

AMERICAN ARBITRATION ASSOCIATION

In the Matter of Arbitration Between the

FRATERNAL ORDER OF POLICE, LODGE #5,

"Union,"

-and-

CITY OF PHILADELPHIA,

"Employer."

AAA Case No. 01-18-0004-7301
(P/O Michael J. Lee (204488) - Transfer)

**OPINION
AND
AWARD**

**Before
Robert C. Gifford, Esq.
Arbitrator**

Appearances:

For the Union:

James Glowacki, Esq.
Willig Williams & Davidson

For the Employer:

Frank Wehr, Asst. City Solicitor

FOP Lodge #5 and the City of Philadelphia are parties to a collective bargaining agreement ["Agreement"]. On August 14, 2018, Police Commissioner Richard J. Ross Jr. notified Lieutenant Michael Lee that he was officially reprimanded and transferred from his assignment in the Narcotics Field Unit for neglect of duty. [Ex. J-2]. The matter was grieved and subsequently submitted for binding arbitration.¹ On March 6, 2019, AAA notified me that I was chosen to serve as arbitrator.

An arbitration hearing was held at AAA's offices in Philadelphia, Pennsylvania on March 10, 2020, at which time the parties were afforded the opportunity to argue orally, present witnesses and submit documentary evidence into the record. Testifying on behalf of the City was Sergeant M [REDACTED] G [REDACTED] Captain Thomas Davidson, and Police Inspector Anthony Washington. Testifying on behalf of the Union was the Grievant. The parties provided oral closing arguments.

STIPULATED ISSUE

The parties stipulated to the following issue:

Whether the City had just cause to transfer the Grievant? If not, what shall be the appropriate remedy?

¹ The reprimand is not part of this proceeding.

BACKGROUND

Lieutenant Michael Lee ["Grievant"] has been employed by the City of Philadelphia Police Department since 1989. At the time of his transfer, Grievant Lee was assigned to the 26th District's Narcotics Field Unit ["Narcotics"]. The Grievant's transfer stems from the manner in which he handled an officer's report of finding marijuana inside of an apartment. The evidence does not suggest or show that the Grievant has been previously disciplined for conduct similar to that which formed the basis of his transfer from Narcotics.

On January 5, 2018, the Department filed charges against the Grievant for neglect of duty after an internal affairs investigation was completed:

Per General #4293, you were the on call Narcotics Division expert for [REDACTED] to [REDACTED]. Detailed in this general message is the importance of notifying the Narcotics Field Division expert concerning all seizures of large quantities of pills, marijuana grow operations, meth labs, packing operations or narcotics seizures of one pound or more. The importance is detailed to explain that the on call expert must be notified to secure search warrants or debriefing that may be needed, and that failure to notify an expert may have a negative impact on the investigation. On [REDACTED] 12:39 AM, 26th District police responded to [Intentionally Omitted] for a burglary in progress. Arriving officers discovered a forcibly opened apartment containing a large amount of marijuana. Officer M [REDACTED] Q [REDACTED] #3424, 26th District, notified Police Radio and requested notification of the on-call Narcotics Field Unit supervisor. Since you were the Narcotics Field Unit on call lieutenant, you were notified by Police Radio. You contacted Officer Q [REDACTED] who informed you that the open property contains 60 to 80 pounds of

marijuana, along with drug paraphernalia. You told Officer Q [REDACTED] that all he had was an "I/O (investigation objects) and to put the evidence on property receipts and to take the job to East Detective Division. You further asked Officer Q [REDACTED] to text you the district control numbers, which he did, along with a picture of the marijuana spread out on the 26th District conference table. As the Narcotics Division on call expert, you had the authority and authorization to have our narcotics investigators respond to this assignment. You failed to make any notifications, failed to conduct any follow up on the investigation, failed to respond to the location and/or failed to assign narcotics investigators to respond to this assignment. [Ex. J-3].

Captain Thomas Davidson, the Grievant's Commanding Officer, requested that the Grievant's transfer out of Narcotics be part of the disciplinary action. [Id.]. Captain Davidson's Employee Assessment of the Grievant includes the following evaluation:

Lt. Lee has difficulty interpreting Police Department policies and orders. When he is given commands he often becomes argumentative. His decisions do not instill confidence. [Id.].

