

AMERICAN ARBITRATION ASSOCIATION

In the Matter of Arbitration Between :
: FRATERNAL ORDER OF POLICE, LODGE NO. 5 :
: AND : AAA Case No. 01-19-0000-3398
: (Discharge / Khalil D. Shaheed)
: CITY OF PHILADELPHIA :
:

OPINION AND AWARD

Hearing:

June 26, 2019
Philadelphia, Pennsylvania

Appearances:

For Fraternal Order of Police, Lodge No. 5:
Ralph J. Teti, Esquire
Willig, Williams & Davidson

For City of Philadelphia:
Daniel R. Unterburger, Esquire
City of Philadelphia Law Department
Labor & Employment Unit

Before:

Lynne M. Mountz
Impartial Arbitrator

PROCEDURAL AND FACTUAL BACKGROUND

The instant dispute arises from a grievance filed on behalf of Khalil D. Shaheed ("Grievant") alleging that the City of Philadelphia ("City") violated the terms and conditions of its collective bargaining agreement ("CBA") with the Fraternal Order of Police, Lodge No. 5 ("FOP") when it discharged him from employment without just cause. (Exhibit J-1).

Prior to his termination, Grievant had served as a Police Officer with the City for almost eleven (11) years. Up until the events of [REDACTED] Grievant had all satisfactory performance evaluations, multiple commendations and no discipline in his record. (Exhibits J-7, J-8).

On [REDACTED], Philadelphia Police Officers N [REDACTED] K [REDACTED] and T [REDACTED] H [REDACTED] responded to a call involving reported domestic violence at Grievant's residence. Because the call involved an off-duty officer, Lieutenant S [REDACTED] C [REDACTED] and Sergeant R [REDACTED] R [REDACTED] also responded to the call. There were two adults present at the residence, Grievant and his wife, along with their young daughter. Ms. S [REDACTED] had contacted the police to report that a verbal argument between her and Grievant had turned into a physical altercation.

Each of the officers present participated in interviewing Grievant and Ms. S [REDACTED]. The versions of the incident provided by the two were substantially consistent. Generally, Grievant and his wife had an argument that escalated into pushing and shoving one another and Grievant then punching his wife in the jaw with a closed fist. Throughout the interviews, Grievant acknowledged that he was a City Police Officer and that he had struck his wife.

After they left the premises, Officer K [REDACTED] prepared a Domestic Violence Report. (Exhibit C-1). An investigation was opened by Internal Affairs Division ("IAD") and assigned to

Lieutenant Peter Sandusky. Grievant, his wife and each of the officers were interviewed as part of the investigation. (Exhibit C-2). The matter was referred to the District Attorney's Office for review and consideration of any criminal charges on November 15, 2017. Grievant was placed into an Accelerated Rehabilitation Disposition Program ("ARD"). It was agreed that if he successfully completed the program that information would be provided to the District Attorney's Office for further review. (N.T. 77).

In December 2018, Sergeant Thomas Brown was assigned to the IAD. He became responsible for several cases being handled by Lt. Sandusky who was preparing to retire. (N.T. 65-68). The investigation involving Grievant was one of those cases. (N.T. 68-69). On January 4, 2019, Sgt. Brown was informed by the District Attorney's Office that Grievant had not completed the ARD program. He was advised to forward an arrest warrant affidavit for Grievant to that office for approval. (N.T. 73-75, 77-78, 89-90; *See*, Exhibit C-5).

Sgt. Brown prepared an Affidavit of Probable Cause for Arrest Warrant for Grievant, with a charge of Simple Assault, an M2 offense. In support of the charge, Sgt. Brown wrote:

On [REDACTED], the complainant, NMS, 30, B/F, was interviewed by the Internal Affairs Division and stated that at approximately 8:50 am, while inside her address on the [REDACTED], she was involved in a verbal argument with Khalil Shaheed, 36, B/M. During the argument, Khalil Shaheed punched her in the face with a closed fist, striking her in the face on the right side, near her jaw. Khalil Shaheed is the complainant's husband.

(N.T. 74-75; Exhibit C-3). The Affidavit was forwarded to the District Attorney's Office and was approved. (N.T. 76). An arrest warrant for Grievant was issued on January 9, 2019. (N.T. 76-77; Exhibit C-4).

