

AMERICAN ARBITRATION ASSOCIATION

IN THE MATTER OF ARBITRATION BETWEEN:

Fraternal Order of Police	:	
Lodge #5	:	
The Union	:	Opinion
	:	
	:	and
- and -	:	
	:	Award
City of Philadelphia	:	
	:	
The Employer	:	

Grievance: Lisa Salvato
AAA Case No. 01-19-0000-7377

Before

Margaret R. Brogan, Esquire
Arbitrator

Appearances

For the Employer

Frank E. Wehr, II, Esquire
Assistant City Solicitor
City of Phila. Law Department
One Parkway
1515 Arch Street.
Philadelphia, PA 19102-1595

For the Union

Jessica C. Caggiano, Esquire
Willig, Williams and Davidson
1845 Walnut St., 24th Floor
Philadelphia, PA 19103

BACKGROUND

A video arbitration hearing was held on September 11, 2020 in the above-captioned matter. No stenographic record was taken. At hearing, the parties were granted the opportunity to present all relevant evidence and argument. The parties closed orally with respect to the merits, and briefed an arbitrability dispute over the scope of the grievance before the arbitrator. Those briefs were received by the undersigned on October 14, 2020, at which time the matter was submitted for determination. Both the arbitrability question and merits will be discussed below.

At hearing, the following individuals testified. For the City: Lt. J. [REDACTED] J. [REDACTED], Commanding Officer of the Major Crimes Division; Officer D. [REDACTED] C. [REDACTED], who also worked in Major Crimes and was a witness to the incident; and Lt. James Gallagher who served on the PBI panel which considered the discipline of the grievant. Det. Lisa Salvato, the grievant, testified in the Union's case, along with Lodge 5 Vice President John McGrody, who testified regarding the arbitrability issue. The parties agreed to the authenticity and receipt of the City's documents related to the grievant's discipline, but stipulated that the written statements contained therein would not be taken for the truth for those individuals who did not testify at arbitration – those statements were received for purposes of showing the investigation conducted by the City, and the information the City relied upon in disciplining the grievant.

RELEVANT FACTS

This matter involves discipline imposed upon Detective Lisa Salvato (the grievant) for her alleged behavior in connection with her reporting for overtime duty at Major Crimes Headquarters on [REDACTED]. At the time, the grievant was a Detective in the Major Crimes Division, and Lt. J [REDACTED] J [REDACTED] was her Commanding Officer. After the incident, Lt. J [REDACTED] requested formal disciplinary action against Det. Salvato based on the incident. The grievant is a 23 year officer, with a good work record, and has been rated as excellent over the years.

The purpose for the Saturday overtime duty on [REDACTED] was to conduct surveillance in connection with a skimming investigation assigned to Detective L [REDACTED] C [REDACTED]. In addition to Lt. J [REDACTED], six officers in total had signed up and reported for overtime at the Major Crimes Headquarters. Along with Lt. J [REDACTED] and the grievant, also reporting was Det. C [REDACTED], Officer C [REDACTED], Det. P [REDACTED], Det. E [REDACTED] and Officer H [REDACTED]. All were regularly assigned to perform surveillance for Major Crimes, with the exception of Officer H [REDACTED] who was generally assigned to be the assistant to Captain Roland Lee, and performed surveillance on limited occasions, typically on weekend overtime. The following recitation of what occurred is based upon the Request for Disciplinary Action authored by Lt. J [REDACTED], the arbitration testimony, and the written statements of those who testified, which were taken during the investigation of the incident. (CXs 1, 2, 3, 4)

Upon arriving for the overtime work, the grievant learned that she was going to be working surveillance in a two-person team with Officer H [REDACTED]. The others were assigned to work with their regular partners, and after those pairings, that left the grievant and Officer H [REDACTED]. According to the testimony of Lt. J [REDACTED] and Officer C [REDACTED], Lt. J [REDACTED] briefed the team and made those assignments, including locations. Det. Salvato testified it was Det. C [REDACTED] who made the assignments. The grievant protested the assignment of working with Officer H [REDACTED] in a loud voice in the presence of all of the other officers. The grievant subsequently walked out and did not work the overtime assignment.