On June 27, 2018, a P.B.I. hearing was conducted where it was determined by a unanimous vote of the Board of Inquiry that the Grievant was guilty of the charges. [Ex. J-1]. On November 9, 2018, Police Commissioner Richard J. Ross Jr. issued the Grievant an Official Reprimand and confirmed the transfer from Narcotics. [Ex. J-2].

The matter was grieved and subsequently submitted for binding arbitration. The Grievant's transfer is the only issue to be addressed. The testimony during the arbitration proceedings is summarized below.

Sergeant M [REDACTED] Q [REDACTED] has been employed by the City of Philadelphia Police Department for 26 years. He was promoted to Sergeant in December 2019. Q [REDACTED] testified that after responding to an attempted burglary in progress he discovered a large amount of marijuana in vacuum-packed bags located in bins, boxes and a refrigerator inside of an apartment that he forcibly entered through a second floor window. He also found paraphernalia such as a scale, a money counter, a vacuum sealer, and packaging material. Q [REDACTED] testified that at the time of the incident he estimated the weight of the marijuana to be approximately 60-80 pounds. Q [REDACTED] testified that this was the first time in his career that he discovered such a large amount of marijuana.

Q [REDACTED] informed his supervisors on the scene that he found a "bunch of pot". He then placed a call to detectives who informed him to contact the Narcotics Field Unit.

Q [REDACTED] testified that the Grievant was the on-call narcotics expert who responded to his call. Q [REDACTED] testified that he informed the Grievant that he discovered a large amount of marijuana, approximately 60-80 pounds in weight.

Q [REDACTED] testified that he told the Grievant that the tenant of the apartment was not present when he entered through the window. Q [REDACTED] testified that the only information he was able to obtain about the tenant at the time was received from a neighboring tenant who identified the tenant as "Joe" and provided Q [REDACTED] with a cell phone number. Q [REDACTED] called and/or texted the number but he did not receive a response. Q [REDACTED] testified that the Grievant told him that due to the fact that the discovery could not be immediately attached to anyone that he should document it by tagging the marijuana on property receipts, marking the items as "IO", "Investigate Objects". Q [REDACTED] testified that the Grievant's instruction took him by surprise given the quantity of marijuana he discovered. Q [REDACTED] indicated that he thought that someone from Narcotics would come out to process (*i.e.* perform fingerprinting) the scene.

Q [REDACTED] testified that he complied with the Grievant's instruction. The marijuana was marked, loaded up, and transported to the 26th District. Q [REDACTED] testified that he took photos of the marijuana and paraphernalia that he sent to the Grievant about two (2) hours after he cleared the scene. [Exs. C-1 & C-2].

Q [REDACTED] described the amount of marijuana he discovered in various ways in his reports and interviews. Q [REDACTED]'s incident report for the burglary attempt indicates that he found a "large amount of marijuana". [Ex. C-3]. His incident report for the discovery of marijuana provides a detailed description of the

paraphernalia and the weight of each individual bag of marijuana located in the apartment. [Id.]. On November 2, 2017, during an investigation interview with a detective, Q [REDACTED] indicated that he "observed a large amount of marijuana" with an approximate weight of 55 pounds. [Id.]. On November 8, 2017, during an internal investigation interview, Q [REDACTED] stated that he informed the Grievant that he found approximately 60-80 pounds of marijuana in the apartment. [Ex. C-4]. Q [REDACTED] also stated that he informed the Grievant of the paraphernalia that was discovered. [Id.].

Captain Davidson testified that the Grievant's lack of action decreased the likelihood of making an arrest. Davidson indicated that based upon the information that the Grievant received from Q [REDACTED] he should have immediately responded himself or sent a crew of officers to the scene to investigate and gather information. Davidson testified that he personally assigned another squad to investigate the matter to see if they could retrieve any evidence from the scene, but once the evidence was handled and marked as "IO" as instructed by the Grievant the scene was already contaminated. Davidson indicated that a search warrant could not be obtained until 4:00 p.m. that day.