After receiving the arrest warrant, Sgt. Brown prepared Forms 75-18, filing disciplinary charges against Grievant. (N.T. 81-83; Exhibit C-6). Those charges are as follows:

ARTICLE 1: Conduct Unbecoming

SECTION 1-§001-10: Unspecified

SPECIFICATION: On Tuesday, [REDACTED] approximately 8:50 AM, 18th District police officers responded to a domestic incident at your residence in the [REDACTED]. Upon their arrival, police were met by your wife, N [REDACTED] M [REDACTED] S [REDACTED], who reported that you and she were involved in a verbal dispute. During the dispute, she described a domestic assault, reporting that you pushed her into a railing in the hallway and punched her in the jaw with a closed fist, striking her in the face on the right side, near her jaw.

ARTICLE 1: Conduct Unbecoming

SECTION 1-§026-10: Engaging in any action that constitutes the commission of a felony or a misdemeanor which carries a potential sentence of more than (1) year. ... Neither a criminal conviction nor the pendency of criminal charges is necessary for disciplinary action in such matters.

SPECIFICATION: On Tuesday, [REDACTED] complainant N [REDACTED] M [REDACTED] S [REDACTED], was interviewed by the Internal Affairs Division and stated that approximately 8:50 AM, while inside her address on the [REDACTED] she was involved in a verbal argument with you, her husband. During the argument, you punched her in the face with a closed fist, striking her in the face on the right side, near her jaw. An affidavit of Probable Cause for Arrest Warrant was approved for the charge of PCC 2701(a)(1), Simple Assault, M2, under DC# [REDACTED].

(Exhibit C-6).

On January 11, 2019, Grievant was formally charged on the Arrest Warrant. He was also presented with the disciplinary charges against him and advised that he was being immediately suspended for a period of thirty (30) days with the intent to dismiss. (Exhibits C-2, C-5). The Philadelphia Police Commissioner took Direct Action to terminate Grievant's employment. (Exhibit C-7).

The instant grievance ensued. (Exhibit J-1). Subsequent to the filing of the grievance, the criminal charge against Grievant was dismissed. (N.T. 91-92; Exhibit C-2). The matter, remaining unresolved between the parties, proceeded to arbitration before the undersigned on June 26, 2019. During the hearing, the parties were afforded full opportunity to examine and

cross-examine witnesses, submit documentary evidence and make arguments on behalf of their respective positions. The parties waived their right to file post-hearing briefs.

The record was closed upon receipt of the notes of transcript from the hearing. The matter is now ready for disposition.

ISSUE

Whether the City had just cause to terminate Grievant from employment and, if not, what shall the remedy be?

RELEVANT CONTRACT PROVISIONS¹

ARTICLE XXI - GRIEVANCE AND ARBITRATION PROCEDURE

A. Definition

1. Grievances as defined herein shall be limited to contract violations, disciplinary suspensions, demotions, and discharges.

...

J. Authority of Arbitrator

The arbitrator selected shall have no authority to add to, subtract from or in any way alter the terms of this contract, Act 111 arbitration awards or the scale of wages set forth herein.

¹ Exhibits J-4, J-5.

RELEVANT SECTIONS
PHILADELPHIA POLICE DEPARTMENT DISCIPLINARY CODE²

ARTICLE 1
CONDUCT UNBECOMING

Section: 1-§001-10

Charge: Unspecified

1st Offense: Reprimand to Dismissal

...

Section: 1-§026-10

Charge: Engaging in any action that constitutes the commission of a felony or a misdemeanor which carries a potential sentence of more than (1) year. ... Neither a criminal conviction nor the pendency of criminal charges is necessary for disciplinary action in such matters.

1st Offense: 30 Days or Dismissal

POSITIONS OF THE PARTIES

CITY

The City had just cause to terminate Grievant for the disciplinary charges against him as evidenced in this proceeding. Four officers responded to the incident at Grievant's residence on [REDACTED]. They all reported the same thing: that Ms. S [REDACTED] said she had been punched in the face by Grievant and that Grievant admitted that he had punched his wife in the face. Clearly, this was a case of domestic violence.