According to Lt. J [REDACTED], the grievant was loud and boisterous in announcing that she did not want to work with Officer H [REDACTED], saying that this was not the arrangement planned on the day prior, and she would not have agreed to work if she was going to get stuck working with Officer H [REDACTED]. The grievant then said, "I can't do this, I'm leaving." Lt. J [REDACTED]'s response was that, if she left, she would not get paid. The grievant collected her personal belongings, and left. Det. Salvato did not return that day. Lt. J [REDACTED] did not tell the grievant to leave, or demand that the grievant stay. Lt. J [REDACTED] testified that he did not remember the grievant saying she would work alone, although in his statement he did confirm she asked that. Lt. J [REDACTED] testified that he would not allow her to work alone for safety reasons.

Officer C [REDACTED] testified that the grievant was angry in her demeanor, raised her voice, and was disrespectful. According to Officer C [REDACTED], the grievant asked to work

alone, as she said she had to work with Officer H [REDACTED] all the time, and has to “babysit her.” According to Officer C [REDACTED], Lt. J [REDACTED] told her for safety reasons he did not want anyone to work solo, at which point the grievant stated that she didn’t want to work with Officer H [REDACTED], and left. He testified that he had never seen anyone else be disrespectful or walk off an assignment in such a manner. Officer C [REDACTED] confirmed that the grievant was loud enough in her comments so that others, including Officer H [REDACTED], could hear. Officer C [REDACTED] testified that the grievant had previously complained to him that Officer H [REDACTED] did not have investigative experience. Officer C [REDACTED] confirmed that Officer H [REDACTED] was easily distracted and did not have a lot of time on the street.

Det. Salvato testified that she did not want to work with Officer H [REDACTED] [REDACTED] on [REDACTED] because she had previously complained to Lt. J [REDACTED] about safety concerns over Officer H [REDACTED] that had not been addressed. Det. Salvato testified that she sometimes worked with Officer H [REDACTED] [REDACTED] on weekends on overtime and otherwise they had a cordial relationship. According to the grievant, her previous problems about which she complained included an instance when Officer H [REDACTED] forgot her gun when reporting to the unit, causing them to be an hour and a half late in their assigned surveillance, and on the same day Officer H [REDACTED] Face-Timed on her phone while in a surveillance van, disclosing her location on the call. The grievant testified that Officer H [REDACTED] [REDACTED] also left early that day. The grievant testified that she complained to Lt. J [REDACTED] about her conduct but nothing was done, and on the next time they worked

together Officer H [REDACTED] was again Face-Timing during surveillance. The grievant testified that others complained about her work but nothing was done, causing divisiveness in their unit.

On [REDACTED] the grievant testified that she understood that Officer H [REDACTED] was not coming in, and she was upset when she was paired with the officer as she had complained about her before. The grievant testified she wanted to work alone but Lt. J [REDACTED] said he would not allow her to do so. In her testimony, the grievant stated that Lt. J [REDACTED] allowed others to work alone at times. The grievant told Lt. J [REDACTED] she was leaving, and Lt. J [REDACTED] responded that the grievant would not get paid. According to the grievant, Lt. J [REDACTED] seemed angry because he was yelling.

The grievant testified that she does not agree that she was loud and animated in stating she did not want to work with Officer H [REDACTED]. The grievant acknowledges that she was upset at the time. She also does not think she was unprofessional. The grievant testified that after that incident she did not work any more overtime, and then she left the unit. The grievant testified that, after the incident, she apologized to Lt. J [REDACTED] because he seemed angry with her, such conduct was not in her nature, and she did not want him to think of her in that manner.

Lt. J [REDACTED] testified that he only remembers the grievant complaining about Officer H [REDACTED] being on the phone while working surveillance. Lt. J [REDACTED] testified that phones can be used while at work – sometimes they are needed to communicate

with the team or family, and that previously he did tell Officer H [REDACTED] that she should keep her phone calls short. Detective Salvato testified that Lt. J [REDACTED] previously said that Det. C [REDACTED] was a saint for working with Officer H [REDACTED] as she could not be taught. Lt. J [REDACTED] denied making that comment.

After Lt. J [REDACTED] submitted the Request for Disciplinary Action, he separately interviewed the Crimes Unit officers who were there on [REDACTED], with the exception of the grievant. Captain Lee took the statements of Lt. J [REDACTED] and Det. Salvato.

