discipline. However, I have concluded that the 10-day suspension meted out to Office Faison was not the appropriate remedy.

I have carefully evaluated the testimony of Officer Faison, Officer C [REDACTED] and Officer S [REDACTED]. Officer Faison's and Officer C [REDACTED]'s recollections of the [REDACTED] and [REDACTED] incidents differ from one another. Officer S [REDACTED]' testimony is important because she, a fellow employee of both Officer Faison and Officer C [REDACTED], corroborated portions of Officer C [REDACTED]'s recollections concerning the [REDACTED] incident that differed from Officer Faison's recollections. Particularly important were Officer S [REDACTED] recollection that Officer Faison took off her glasses and necktie and that the volume and tone of Officer Faison's voice was sufficient to alert nearby employees to the conflict and bring them out of their offices. Having evaluated all the testimony concerning the [REDACTED] and [REDACTED] incidents, I found Officer C [REDACTED]'s version of the incidents to be more persuasive than Officer Faison's.

Compliance with the General Orders and Employee Code of Conduct is important to the safety and protection of both employees and inmates. What is most important about the [REDACTED] incident is that it involved physical contact initiated by Officer Faison and that Officer C [REDACTED] believed it was serious enough to warrant a followup conversation. Even if Officer Faison did not think the incident worth reporting on [REDACTED], her response when Officer C [REDACTED] approached her on [REDACTED] in the Social Service Corridor, including threatening Officer C [REDACTED]² taking off her glasses and necktie, and gesturing as though she were inviting Officer C [REDACTED] to fight were not appropriate responses, and the City was warranted in concluding that discipline of Officer Faison was warranted. The City also disciplined Officer C [REDACTED] for her conduct, though neither party submitted evidence about what discipline she received.

The City's conclusion following the investigation and disciplinary hearing that Officer Faison's conduct violated General Orders 1, 2, 5, 6, and 25, and the Employee Code of Conduct was also warranted. General Orders 1 and 2 require knowledge of the appropriate rules and legal requirements which apply at the Detention Center and provide that lack of knowledge thereof will not be an excuse for non-compliance, and I rely on Deputy Warden's testimony that those General Orders are automatically included in written disciplinary notices.³ General Order 5, which requires employees to "cooperate in maintaining . . . security and good order," and General Order 6, which requires employees to maintain "professional deportment" and refrain from "unprofessional or illegal behavior," were both clearly implicated. While Union Counsel argues that the language of General Order 25 indicates that it should be applied only in instances of discrimination, the first sentence of General Order 25 starts with the general requirement that, "All employees of the PPS shall demonstrate the mutual respect for one another," and the phrase at the end of that sentence makes it clear that mutual respect is expected "without . . . restriction."

² In the context of what followed, Officer Faison's admitted statement that Officer C [REDACTED] was "not going in my mouth" could be seen as inappropriate workplace behavior.

³ Union Counsel did not cite an arbitration award or other precedent to support her argument that General Order 2 should not be applied in this case.

While Officer Faison's conduct on [REDACTED] and [REDACTED] warranted some discipline, I have concluded that the City went too far in suspending her for 10 days. The City relies on its interpretation of the Disciplinary Matrix for Represented Employees as the basis for its conclusion that a 10-day suspension was warranted. In particular, the City argues that Faison's conduct in this case was a "2nd Offense" to the disciplinary warning she received on January 4, 2017, and it points to the suggested disciplinary measures in the 2nd Offense column of the Matrix for General Orders 5, 6, and 25 to justify the 10-day suspension of Officer Faison. The City's argument is based on the Disciplinary Board's conclusion that this case falls within the two year "Reckoning Period" for violations of General Orders 5, 6, and 25.

Similar language concerning the meaning of the term "reckoning period" appears at two places in the April 16, 2016 memorandum concerning Represented Employee Disciplinary Procedures. The following language appears on pp. 1-2 of that memorandum:

Reckoning periods are recognized as the period of time during which an employee is expected to have a record free of any type of offense.

All reckoning periods for offenses for which an employee has been found guilty shall begin on the date the first offense was committed. Second, third, and subsequent violations committed during the reckoning period shall be treated as second, third, etc., offenses.

Any type of offense committed after the reckoning period expires counts as a first offense.

The following very similar language appears on pp. 8-9 of the memorandum, in the portion of the memorandum explaining the various columns of the Disciplinary Matrix:

The Reckoning Period Column: Reckoning periods are recognized as the period of time during which an employee is expected to have a record free of any type of offense for which he/she was found previously guilty. All reckoning periods for offenses for which an employee has been found guilty shall begin on the date the first offense was committed. Second, third, and subsequent violations of the same section committed during the reckoning period of the first violation shall be treated as second, third, etc., offenses.

The quoted language makes it clear that what counts for purposes of establishing whether an offense is a first or second offence is the dates on which the offenses occurred. The last sentence of the quotation from pp. 1-2 of the memorandum makes it clear that, if at the time of the offense, the reckoning periods for all previous discipline have expired, the offense will be treated as a first offense. The conduct in

this case occurred on [REDACTED] and [REDACTED]. Both those dates are *before* the January 2, 2017 date of the conduct described in the January 4, 2017 warning. There appears to be no basis for the Disciplinary Board's conclusion that Officer Faison's offenses in this case should be treated as a 2nd Offense. During oral argument at the end of the hearing counsel for both parties referred to the entries for General Orders 5 and 6 in the 1st Offense column of the Disciplinary Matrix. I believe that it is to those entries that the Disciplinary Board should have referred. Accordingly, as a 5-day suspension is the minimum recommended discipline for both General Order 5 and General Order 6, I have concluded that the 10-day suspension Officer Faison received should be reduced to a 5-day suspension.

Based on the above discussion, I find that the City has not met its burden of establishing just cause sufficient to sustain the 10-day suspension of Officer Faison. My Award, set forth below, will grant the grievance in part and deny the grievance in part.

AWARD

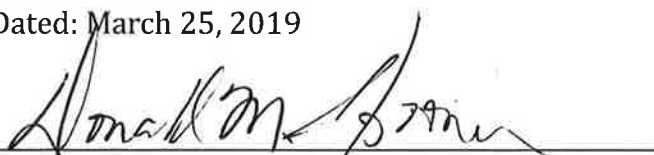
Having carefully reviewed all of the evidence and arguments presented by the parties, and for the reasons set forth above, the grievance is granted in part and denied in part.

The suspension is reduced to a 5-day unpaid suspension. The record does not indicate whether Officer Faison in fact served the 10-day suspension in May 2017, as set forth in the Notice of Suspension. If she in fact served the suspension at that time, or at some other time, she should be given full backpay and any appropriate restoration of benefits for a period of 5 days. Any backpay or restoration of benefits should be computed using the wages and benefit rates in effect at the time she served the suspension.

I will retain jurisdiction of the grievance for 30 days following the issuance of this Award to resolve any disputes regarding the implementation of the Award or the remedy I have directed. If either the City or the Union advises me by that time of a dispute concerning the implementation or remedy, then my jurisdiction will continue for as long as is required to resolve that dispute. If neither party advises me of a dispute regarding the implementation or remedy, my jurisdiction of the grievance will end 30 days following the issuance of this Award.

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

Dated: March 25, 2019



Donald M. Spooner, Arbitrator
Wayne, Pennsylvania