Grievant was charged under two sections of Conduct Unbecoming in the Disciplinary Code. The first, unspecified, carries a disciplinary penalty from reprimand through

² Exhibit J-3.

dismissal for a first offense. The second, engaging in an action that constitutes a misdemeanor with a potential sentence exceeding one year, carries a penalty of a 30-day suspension or dismissal. Grievant was charged with Simple Assault, an M2 offense, that carries a potential sentence exceeding one year. It does not matter what happens to the criminal charges for purposes of disciplinary action. All that needs to occur is that an officer, whether on or off-duty, engages in the type of action that could be charged as a misdemeanor or felony with a potential sentence of more than one year. Such is the case in this matter.

Dismissal is contemplated for both charges with which Grievant was cited under the Disciplinary Code which is encompassed in the CBA between the City and the FOP. When an officer is charged with something that could be subject to a criminal penalty of a year or more, the Department has no choice but to administer discipline. Such behavior is inimicable with the trust that is placed in a public servant and police officer. This is especially true with respect to domestic violence.

Domestic violence has nothing to do with the pressures that police officers face on the job. If Grievant is unable to cope with the pressures of his job in his personal life, how would it be different with him out on the street with a gun.

Finally, Grievant had the opportunity to avoid the criminal charges entirely. He was placed into a diversionary program prior to any charges being filed. Grievant knew what was at stake and didn't take the program seriously enough to complete it, avoid criminal charges and save his job. The City had just cause not only to discipline Grievant, but to dismiss him. The penalty he received is contemplated by both of the charges that were bargained for as part of the contract, and the behavior in which he engaged is inimicable with being a police officer.

FOP

The City has the burden to establish not only that it had just cause to discipline Grievant, but that it had just cause for his dismissal. In order to establish if the penalty imposed in this case was appropriate, it is essential to weigh all of the evidence. Grievant's employment record with over ten years of service, no prior discipline, good performance evaluations and commendations must be balanced against one incident that occurred in [REDACTED].

There is no dispute about what occurred during that incident. Grievant did not try to hide any of the facts when interviewed by the officers responding to the scene. The Department now argues that what occurred was so serious and so inimicable to his position as a police officer that it had to dismiss him. The Department, however, took no steps to do so until fourteen months later.

Obviously the Department thought there was something to salvage with this officer. While Grievant was participating in a diversionary program, he continued to work in the Police Department in a no contact position. During the fourteen months that he worked in that capacity, there was no further investigation into the matter. There was no disciplinary action brought against Grievant based on the [REDACTED] incident or any other incident.

The Department did not act to dismiss Grievant until criminal charges were filed and an arrest warrant was issued after Grievant failed to complete the diversionary program. The Department argues that Grievant had an opportunity to avoid the criminal charges, but he essentially blew it. Failure to complete the ARD program, however, is not what Grievant was charged with. Moreover, the criminal charges were dismissed, leaving only disciplinary action for an incident that occurred a year and one-half earlier.

The Disciplinary Code does not require dismissal as a penalty in this case. There is discretion for a lesser penalty in both of the charges against him. No one is denying that domestic violence is a bad thing. In this case, there was one incident that might justify some discipline, but not dismissal when all of the factors are considered. The Department did not have just cause to dismiss Grievant and he should be given his job back under the circumstances.

DISCUSSION

The essential facts in this matter are not in dispute. Grievant, a ten year veteran police officer in the Department, was involved in an off-duty altercation with his wife on [REDACTED]. Grievant's wife called the police and four officers responded to the call. While there, the officers interviewed both Grievant and his wife who reported similar accounts of the incident. Specifically, the two had engaged in a verbal argument that escalated with mutual pushing and shoving and culminated with Grievant punching his wife in the face with a closed fist.

A report of the incident was filed and an IAD investigation was opened. The matter was referred to the District Attorney's office. As a result, Grievant was offered the opportunity to participate in an ARD program before any criminal charges were filed. Upon successful completion of the program, the District Attorney's office was expected to re-evaluate the matter with the potential outcome that no criminal charges would be filed over the incident. In the meantime, Grievant was reassigned to a no-contact position within the Department and continued to work until January 11, 2019.

