

AMERICAN ARBITRATION ASSOCIATION

In the Matter of Arbitration Between:

FRATERNAL ORDER OF POLICE, LODGE #5

and

CITY OF PHILADELPHIA

**AAA Case #01-18-0004-7302
(Gr: P/Os Walsh and Jones –
Discharge)**

Walt De Treux, Esq., Arbitrator

Hearing Date: 8/20/19

Decision Date: 10/7/19

Appearances: For the FOP – Richard G. Poulson, Esq., *WILLIG WILLIAMS DAVIDSON*
For the City – Erika E. Kane, Esq., *ASSISTANT CITY SOLICITOR*

Introduction and Statement of Relevant Facts

On [REDACTED], City of Philadelphia Police Officers Matthew Walsh and Marvin Jones were working their first day of assignment to the Northwest Police Division Task Force in the Germantown section of the City. At approximately 10:15a, the officers stopped J [REDACTED] E [REDACTED] after observing him inside and outside of Torres Grocery, a store located on a known drug corner. In a subsequent report, the officers stated that they observed E [REDACTED] “apparently using narcotics” on the highway. They searched and briefly detained E [REDACTED] in their patrol vehicle, only to drive a short distance away before releasing him.

E [REDACTED] filed a complaint with the Department alleging that the officers forcibly pushed him out of the grocery store, improperly searched him and his vehicle, threw him against the patrol vehicle, slammed the door on his knee as he sat in the back seat, used profane and obscene language toward him and otherwise verbally abused him, improperly detained him,

damaged his vehicle, and misappropriated four of fifteen Oxycodone tablets that he had in his pocket.

After investigation, the Department determined that the verbal and physical abuse allegations and the allegations regarding damaged and missing property were either unfounded or not sustained. The Department sustained the allegations related to an improper search of E [REDACTED] and his car and an improper detention. It added charges of an improper pedestrian stop and falsification of the 75-48A police report.

Upon review of the incident, the City of Philadelphia District Attorney charged the officers with criminal offenses related to the improper search. Those charges were dismissed at a preliminary hearing held on November 19, 2018. On November 23, 2018, Internal Affairs issued its investigation report, finding the departmental violations noted above¹. On October 22, 2018, prior to the criminal hearing and prior to the issuance of the IA report, the Police Commissioner took direct action to terminate the officers' employment.

Officers Walsh and Jones timely grieved their discharges. The parties were unable to resolve the grievance through the contractual steps, and the matter was referred to arbitration. On August 20, 2019, a hearing was held at the Philadelphia offices of the American Arbitration Association, during which time both parties had a full and fair opportunity to present documentary and other evidence, examine and cross-examine witnesses, and offer argument in support of their respective positions. The parties closed the hearing with oral argument, and the matter was submitted to the Arbitrator for a decision.

¹ The IA report was reviewed and approved through the chain of command as of December 5, 2018.

Issue

The parties stipulated to the following issue,

Did the City of Philadelphia have just cause to discharge Officers Matthew Walsh and Marvin Jones? If not, what shall be the remedy?

Analysis and Decision

The City's presentation of its case was handicapped by the fact that J ■■■ E ■■■ declined to attend the hearing and testify. E ■■■ filed the complaint that led to the Internal Affairs investigation. It is not clear from the record evidence whether E ■■■ cooperated with IA. (At hearing, only the conclusions of the IA report were introduced into evidence.) But E ■■■'s testimony likely would not have had much impact on the resolution of the present grievances. The IA report dismisses as "unfounded" or "not sustained" most of the allegations directly raised by E ■■■. IA had to rely primarily on the video it had obtained from security cameras focused on the intersection at which the police activity occurred. That same video proved E ■■■ to be less than credible. He asserted that Officers Walsh and Jones physically abused him by forcibly pushing him out of the grocery store, slamming him against the patrol vehicle, and slamming the car door on his knee. IA found that none of that alleged conduct occurred. E ■■■ also claimed that the Grievants damaged his vehicle and misappropriated four Oxycodone pills that he was carrying in his pocket. The video did not show the Grievants doing any apparent damage to the vehicle, and an extensive search of Grievants' persons, lockers, and patrol vehicle did not result in the discovery of the allegedly pilfered pills. In short, E ■■■'s allegations

were neither reliable nor truthful. The misstatements and false accusations in his complaint would certainly have impacted his credibility as a witness.