Davidson testified that he conducted the internal investigation interview of the Grievant. [Ex. C-8]. Davidson indicated that he got the impression that the Grievant was evasive and less than forthright during the interview. Davidson

testified that the Grievant did not accept responsibility for his actions. Davidson drew the following conclusion in his report to the Deputy Commissioner for Special Operations:

Lt. Michael-Jerry Lee was the narcotics on call expert and has the authority and authorization to have narcotics investigators respond to these types of assignments. Based on Lt. Lee's interview, he does not see the importance, significance or negative impact his failed to immediately assign narcotics investigators to respond to this assignment. Based on Lt. Lee's continued failure to take any responsibility for his improper decisions, his evasiveness when questioned and his failure to properly supervise this narcotics investigation, I respectfully request formal disciplinary action be taken against Lt. Michael-Jerry Lee #474. [Ex. C-9].

Davidson testified that the Grievant is not cut out for conducting narcotics investigations due to the fact that he failed to perform an essential function of his position. Davidson agreed that the Grievant's transfer from Narcotics was appropriate. Davidson acknowledged that a written policy that expressly addresses the situation that the Grievant encountered may not exist, but the Grievant's prior work experience in Narcotics along with basic common sense should have sufficed under the circumstances.

Police Inspector Anthony Washington served as the President of the P.B.I. Hearing Board that conducted the Grievant's disciplinary hearing. Washington testified that the Grievant neglected his duty by failing to assign a team or

personally show up to the scene to conduct an investigation. Washington indicated that given the amount of marijuana that was confiscated and the Grievant's decision not to assign a team to investigate that the Grievant is not suitable for Narcotics. Washington testified that this holds true regardless of whether the Grievant was informed by Q [REDACTED] there was a "large amount" or "60-80 pounds" of marijuana.

The Grievant testified on his own behalf. The Grievant commenced his employment with the City in 1989 and the Philadelphia Police Department in 1991. The Grievant testified that he has several years of experience and extensive training in narcotics. [See Ex. U-2]. The Grievant indicated that he does not have any prior discipline as an on-call narcotics expert. The Grievant testified that as an on-call narcotics expert he exercises discretion in reviewing each assignment and determining a plan of action based upon the information that is described and provided by the reporting officer.

The Grievant testified that on [REDACTED], Q [REDACTED] advised him that he discovered marijuana inside of an apartment after responding to a burglary. The Grievant testified that when he asked Q [REDACTED] how much marijuana was discovered that Q [REDACTED] responded, "It's a lot". The Grievant instructed Q [REDACTED] to look around without touching anything. The Grievant testified that Q [REDACTED] informed him that he did not see anything else in the room. The Grievant

testified that based upon the information that Q [REDACTED] provided him that they did not have any solvability factors to make an arrest. The Grievant instructed Q [REDACTED] to mark the marijuana as "IO". The Grievant testified that by marking the marijuana as "IO" that a search warrant could still be obtained at a later point in time, if needed.

The Grievant testified that there are no written policies or directives that require him to execute a specified plan of action based upon the weight of narcotics discovered. The Grievant testified that his plan of action was based upon his experience, the information provided by Q [REDACTED], and the use of his discretion. The Grievant indicated that a narcotics team is not always assigned to investigate. The Grievant testified that as the on-call narcotics expert he has never ordered an officer to perform a DNA test or lift fingerprints at a crime scene.

During cross-examination, the Grievant denied that Q [REDACTED] told him that he discovered "60-80 pounds" of marijuana. The Grievant indicated during his P.B.I. hearing that had he known of this amount that he would have asked Q [REDACTED] additional questions. The Grievant also denied that Q [REDACTED] informed him there was paraphernalia in the apartment. The Grievant testified that had he been apprised of the paraphernalia he would have treated the incident differently, but he probably would not have dispatched a narcotics team to the scene.

The Grievant testified that he did not ask Q [REDACTED] to estimate the amount of marijuana he discovered in the apartment because Q [REDACTED] seemed competent. The Grievant simply assumed that there was nothing more to tell. The Grievant did not recall reviewing the photos that Q [REDACTED] took of the marijuana and paraphernalia, but he indicated that it was possible that he saw them the following day.