Grievant failed to complete the ARD program. As a result, both criminal and disciplinary charges were filed. An arrest warrant was issued on January 11, 2019. The criminal charges were subsequently dismissed. The disciplinary charges were referred to the Commissioner who took Direct Action to dismiss Grievant from employment. The issue is whether there was just cause to do so.

In support of its position to terminate Grievant, the City contends that Grievant's conduct on [REDACTED] constituted Conduct Unbecoming under Sections 1-001-10 and 1-026-10. Both sections carry a maximum penalty of termination for a first offense. Grievant was arrested and criminally charged with a misdemeanor that carries a potential sentence exceeding one year. Notwithstanding the fact that the criminal charges were dismissed, Section 1-026-10 makes the underlying conduct subject to a 30-day suspension or dismissal. The City further asserts that Grievant failed to avoid the criminal charges by not completing the ARD program that was made available to him. His actions were inimicable with being a police officer and the Commissioner appropriately took action to dismiss him.

The FOP, in turn, argues that while some discipline might be appropriate for Grievant's conduct in [REDACTED], there is no just cause for his dismissal. Although the City contends that Grievant's actions were inimicable with his position as a police officer, they permitted him to remain working in the Department for fourteen months following the incident. Grievant was terminated from employment after criminal charges were filed against him. Those charges were dismissed. Grievant's dismissal was not required under the Disciplinary Code which permits discretion with respect to a penalty for his offense.

Although neither Grievant nor his wife presented testimony regarding the incident that occurred at their residence on [REDACTED] there can be no doubt on the record produced that Grievant engaged in an act of domestic violence. His conduct was attested to by three of the four officers who responded to the call that day. All three officers credibly testified that after interviewing Grievant and his wife, it was established that Grievant had in fact punched his wife in the face. The testimony offered was consistent with the police report that was filed at the time as well as with the statements the officers provided during the IAD investigation.

As a police officer, Grievant is expected to respond to calls of domestic violence. Clearly, his having engaged in such conduct himself is a serious breach of the duty he owes his Department and the public in general. Moreover, Grievant's conduct violated both sections of the Disciplinary Code with which he was charged. Thus, there is no question that the City has established just cause to discipline him. The critical issue is whether it had just cause to impose the ultimate penalty of dismissal.

After careful consideration of the record presented, including the well-defined and articulate arguments of the parties, I am constrained to find for the following reasons that just cause for Grievant's dismissal has not been established.

First and foremost, is the fact that the City waited fourteen months to discipline Grievant. Domestic violence is a serious offense and Grievant's action in punching his wife in the face cannot be justified in any way. It was wrong. Grievant's conduct did not, however, become more serious fourteen months after the incident. Grievant's actions on [REDACTED],

██████ violated the same sections of the Disciplinary Code on that date as they did when he was charged on January 11, 2019.

In the interim, the City reassigned Grievant and continued to employ him in the Department. The City evidenced a willingness to try and keep Grievant as a police officer. At the time, Grievant's conduct was not viewed as an offense requiring his removal from the force. He was not the subject of further investigation or any disciplinary action at all. It was not until it became known that Grievant had failed to complete the ARD program and criminal charges were filed that discipline in the form of dismissal took place.

The City correctly observes that Grievant most likely would have been able to avoid criminal charges if he had not failed to complete the ARD program. Failure to complete the ARD program, however, is not why Grievant was dismissed. There is no evidence of record that Grievant's continued employment with the Department was made contingent upon his successful completion of the program. While Grievant's failure to complete the program is a decidedly troubling fact, it is not in and of itself, a basis to terminate his employment.

As noted, the disciplinary charges were filed after the criminal charges were filed. The criminal charges were dismissed. Section 1-026-10 provides that, "[n]either a criminal conviction nor the pendency of criminal charges is necessary for disciplinary action in such matters." (Exhibit J-3). That provision clearly does not preclude the imposition of disciplinary action in this case just because Grievant's criminal charges were dismissed. On the other hand, it does not prevent the dismissal of those criminal charges from being a factor in weighing the penalty to be issued if disciplinary action is to be taken.