As a result of E■■■■'s lack of credibility, the IA investigation depended primarily on the video obtained from the security cameras. Based on that video, the Department determined that Grievants conducted an improper stop of E■■■■. It concluded that Grievants could not have observed E■■■■ "apparently using narcotics" on the highway, and therefore, had no reasonable suspicion or probable cause to stop him. Having determined that the stop was improper, the Department concluded that the subsequent search of E■■■■ and his personal vehicle and his brief detention were also improper. It reasoned that a lack of reasonable suspicion and probable cause for the stop tainted the subsequent searches and detention and rendered them unlawful. Finally, the Department found that the Grievants falsified the police report (75-48A) because it indicated that Grievants observed E■■■■ "apparently doing narcotics" on the highway.

It should be noted that the Department failed to interview the Grievants prior to dismissal, depriving the investigation of the Grievants' account of their activities. To be fair, the District Attorney's puzzling decision to bring criminal charges for an alleged improper search, charges which were promptly dismissed at the preliminary hearing, further hindered the IA investigation. Had the DA not brought charges, the Department could have ordered the Grievants to comply with an interview request with the appropriate *Garrity* warnings. On the expected advice of counsel, Grievants declined to submit to an IA interview with criminal charges pending. Once the criminal charges were summarily dismissed, IA could have renewed its interview request, but did not do so. It is not certain that the Grievants would have been

able to agree to an interview at that point since the DA's office apparently did not give up its option to re-file charges. Regardless, IA's pursuit of an interview at that point may have been moot since the Commissioner terminated Grievants a month prior to the dismissal of the criminal charges and more than a month prior to the release of the IA investigation report.

The parties stipulated that the Commissioner based his decision to terminate on the IA investigation and findings, the videos, and the pending criminal charges. Although the IA report was not finalized until approximately 6 weeks after the Commissioner's direct action to dismiss Grievants, the Commissioner presumably was informed of the IA investigation and its anticipated findings. As noted, the IA findings were rooted primarily in the videos, so the Commissioner's decision had to be based on those videos. Any role the pendency of the criminal charges played in the Commissioner's decision became irrelevant once those charges were dismissed.

The focus, therefore, is on the videos and whether they show, as IA found, that there was no opportunity for the Grievants to observe E ■■■ "apparently using narcotics" on the highway.

The videos were retrieved from security cameras and clearly showed the intersection of E. Sharpnack and Ross Streets with Torres Grocery on the southeast corner. E ■■■ parked his vehicle on the northwest corner at 10:00:32am and entered the store, a known area for drug activity according to the IA investigator. Grievants drove through the intersection at 10:06:58am, southbound on Ross Street. Approximately 19 seconds later, E ■■■ exited the store and walked toward his car and out of the view of the camera. At 10:08:10am, E ■■■ stood at the front passenger door of his car for approximately 43 seconds. As E ■■■ started to walk

back to the store, Grievants' vehicle re-entered camera view, driving northbound on Ross Street (a one-way street going south). Before Grievants' patrol vehicle was fully stopped, E [REDACTED] re-entered the store. Grievants followed him inside and escorted him outside. Outside the store, Officer Walsh searched E [REDACTED]'s pockets and removed an item (presumed by IA to be the Oxycodone tablets). E [REDACTED] was handcuffed and placed in the patrol vehicle. With E [REDACTED] secured in the patrol vehicle, Grievants searched his vehicle. After the search, Grievants drove away with E [REDACTED]. Approximately one minute later, the patrol vehicle can be seen driving southbound on Ross Street toward Sharpnack Street, and E [REDACTED] can be seen walking in the same direction. Presumably, Grievants had released him from the handcuffs and the patrol vehicle shortly after driving away from the intersection.