Lt. James Gallagher served on the PBI panel held to determine the discipline imposed on the grievant for the [REDACTED] incident. The grievant was served with a Statement of Charges, charging her with Insubordination, Article 4, Section 4-§002-10 (Refusal to obey proper orders from a superior officer). Under the disciplinary code, which is part of the collective bargaining agreement of the parties, the penalty range for this charge is a 5 to 30 day suspension. The panel determined, based on the investigatory evidence, that the grievant was guilty of insubordination, and the penalty to be imposed was a 5 day suspension. Lt. Gallagher testified that the panel concluded that the grievant engaged in insubordinate behavior, but because of her good work record, they recommended the minimum penalty of a 5 day suspension. The PBI's recommendation was not modified, and notice of a 5 day suspension was issued to Det. Salvato. (JX 3; CXs 2, 3, 4, 5). A grievance was filed by the Union protesting the 5 day suspension. (JX 2)

In the same PBI hearing, and based upon the same incident, the panel considered a Statement of Charges issued to the grievant charging her with Conduct Unbecoming, Section 1-§001-10. The penalty range for this charge under the Disciplinary Code is reprimand to dismissal. The PBI panel concluded that the charge was founded and recommended the minimum penalty of reprimand. The recommendation was not modified and a reprimand issued. (CXs 2, 3, 4; UX 3). The grievance filed does not explicitly refer to the reprimand, which has led to the City raising an arbitrability issue as to the scope of the arbitrator's authority. (JX 2)

DISCUSSION

Positions of the Parties

The positions of the parties will be briefly summarized. The City raises a threshold arbitrability issue, contending that the undersigned does not have the jurisdiction to consider whether there was just cause for the reprimand issued to Det. Salvato, the grievant. The City argues that the grievance makes no mention of the reprimand, and further maintains that the Contract between the parties defines a grievance, which does not include a reprimand, and limits the scope to "contract violations, disciplinary suspensions, demotions and discharges," rendering a written reprimand inarbitrable. The City contends that a consideration of the written reprimand would run afoul of the American Arbitration Association's Labor Arbitration Rules. The City cites legal authority in support of its position. The City opines that the written reprimand is not properly before me, and my jurisdiction is limited to the question of whether the 5 day suspension of the grievant was for just cause. The City argues, on

the merits, that this is a clear case of insubordination. According to the City, the grievant received an order to work which she then refused; she was rude and boisterous in complaining about another officer; and she left her post and her unit short-staffed. The City opines that it is not clear that the grievant raised safety issues with clarity, but if she did there was no excuse for her to behave in the manner that she did. The City urges that the grievance be denied, and the 5 day suspension upheld.

To the contrary, the Union argues, with respect to arbitrability, that I have the jurisdiction to consider the reprimand, as it is encompassed within the grievance filed in line with arbitral authority that the scope of a grievance should be resolved in favor of coverage, and that there are no formal requirements on the contents of a grievance. The Union points to the statement of remedy in the grievance to demonstrate that the grievance was broadly worded. The Union cites caselaw and arbitral authority in support of its position. The Union points out that the City was not prejudiced, given the reprimand was issued with respect to the same incident. The Union argues that I should determine whether there was just cause for both the reprimand and the 5 day suspension. On the merits, the Union contends that there was not just cause for the discipline due to Det. Salvato's conduct on [REDACTED]. The Union points out that the grievant was a good employee, and had previously expressed safety concerns about Officer H [REDACTED] that had not been addressed by Lt. J [REDACTED]. The Union argues that the officer had limited experience in surveillance, and other officers complained about her and refused to work with her, yet were not disciplined. The Union contends that there was not a proper order to work, which is necessary to sustain a

charge of insubordination. According to the Union, the grievant did not have notice of the consequences if she refused to work a voluntary assignment. The Union urges that the grievance be upheld, the discipline removed from the grievant's record, and she be made whole.

Decision on Arbitrability

Both parties have granted me the jurisdiction to determine the scope of the grievance, that is whether the reprimand is properly before me. For the below reasons, I conclude that I do not have jurisdiction to decide whether the reprimand was for just cause.

