

AMERICAN ARBITRATION ASSOCIATION

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In the Matter of the Arbitration between:

**FRATERNAL ORDER OF POLICE, LODGE #5,**  
("Union"),

-and-

**CITY OF PHILADELPHIA**  
("City" or "Employer"),

Grievant: P/O Richard Nicoletti (201009)

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ARBITRATOR'S

**OPINION  
and  
AWARD**

AAA Case No.  
01-19-0001-3174

BEFORE: Robert A. Grey, Esq., Arbitrator

HEARING: January 13, 2020, at American Arbitration Association, 230 South  
Broad Street, Philadelphia, PA 19102

APPEARANCES:

FOR THE UNION:

Willig, Williams & Davidson  
By: Jessica C. Caggiano, Esq.

FOR THE EMPLOYER:

City of Philadelphia Law Department  
By: Daniel Unterburger, Esq.

# OPINION

## INTRODUCTION

The Philadelphia Police Department (“PPD”) suspended Grievant for thirty (30) days, and transferred him, for alleged violation of PPD Disciplinary Code 6-§008-10. The Union seeks that the charges be rescinded and expunged, and Grievant be made whole in all respects. The City seeks denial of the grievance in all respects.

Consistent with the parties’ CBA, the hearing of this grievance took place on January 13, 2020, upon mutual agreement. Both parties appeared by counsel and were afforded full, fair and ample opportunity to present and challenge evidence, examine and cross-examine witnesses, and argue their positions. Neither party questioned the fairness of the proceedings.

This Opinion and Award is based upon detailed and thorough review and analysis of the entire record. All evidence and party positions have been thoroughly considered in rendering this Opinion and Award, whether or not specifically addressed herein.

## STIPULATED ISSUES

The parties submitted the following stipulated issues for final and binding determination:

**Whether there was just cause for Grievant’s suspension, and whether there was just cause for Grievant’s transfer?**

**If not, what shall be the remedy?**

## RELEVANT PROVISIONS

### PPD DISCIPLINARY CODE, ARTICLE VI, DISOBEDIENCE, 6-§008-10

Discharging, using, displaying or improper handling of a firearm while not in accordance to Departmental Policy.

Penalty for 1<sup>st</sup> Offense: Reprimand to Dismissal.

Joint Exhibit 1.

PPD Directive 10.1 “USE OF FORCE - INVOLVING THE DISCHARGE OF FIREARMS”

\* \* \*

4. SPECIFIC PROHIBITIONS

\* \* \*

H. Police officers shall not discharge their firearms AT a vehicle unless a person in the vehicle is immediately threatening the officer or another person with deadly force by means other than the vehicle (e.g., officers or civilians are being fired upon by the occupants of the vehicle).

1. A moving vehicle alone shall not presumptively constitute a threat that justifies an officer’s use of deadly force.

2. Officers shall not move into or remain in the path of a moving vehicle. Moving into or remaining in the path of a moving vehicle, whether deliberate or inadvertent, **SHALL NOT** be justification for discharging a firearm at the vehicle or any of its occupants. An officer in the path of an approaching vehicle shall attempt to move to a position of safety rather than discharging a firearm at the vehicle or any of the occupants of the vehicle.

\* \* \*

City Exhibit 3 [Emphasis in original].

**DISCUSSION AND OPINION**

The underlying facts are not materially in dispute. On December 7, 2018 the City served Grievant with Notice of Suspension Without Pay for violation of Disciplinary Code 6-§008-10, during an on-duty incident on [REDACTED]. On December 18, 2018 a Police Board of Inquiry (“PBI”) found Grievant Guilty, and recommended a twenty (20) day suspension. On December 24, 2018 Police Commissioner Ross imposed a thirty (30) day suspension and transfer. On April 26, 2019 the Union filed a Demand for Arbitration. On June 20, 2019 the undersigned was selected as arbitrator of this grievance through the procedures of the American Arbitration Association.

Upon thorough review of the arbitration record, including detailed review of the video and documentary evidence, the arbitrator finds that the City established that on

██████████, Grievant violated Disciplinary Code 6-§008-10.

### **REMEDY/PENALTY**

The penalty range for a “1st Offense” violation of 6-§008-10 is “Reprimand to Dismissal”. Grievant has no other discipline of record. The PBI’s recommended penalty was a *twenty (20)* day suspension. The Department instead imposed a *thirty (30)* day suspension *and* transfer. Joint Exhibits 1, 2 and 4.

Prior to this incident, Grievant had 29 years and nine (9) months of unblemished and exemplary service as a police officer. Grievant was appointed on November 14, 1988, and assigned to the Narcotics Field Unit on June 28, 1993. The Supervisor’s Evaluation section of the Employee Assessment prepared for the PBI states, verbatim:

Since being under my supervision P/O Richard Nicoletti has proven himself to be a professional and reliable narcotics investigator. He conducts complex and thorough investigations with little supervision. P/O Nicoletti assists in administrative duties for his squad. He is a role model to his coworkers who often seek his advice because of his extensive experience. He is an asset to this unit.

Joint Exhibit 2.

In addition to several Commendations for Merit, and Commendatory Letters (Union Exhibit 2), the Union moved into evidence all of Grievant’s annual Performance Reports, all of which have “Satisfactory” individual criteria ratings, and “Satisfactory” Overall Ratings (“Satisfactory” and “Unsatisfactory” are the only options). Furthermore, Grievant’s annual Performance Reports “Comments” sections are replete with laudatory remarks from supervisors, particularly regarding his Narcotics Field Unit expertise and his value to the Unit.

Consequently, in view of all the facts and circumstances of this record, and after full consideration of the parties’ respective penalty arguments, the arbitrator concludes that the City had just cause to suspend Grievant for thirty (30) days, but not to also transfer him out of the Narcotics Field Unit.

Therefore, the City is directed to rescind Grievant’s transfer and to make him whole except for the period of his thirty (30) day suspension. This remedy is remanded to the

parties to calculate the difference in lost overtime which resulted from his transfer from the Narcotics Field Unit to DVIC.

Accordingly, the following Award is issued:

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## **AWARD**

**For the reasons set forth in the accompanying Opinion, the grievance is denied in part and sustained in part.**

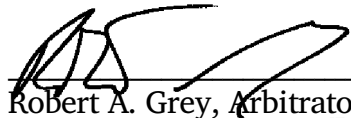
**There was just cause for Grievant's suspension.**

**There was not just cause for Grievant's transfer.**

**The City is directed to rescind Grievant's transfer and to make him whole except for the period of his thirty (30) day suspension. This remedy is remanded to the parties to calculate the difference in lost overtime which resulted from his transfer from the Narcotics Field Unit to DVIC.**

**The arbitrator retains jurisdiction for sixty (60) days to resolve any questions that may arise over application or interpretation of remedy.**


Dated: July 10, 2020

  
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Robert A. Grey, Arbitrator

### **AFFIRMATION**

I hereby affirm that I executed this instrument as my Opinion and Award.

Dated: July 10, 2020

  
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Robert A. Grey, Arbitrator