In an offer of proof with respect to the Commissioner's intended testimony,³ it was asserted that the Commissioner would testify, in part: that in instances where criminal charges are issued and Section 1-026-10 is applicable, the Commissioner's Direct Action is taken to terminate the employee; that he personally did not know any of the facts of the case, but when such severe penalties can attach it is in the Department's best interest to dismiss the employee; and, there was just cause for Grievant's dismissal. (N.T. 105).

The difficulty presented is that, while dismissal may be appropriate in many if not the majority of cases involving criminal charges and Section 1-026-10, just cause for dismissal requires the consideration and weighing of all of the relevant evidence. The Disciplinary Code is encompassed in the parties' CBA. The Disciplinary Code specifies that dismissal is the only penalty available for a first offense for several of the charges included under Article 1.⁴ Grievant is not charged with any of those offenses. The two charges against him do provide for dismissal as the maximum penalty for a first offense. The fact that there are disciplinary actions available other than dismissal reflects that there is some discretion in the penalty to be imposed. Encompassed within that discretion in Section 1-026-10 is a recognition of the serious nature of the offense by making the maximum suspension (30 days) the alternative to dismissal.

In this case, Grievant's work history reveals that for almost eleven years he served the Department well. He had no prior discipline and received several commendations. Grievant's performance evaluations were all satisfactory and included favorable comments from his

³ The Commissioner made the decision through Direct Action to terminate Grievant's employment. The Commissioner was scheduled to testify at the hearing but unfortunately was unable to do so. In his absence, the City's Counsel offered what the Commissioner would have testified to had he been present. (N.T. 99-105).

⁴ See, for example, Sections 1-002-10 and 1-007-10. (Exhibit J-3).

reviewing officers. For example, comments in Grievant's last performance evaluation, dated June 1, 2018, and issued after the domestic incident, include: "Since you have been under my supervision you have proven to be an excellent officer. You perform all your duties efficiently and in a professional manner. You seldom require supervision. You interact well with your fellow officers, supervisors and with the public. I know that your [sic] have been recently detailed to RTCC as a result of a domestic issue. I look forward to your return to our District. You are an asset to the Police Department." (Exhibit J-7).

Weighing against the penalty of dismissal in this matter are those factors set forth above. These include: the failure to discipline Grievant for his conduct at all until fourteen months following the domestic incident; Grievant's cooperation when interviewed by the officers at his residence; the willingness of the City to continue to employ Grievant for fourteen months notwithstanding his conduct in the domestic incident; the dismissal of criminal charges related to the domestic incident; Grievant's length of service and work record with the Department; and the discretion for imposing a lesser disciplinary penalty for a first offense within the Disciplinary Code.

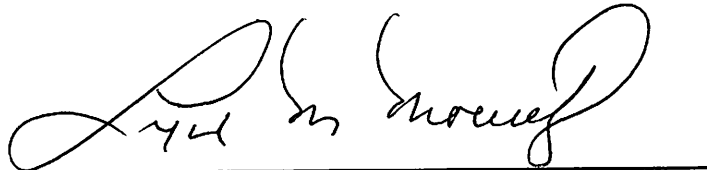
Based upon this and the record as a whole, it is determined that just cause has not been established for Grievant's dismissal. Just cause does exist for a thirty (30) day suspension without pay, a penalty that is provided for in the Disciplinary Code for Grievant's offense.

This decision was not made easily and in no way condones Grievant's conduct in this matter. Grievant should understand that any similar behavior or misconduct in the future will inevitably result in his termination from employment.

AWARD

The Grievance is Sustained in Part. The Grievance is sustained insofar as the City did not have just cause to dismiss Grievant. Just cause exists to suspend Grievant for thirty (30) days without pay.

The City is directed to reinstate Grievant and make him whole in all respects, including lost wages and benefits, except for the period of time covered by the suspension. It is specifically intended that any back pay due Grievant under this Award be offset by earned income and/or unemployment compensation received by Grievant during the relevant period of time.

A handwritten signature in black ink, appearing to read "Lynne M. Mountz", written over a horizontal line.

Lynne M. Mountz, Arbitrator

Dated: August 23, 2019

Harrisburg, PA