It is undisputed that both the reprimand and 5 day suspension were a result of the same incident, they were considered in the same PBI hearing, and the panel's recommendation was accepted and the discipline issued. The Union filed only one grievance relevant to this matter, which does not explicitly state that it is grieving the reprimand. In its grievance, under "Statement of Grievance," the Union alleges that, *"The city is violating numerous provisions of the collective bargaining agreement by: Detective Lisa Salvato...was Suspended for Five (5) Days Without Just Cause."* As for remedy, it states, *"By way of remedy it is requested that all bargaining unit members directly and indirectly affected by each and every aspect of any such violation be Made Whole in all respects regardless of whether specifically identified herein..."*

The City relies upon the plain language of the parties' Contract, the Union's grievance, and prior court cases where an arbitrator's award was in part vacated because the court found the arbitrator had impermissibly expanded the arbitral scope of jurisdiction beyond that contained in the grievance. I find the City's arguments to be persuasive.

The Union counters that the issue of Discipline appears in different sections of the parties' CBA, including in Article AA, Discipline and Discharge, which incorporates by its terms the Disciplinary Code. The Disciplinary Code Matrix is part of the CBA, and references reprimands. However, Article XXI(A)(1) defines a grievance as follows: "*Grievances as defined herein are limited to contract violations, disciplinary suspensions, demotion, and discharges.*" The Union presented evidence that it orally addressed the reprimand during the grievance process, but the City disputed this evidence. The Union acknowledges that the FOP's understanding that the reprimand was being grieved to arbitration was not reduced to writing.

The Union cites prior arbitration awards in which arbitrators ruled on whether reprimands met the just cause standard, in the situation where an officer received other discipline or penalty. However, there is no discussion in those awards related to the arbitrator's authority to review the basis for the reprimand, nor is there any indication that the grievance in those cases failed to state that the reprimand was being grieved. The parties did not ask those arbitrators to rule on the arbitrability issue which is before me. The parties can certainly agree to put the issue of just cause for a reprimand

before the arbitrator as occurred in those prior matters, but that did not happen in this case.

I conclude that, under the circumstances of this case, the Union did not draft the grievance broadly enough to confer jurisdiction upon me, so as to reflect the parties' understanding that the reprimand was properly before me. I acknowledge the Union's argument, which is generally true, that in most cases a grievance need not be held to the formality required in a pleading. But in light of the grievance definition in the Contract, making no explicit mention of reprimands, it was incumbent upon the Union to make clear they wished to put that issue before me during the grievance process. I do not agree that the catchall language, referring to "all bargaining unit members" found in the "remedy sought" section of the grievance cures this failure, given the clear Contract language. At most, that is a request for remedy which is limited to the 5 day suspension.

I find, therefore, that my jurisdiction is limited to the imposition of the 5 day suspension. In light of this ruling, I find it unnecessary to reach the broader question raised by the City, which is whether the Union is generally foreclosed from grieving reprimands by the contract language, standing alone.

Issue

Whether the City had just cause for the 5 day suspension of the grievant, Detective Lisa Salvato, and if not, what shall be the remedy?

Decision on the Merits

On the basis of the record evidence and the arguments of the parties, I find that the City shouldered its burden of demonstrating just cause for the 5 day suspension issued to the grievant, Detective Lisa Salvato. Det. Salvato has proven herself to be an excellent officer, of long tenure. This incident looks to be an aberration for the grievant; nevertheless, her conduct supports the charge of insubordination and the City's imposition of the 5 day suspension.

The grievant received the 5 day suspension for her actions on [REDACTED]. The evidence demonstrated that the grievant reported for the overtime assignment, and then engaged in an angry oral protest of her being paired with Officer H [REDACTED] in full view of, and heard by, her fellow officers in Major Crimes. She subsequently walked off, abandoning her assignment.