The Grievant testified that he does not regret the manner in which he processed the incident, but in hindsight a better decision could have been made.

The Grievant testified that he has lost overtime opportunities as a result of his transfer out of Narcotics.

The parties offered the following arguments in support of their respective positions.

SUMMARY OF THE ARGUMENTS

The City's Position

The City has established that it had just cause to transfer the Grievant from Narcotics. The evidence shows that the Grievant, as a well-trained, expert narcotics officer, neglected his duty when he failed to perform an essential function of his job by failing to initiate an investigation based upon the information he received from the reporting officer. This holds true regardless of whether the Grievant was told there was "60-80 pounds" or "a lot" marijuana. However, to the extent that credibility must be assessed in this case, Q [REDACTED]'s account of the incident must be credited as more reliable than the Grievant's. Unlike Q [REDACTED], who had no incentive to lie, the Grievant was evasive during his testimony as evidenced by the fact that the Grievant was either unable or unwilling to indicate the quantity of marijuana that needed to be reported in order for him to commence an investigation. Moreover, the Grievant was steadfast in his testimony that he did not think it was necessary to ask follow-up questions. In sum, the evidence shows that the Grievant lacks a clear understanding of his duties as a narcotics officer and failed to properly exercise the discretion he is authorized to use. For these reasons, and the entire record, the City had just cause to transfer the Grievant and requests that the grievance be denied.

The Union's Position

The City did not have just cause to transfer the Grievant. This is a case of second-guessing because an arrest was not made. The Grievant simply exercised the discretion he was empowered to use as a narcotics officer based upon his training and expertise given the information that was provided to him. The fact that paraphernalia was present was not brought to the Grievant's attention. Had he known, the Grievant would have asked additional questions. Even assuming that Sergeant Q [REDACTED] actually informed the Grievant that he discovered 60-80 pounds of marijuana, the City cannot point to a policy that required the Grievant to go to the scene for an inspection or dispatch a narcotics team to perform DNA tests or fingerprinting. To the extent the testimony from the Grievant varies from Sergeant Q [REDACTED]'s it was the Grievant's account that was most credible. For these reasons, and the entire record, the City did not have just cause to transfer the Grievant. The Union requests that the Grievant be transferred back to Narcotics and that he be made whole in all respects.²

² The parties agree that in the event that the grievance is sustained and made whole that I would retain jurisdiction over the remedy.

DISCUSSION

I have carefully considered the arguments and evidence submitted into the record. It is the City's burden to prove that it had just cause for transferring the Grievant.

The evidence shows that the Grievant is a longstanding employee with no prior discipline related to his ability to exercise his discretion in his capacity as a Narcotics Lieutenant. But the totality of the evidence also shows that the Grievant did not perform the basic responsibilities of an on call narcotics expert when he failed to reasonably exercise his discretion on [REDACTED]. Captain Davidson provided straight-forward testimony concerning his expectations of an on call narcotics expert. There is nothing in the record that suggests or shows that Davidson was biased or possessed an ill motive against the Grievant in his assessment of the Grievant's actions or the rendering of his recommendation to transfer the Grievant. Davidson's credible testimony supports the City's position that the Grievant, at a minimum, should have asked Q [REDACTED] follow up questions that would have given him additional information to consider before making a decision as to whether additional and immediate police action was required under the circumstances. This holds true regardless of whether Q [REDACTED] informed him that he found 60-80 pounds of marijuana, or simply stated that he found "a lot". I am persuaded that a written policy or


directive was not required in this instance. To summarize, the evidence shows that the Grievant neglected his duty on [REDACTED], and that his lack of action was a serious breach of his basic responsibilities in Narcotics. I find the explanations that the Grievant provided during his testimony concerning the decisions he made on [REDACTED] do not justify his lack of proactivity.

Accordingly, based upon the above and the entire record, I conclude that the City had just cause to transfer the Grievant. The grievance, therefore, is denied.

AWARD

The grievance is denied.

Dated: April 9, 2020



Robert C. Gifford