

**AMERICAN ARBITRATION ASSOCIATION
CASE NO. 01-18-0001-5566N
ARBITRATION OPINION AND AWARD
JARED N. KASHER, ARBITRATOR
February 10, 2020**

In the Matter of an Arbitration Between

CITY OF PHILADELPHIA

and

**AMERICAN FEDERATION OF STATE,
COUNTY & MUNICIPAL EMPLOYEES,
DISTRICT COUNCIL 47**

Appearances

**Benjamin Patchen, Esquire
Assistant City Solicitor
for the City**

**William J. Campbell, IV, Esquire
Willig Williams & Davidson
for the Union/Grievant**

Introduction

The City of Philadelphia (hereinafter the "City", "Department", or the "Employer") and the American Federation of State, County and Municipal Employees, District Council 47 (hereinafter "AFSCME" or the "Union") are parties to a collective bargaining agreement which governs the wages, hours and working conditions of numerous classifications of employees who work for the City.

The Union processed a grievance on behalf of Shantia Potter (hereinafter the "Grievant") alleging that the City violated the parties' collective bargaining agreement by suspending her without just cause.

When the matter could not be resolved directly during handling in the grievance procedure, the Union filed a demand for arbitration with the American Arbitration Association (hereinafter the "AAA").

As a result of that demand an arbitration hearing was held on January 9, 2020. The hearing was conducted in accordance with the rules for labor arbitration published by the Association.

At said hearing both the City and the Union/Grievant were represented by counsel who were afforded a full opportunity to present relevant evidence through the testimony of witnesses and in documentary proofs. A broad range of cross-examination was permitted, and counsel raised points and contentions in support of their respective positions in closing arguments.

Background Facts

On [REDACTED] [REDACTED], at approximately 10:45 p.m., the Grievant, while operating a City vehicle, was in a motor vehicle accident with another car. The Grievant contacted her supervisor from the scene of the accident to advise her of the accident. The Grievant was instructed to report the accident to the [REDACTED] [REDACTED]. The Grievant testified that she called and spoke with the [REDACTED] [REDACTED], M [REDACTED] V [REDACTED]. The Grievant testified that she told Ms. V [REDACTED] that she was in a motor vehicle accident with a City vehicle, that there were no reported injuries, no one

needed to go to the hospital and that there was damage to the bumper, hood and passenger side mirror. The Grievant testified that Ms. V [REDACTED] asked her if the car was drivable. The Grievant testified that the police had arrived and so she asked the police officer if the car was operable and she was told it was. The Grievant testified that she conveyed that information to Ms. V [REDACTED] and that Ms. V [REDACTED] told her that when she returned the car she would have to complete a form and attach the police report.

Ms. V [REDACTED] confirmed that she received a call from the Grievant on the evening of [REDACTED] [REDACTED] [REDACTED]. Ms. V [REDACTED] testified that the Grievant told her that she had just been in an accident with a City vehicle while near her home. Ms. V [REDACTED] testified that she asked the Grievant if she was ok and whether there was any damage to the vehicle. Ms. V [REDACTED] testified that the Grievant told her there was light damage to the bumper. As a result, Ms. V [REDACTED] determined that post-accident drug and alcohol testing was not necessary. Ms. V [REDACTED] explained that post-accident drug and alcohol testing is mandatory if the vehicle involved in the accident has to be towed, or if death or medical treatment is needed, or if a citation for driving under the influence has been issued, or if there is property damage greater than \$500.00 to the vehicle.

The Grievant testified that she returned the City vehicle to transportation that same evening, filled out a form and attached the police report. The Grievant sponsored Union Exhibit 3, the Return Information form she completed indicating that there was damage to the front bumper and hood and that the passenger side mirror was missing.

The next day the car was inspected by the City and it was determined that there was damage in excess of \$500.00. Ms. V [REDACTED] sponsored City Exhibit 4, pictures of the City vehicle after the accident. Ms. V [REDACTED] testified that she could tell from just looking at the pictures that the damage exceeded \$500.00 and that had she seen these pictures, she would have recommended post-accident drug and alcohol testing. Ms. V [REDACTED] testified that after being told by the Transportation Department about the amount of damage to the vehicle, she called the Grievant to advise her that she needed to submit to post-accident drug and alcohol testing. Ms. V [REDACTED] testified that she placed the call to the Grievant at approximately 10:00 a.m. but cannot recall if she spoke with the Grievant or left a message.