In terms of supporting the charge of insubordination, I find that there was a legitimate order that the grievant refused to follow. In the latter part of the week prior, the grievant agreed to work overtime on Saturday, [REDACTED]. She timely reported for her overtime assignment. Lt. J [REDACTED] was there as Commanding Officer, and he made the assignments, which included creating the teams for surveillance and

assigning them to locations. The assignments were reasonably based as Lt. J [REDACTED] put together two sets of officers who usually partnered on assignments, leaving the grievant and Officer H [REDACTED]. The Union argument that the assignments were made by Detective C [REDACTED], who was assigned the surveillance operation, and not Lt. J [REDACTED], is not supported by the weight of the evidence, including the testimony of another officer who observed the incident. Once the grievant reported for the overtime work, she was on duty in the same manner as if she was on her regular shift. The fact she initially volunteered for the assignment does not change this fact. As an officer on duty, she had an obligation to stay and perform her work, as assigned.

Once she learned she was going to be paired with Officer H [REDACTED], the grievant engaged in a loud and animated verbal protest of her being obligated to work with the officer. It is undisputed that most of those present heard her words, including Officer H [REDACTED]. The grievant testified that she did not believe she was loud or unprofessional, but even by her own testimony, it is apparent that her actions were very inappropriate. Officer C [REDACTED] testified that he had never witnessed someone act in such a disrespectful manner and walk off the job, as did the grievant.

The grievant testified credibly that she was frustrated that Lt. J [REDACTED] did not take her complaints about Officer H [REDACTED] seriously, which has some merit. Other testimony supported that Officer H [REDACTED] was inexperienced at surveillance and needed hand-holding by other officers. Lt. J [REDACTED] should have taken the grievant's complaints more seriously, for the good of the Major Crimes operations,

because it seems apparent that Officer H [REDACTED] needed more training. But the evidence as a whole does not support the inference that it was so dangerous for the grievant to work with the other officer that she had the right to refuse to work with her and walk off the job. The grievant's testimony that others complained about the officer, and refused to work with her, was not supported by direct evidence.

On that day, the grievant should have raised any concerns she had about working with Officer H [REDACTED] in a more respectful manner, and privately if possible, so as not to cause such divisiveness within the unit. If again Lt. J [REDACTED] refused to take her concerns seriously, the grievant still had an obligation to obey given the other officer posed no immediate safety threat. At a later time, Det. Salvato could have grieved or protested in a more respectful fashion.

The Union argues that the grievant did not refuse to work because she offered to work alone. However, her superior officer had the discretion to decide if working alone was advisable and safe on a case by case basis. Once he refused the solo assignment, the grievant had an obligation to do the surveillance work, partnering with Officer H [REDACTED].

There was no evidence to support the grievant's excuse that it was somehow arranged the day before that Officer H [REDACTED] would not report for overtime. The grievant provided no testimony as to how she sought to ensure that Officer H [REDACTED], who previously worked Saturday overtime, would not work that day. One

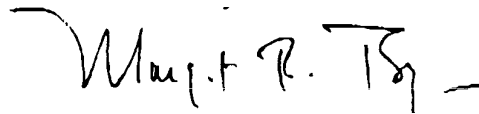
would think that the grievant would have done so, if the officer was such a safety threat. It is also argued that the grievant did not know that there would be adverse consequences from her walking off the job, as all Lt. J. [REDACTED] said when she left was that she would not be paid for the day. However, the grievant acknowledged that Lt. J. [REDACTED] was loud and angry in his tone – the grievant could not have reasonably believed that she had the permission of her supervisor to leave, without repercussions.

I find there was a legitimate order to work that the grievant disobeyed, by first protesting the assignment in a loud and disrespectful manner in the presence of her fellow officers, and then walking off her post. The grievant, as a long tenured police officer, is charged with knowing that such conduct, not reasonably based, would result in disciplinary consequences. I conclude that the grievant engaged in insubordination as charged. The grievant was given the minimum suspension for that charge under the Disciplinary Code Matrix in light of her good work record. Accordingly, I will deny the grievance.

AWARD

As to arbitrability, I find that, under the circumstances of this case, the reprimand issued to Detective Lisa Salvato, the grievant, is beyond my authority as arbitrator and therefore I decline to consider it.

As to the merits, I find that the City shouldered its burden of demonstrating that the City had just cause for the 5 day suspension of the grievant. Accordingly, the grievance is denied.

A handwritten signature in black ink that reads "Margaret R. Brogan". The signature is written in a cursive style with a horizontal line at the end.

Margaret R. Brogan, Arbitrator

Date: November 9, 2020