The City has the burden of proving, through the videos, that the Grievants had no opportunity to observe E [REDACTED] "apparently using narcotics." It cannot meet that burden because the limited range of the videos precludes any definitive determination that Grievants did not make such an observation.

The video does not reveal the location of Grievants' patrol vehicle when E [REDACTED] first pulls up to the store. Without an interview with Grievants, IA could not determine whether Grievants saw E [REDACTED] at any point prior to his arrival at the intersection. When the patrol vehicle rides past the store the first time, it does so very slowly. Although the IA investigator noted that he could not see into the store through the glass door, there does appear to be a figure standing near the door. The security camera is on a [REDACTED] [REDACTED]. It is impossible to determine from the camera angle the view that Grievants had when driving past the store at street level. Whatever they may have seen prior to E [REDACTED]'s

arrival or while he was in the store, it caused Grievants to proceed southbound on one-way Ross Street and make a U-turn to come back northbound on Ross Street in the opposite direction of the way traffic is required to flow. While Grievants are coming down Ross Street, E■■■■ is outside near his car, and for a brief time, out of view of the security camera. As Grievants approach the intersection, E■■■■ goes back inside the store. Inside the store (where another camera is located), E■■■■ can only be seen from behind, his hands blocked from view, as Grievants approach.

While the Department correctly concluded that E■■■■ was not “apparently using narcotics” while in view of the security cameras, Grievants had at least three possible opportunities to observe such conduct – prior to E■■■■ first parking across from the store, as they looked inside the store, or as they drove northbound on Ross Street when E■■■■ was near his car but outside of camera range. The evidence does not preclude the possibility that the Grievants observed conduct from E■■■■ that gave them reasonable suspicion or probable cause to stop him. The fact that Grievants slowly drove through the intersection and past the store and made a U-turn on a one-way street to return to the intersection indicates that, at some point, they saw something that gave rise to their suspicions. When they searched E■■■■, he had 15 Oxycodone pills in his pocket and not in a prescription bottle. Though the pills were determined to be prescribed (leading to release from his brief detention), the fact that he had narcotics in his pocket and within easy reach again lends credence to the possibility that the Grievants observed some conduct by E■■■■ that led them to believe he was “apparently using narcotics

The evidence has not established whether the stop was proper or improper. It defies the just cause standard to discharge Grievants based on the possibility they may have engaged in an improper stop when it is just as likely they did observe suspicious conduct that would justify the stop. Absent a definitive conclusion, the charge of an improper stop cannot stand.

The other charges – improper search of E [REDACTED] and his car, improper detention, and the falsification of the police report – all flow from the conclusion that Grievants made an improper stop. The IA report notes “any frisks or searches would not have been lawful” if the Grievants did not have “the requisite reasonable suspicion or probable cause” to stop E [REDACTED]. It uses the same language in describing the improper vehicle search and the detention. It found the police report to be falsified because the Grievants wrote that E [REDACTED] was “apparently using narcotics” on the highway. None of those charges stand because the City has not proven that Grievants did not observe or could not have observed E [REDACTED] “apparently using narcotics.”

For all these reasons, I find that the City did not have just cause to discharge Officers Matthew Walsh and Marvin Jones.

Award and Remedy

The grievance is sustained. As remedy, the City is directed to reverse the discharges of Officers Walsh and Jones and reinstate them to their former positions without loss of seniority as soon as practicable after issuance of this Award. The City is further directed to make Grievants whole for any losses incurred by their respective discharges, including but not limited to, back pay and benefits for the period from the date of their discharge to the date of their reinstatement, less interim earnings.

The Arbitrator shall retain jurisdiction of this case for the sole purpose of resolving any dispute over the implementation of the remedy.

WALT DE TREUX

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