The Grievant testified that she attended a funeral Thursday morning and while in the service received a number of calls from work. The Grievant stated that she called her supervisor at approximately 11:00 a.m. and was instructed to call Human Resources. The Grievant testified that she then called Human Resources and was advised that because of the amount of damage to the vehicle and her failure to submit to post-accident drug and alcohol testing, she was deemed to have tested positive and was instructed to contact D [REDACTED] A [REDACTED] to schedule a drug screen. The Grievant testified that she called Mr. A [REDACTED] Monday morning and was told to report for testing on Tuesday at 1:00 p.m. The Grievant testified that she reported as directed on Tuesday and took the test. The Grievant was advised that the results would not be available until Friday and that she would have to stay home until the results came

in. The results came back negative, nevertheless, in accordance with the City's Drug and Alcohol Policy, she was required to sign a substance abuse agreement, attend drug and alcohol treatment and attend Alcohol Anonymous meetings. The Grievant testified that she was also subject to periodic drug screens and was required to successfully complete a driving course. The Grievant testified that she complied with all of the above and sponsored Union Exhibit 4, her attendance at AA meetings, and Union Exhibit 5, her Certificate of Completion of the driver safety course.

The Grievant testified that after fully complying with the City's Drug and Alcohol Policy a discipline hearing was conducted on July 25, 2017 to address the charges of violating the Drug and Alcohol Policy for refusing to cooperate in the testing process, falsely reporting the amount of damages incurred, and for the unauthorized use of a City vehicle. The Panel substantiated the charges of refusing to cooperate with the drug and alcohol testing and with falsely reporting the amount of damages incurred. The Panel found the charge of unauthorized use of a City vehicle to be unsubstantiated. The Panel recommended a five (5) suspension.

On January 3, 2018 the Grievant was served with a Notice of Suspension for five (5) days without pay.

Position of the City

The City argues that there was just cause to impose a five (5) day suspension for the Grievant's failure to submit to drug and alcohol testing. The City contends that the Grievant misrepresented the amount of the damage to the vehicle and thus no post-accident testing was initially required. The City submits that there would be no reason for Ms. V [REDACTED] to misstate what the Grievant told her regarding the damage to the vehicle. The City further submits that had Ms. V [REDACTED] heard anything that remotely sounded like the damage exceeded \$500.00, she would have ordered post-accident testing.

The City contends that after the vehicle was inspected, it was apparent that the damage exceeded \$500.00 and the Grievant was ordered to submit to testing. The City argues that the Grievant refused to make herself available for testing, even when the City offered to provide transportation. The City submits that there is no evidence that the Grievant made any effort to submit to post-accident testing when initially alerted to the need.

The City notes that it has an obligation to ensure the safety of the public and to make sure employees are not operating vehicles while under the influence of drugs or alcohol. The City argues that if it therefore must strictly enforce their Drug and Alcohol Policy in order to protect the public.

The City therefore requests that the grievance be denied.

Position of the Union

The Union argues that the evidence failed to establish that the City had just cause to impose any discipline on the Grievant. The Union contends that the Grievant followed all the appropriate steps when she was involved in the motor vehicle accident on [REDACTED]. She immediately reported it, accurately reported that there were no injuries and conveyed what damage she believed the City vehicle had incurred. The Union argues that there is no evidence that the Grievant falsified the damage and submits that the Grievant had no reason to lie about the vehicle's condition. The Union points out that the Grievant is not a mechanic and simply answered the question posed to her by Ms. V [REDACTED].

The Union further contends that there is no evidence to support the City's allegation that the Grievant failed to comply with the Drug and Alcohol Policy. The Union submits that by the time the Grievant returned the call of her supervisor, the City had already deemed her to have tested positive. The Grievant then proceeded to comply with the Policy by attending the requisite meetings and trainings and undergoing further testing, even though it was unwarranted. The Union argues that the City's Drug and Alcohol Policy is a remedial measure for purposes of assisting and helping those employees who need it and argues that it is not to be used as a punitive tool.

The Union therefore requests that the grievance be sustained, the discipline removed from the Grievant's record and that she be made whole.

Findings and Opinion

The issue before this Arbitrator is whether the City had just cause to suspend the Grievant for five (5) days for allegedly refusing to cooperate with the City's Drug and Alcohol Policy and for falsely reporting the amount of damage sustained to the City vehicle she was operating.

There is little dispute as to the material facts of this grievance. On the evening of [REDACTED] [REDACTED] the Grievant was in a motor vehicle accident while operating a City owned vehicle. Immediately after the accident the Grievant contacted her supervisor and was told to report the accident to the [REDACTED], M [REDACTED] V [REDACTED], which the Grievant did. According to the Grievant, Ms. V [REDACTED] asked if anyone was injured and/or whether anyone needed medical care, to which the Grievant responded there was not. The Grievant further stated that Ms. V [REDACTED] asked what damage there was to the vehicle and whether it was drivable. The Grievant credibly testified that she told Ms. V [REDACTED] that there was damage to the bumper, hood and passenger side mirror, and that the car was drivable. The Grievant further provided that she told Ms. V [REDACTED] that the vehicle was drivable based upon what the responding police officer told her.

The Grievant is not a mechanic. She was asked to provide a description of the damage she observed that evening, when it was surely dark outside. The Grievant was not asked to provide photographs of the vehicle, and no City employee reported to the scene to inspect the vehicle. More importantly, there is no evidence that Ms. V [REDACTED] asked

the Grievant if there was more than \$500.00 of damage to the vehicle. While it is doubtful that the Grievant would have been able to accurately answer that question, it is likely that she would have asked the responding police officer for his or her opinion, just as she did when she inquired from the officer if the car was drivable.

In contrast to the Grievant's testimony, Ms. V [REDACTED] testified that that Grievant told her only that there was "light damage to the bumper", and based solely on this description, determined that post-accident drug and alcohol testing was not necessary. The next day, when the car was inspected, the City's Transportation Department determined that there was in excess of \$3,000.00 of damage and notified Ms. V [REDACTED]. Apparently, upon learning of the damage, the City not only made the decision to test the Grievant, but also concluded that the Grievant had falsified the damage.

There is no evidence that the Grievant intended to deceive the City. The Grievant returned the vehicle that evening and provided a written description, consistent with her testimony, that the front bumper, hood and passenger side mirror was damaged. This Arbitrator agrees with the Deputy Commissioner's testimony that the Grievant did not lie about the vehicle's damage but was simply "reporting what she knew" and was not being dishonest. While the Disciplinary Panel substantiated the charge of falsely reporting the damages, the Deputy Commissioner stated at the arbitration that she found that charge to be unsubstantiated, and this Arbitrator agrees.

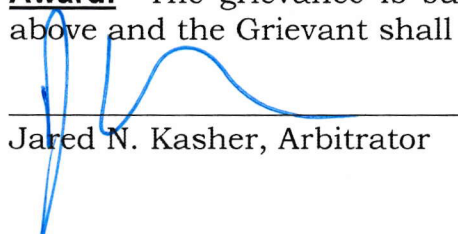
In addition, as pointed out at the hearing, there is a Side Letter attached to the Drug and Alcohol Policy which clearly provides that the “City will interpret the term accident ‘resulting in property damage of more than \$500.00’ in Section III.A.1 as an accident that requires towing of the vehicle.” Again, Ms. V [REDACTED] specifically asked the Grievant if the car was drivable and the undisputed facts are that it was. Therefore, this Arbitrator finds no evidence to support the charge that the Grievant falsified the extent of damage to the vehicle.

Turning next to the Grievant’s alleged failure to submit to post-accident testing. Pursuant to the City’s Drug and Alcohol Policy, “refusal to submit” is defined as an employee “engaging in conduct that clearly obstructs the testing process, including but not limited to efforts to adulterate a testing sample or refusal to sign any consent or waiver required by [the] policy or [refusal] to make oneself available for testing.” The evidence before this Arbitrator falls short of establishing that the Grievant engaged in conduct that clearly obstructed the testing process. As set forth above, the Grievant immediately notified her supervisor and the [REDACTED] of the accident. She complied with the instructions she was given that evening and there is no reason to believe that she would have refused to be tested if requested that evening. The Grievant had previously notified her supervisor that she would be out of work on Thursday attending a funeral, which she did. That morning the City inspected the vehicle and determined that the damage exceeded \$500.00. According to the Grievant, while she was attending the funeral on Thursday morning, she missed some calls from work. The Grievant

testified that she stepped outside at approximately 9:30 a.m. and called her supervisor. Upon speaking with her supervisor, the Grievant was instructed to contact Human Resources. The Grievant stated that she complied with her supervisor's instructions and contacted Human Resources at approximately 11:00 a.m. The Grievant testified that during this telephone call she was advised that she had already been deemed "positive" for failing to submit to drug and alcohol testing and was instructed to follow up with D [REDACTED] A [REDACTED]. The Grievant went on to contact Mr. A [REDACTED] and successfully complied with every aspect of the drug and alcohol policy. Had the Grievant wanted to obstruct the testing process she certainly could have avoided returning any calls on her scheduled day off. Instead, she called her employer back and after being advised that she was considered to have tested positive, abided by everything that was asked of her.

There are no credible facts before this Arbitrator to suggest that the Grievant obstructed the testing process or refused to make herself available for testing. Therefore, this Arbitrator concludes that there was not just cause to impose discipline and the grievance shall be sustained and the Grievant made whole.

Award: The grievance is sustained in accordance with the above and the Grievant shall be made whole.



Jared N. Kasher, Arbitrator