

AMERICAN ARBITRATION ASSOCIATION

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In the Matter of the Arbitration	:	
	:	AAA Case No.
between	:	01-19-0004-4759
	:	
CITY OF PHILADELPHIA,	:	Opinion & Award
	:	
“City”	:	Re: Suspension of
	:	Brion Walsh
- and -	:	
	:	Hearing: November 23, 2020
F.O.P, LODGE NO. 5,	:	
	:	
“Union”	:	
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APPEARANCES

For the City

CITY OF PHILADELPHIA LAW DEPARTMENT
Tiffany R. Allen, Esq. Assistant City Solicitor

For the Union

WILLIG, WILLIAMS & DAVIDSON
William J. Campbell, IV, Esq.

BEFORE: David J. Reilly, Esq., Arbitrator

BACKGROUND

The City suspended Police Officer Brion Walsh for four days beginning October 11, 2018. It took this action upon finding that he had violated two provisions of the Police Department's Disciplinary Code of Conduct ("Disciplinary Code"). These violations consisted of: (1) "Conduct Unbecoming," stemming from his alleged use of unauthorized or excessive force on [REDACTED] in contravention of Disciplinary Code Section 1-§012-10; and (2) "Neglect of Duty" in violation of Disciplinary Code Section 5-§011-10, due to his failure to give notice of and document his use of force on that occasion. (Joint Exhibit 3.)¹

The Union contends the City lacked just cause to impose this suspension. It asks that the suspension be reversed and Walsh be made whole for all pay and benefits lost as a consequence of it.

The basic facts of this case, including the areas of dispute, may be set forth succinctly.

Walsh's Employment History

Walsh has been a member of the City's Police Department for over eight years. He has no record of prior discipline. Throughout his tenure with the Department, he has been assigned to the 14th District.

Department Directive 10.2

The Department's Directive 10.2 governs the use of moderate/limited force by its officers.² It specifies:

¹ The Department's Disciplinary Code is appended to the parties' collective bargaining agreement. (Joint Exhibit 1.)

² A separate directive addresses the use of lethal or deadly force.

“Only the amount of force necessary to protect life or to effect an arrest should be used by an officer. **Excessive force will not be tolerated.** Officers should exercise all safe and reasonable means of control and containment, using only the minimal amount of force necessary to overcome resistance. The application of force by a police officer should be guided by principles found in the following ‘Use of Force Decision Chart,’ and the provisions of Chapter 5 of the Pennsylvania Crimes Code (18 Pa. C.S.A. §501, et seq.) state and federal court decisions and other statutory provisions.

(City Exhibit 6, pg. 1 (emphasis in original).)

As general guidance, the Directive advises that when responding to any incident that may require the use of force, officers, among other matters, will evaluate the situation, notify a supervisor immediately and, when feasible and safe, provide some verbal warning to the individual. (City Exhibit 6.)

The Directive also instructs:

“Subjects may be physically or mentally incapable of responding to police commands due to a variety of circumstances, including but not limited to alcohol, drugs, mental impairment, medical conditions or language or cultural barriers. Officers should be mindful of this when making use of force decisions.”

(City Exhibit 6, pg. 1.)

In all situations, it states, officers will not “offensively kick and/or stomp on a subject.” It also directs that when force is used the officer will prepare a Use of Force Report. (City Exhibit 6, pp. 7-9.)

In his testimony, Walsh confirmed that he understood and had received training on Directive 10.2. He related that under the Directive’s Use of Force Decision Chart, an officer, in responding to an aggressive or combative subject has a range of choices to contain the individual. These, he said, begin with verbal commands and continue with

control holds. Where the subject is assaultive, he related, an officer may employ open and closed hand strikes and defensive kicking.

Incident at

The events that led to Walsh's suspension occurred on [REDACTED], and involved his actions in the Emergency Room ("ER") at [REDACTED] relative to a seventeen year-old patient with autism that hospital staff was attempting to restrain.

Doctor M [REDACTED] F [REDACTED], an attending physician employed at [REDACTED]'s ER, who was treating the patient, testified that he had become agitated and attempted to leave the hospital.³ In doing so, she said, he pushed his mother to the ground and then grabbed and held a nurse, who attempted to block his access to the exit. She recounted hitting the panic button to summon security.⁴

Before security arrived, she related, fellow ER physician Doctor D [REDACTED] M [REDACTED] placed the patient in a "bear hug" to restrain him. Seconds later, she said, approximately five hospital security officers joined M [REDACTED] in seeking to subdue the patient.

She related that as M [REDACTED] and security engaged in these efforts, Walsh and fellow police officer A [REDACTED] F [REDACTED] intervened.⁵ According to F [REDACTED], as M [REDACTED] and the security officers lifted the patient off his feet, Walsh struck him with a closed fist multiple times in the torso. Once the patient had been lowered to the ground, she said,

³ This represented the patient's second attempt to leave hospital. His parents had brought him there for treatment after he tried to jump from their vehicle while being transported to a crisis response center. In his first attempt, he sought to flee after becoming agitated, but his father succeeded in calming him down and returning him to the treatment room.

⁴ F [REDACTED] averred that security is called to the ER at least once per day to restrain a patient that is intoxicated or experiencing a mental health episode.

⁵ At that time, F [REDACTED] had not had any prior involvement with either Walsh or F [REDACTED].

Walsh kicked him in the leg more than once. During this exchange, she recalled, the patient was restrained and did not kick or hit Walsh.

F [REDACTED] described being shocked by Walsh's behavior toward the patient. For this reason, she reported submitting a police misconduct complaint to the Department. (City Exhibit 2.)

Dr. M [REDACTED], in his testimony, confirmed responding to a commotion in the ER on [REDACTED]. In particular, he recounted observing the patient grab a nurse, who had blocked his path to the exit. According to M [REDACTED], he grabbed the patient from behind in a bear hug, pinning his right arm against his body. When security arrived seconds later, he said, the officers secured the patient's left arm and legs and then, after lifting him off his feet, they proceeded to lower him to the ground.

As they did so, he related, Walsh approached and then struck the patient in the groin with a closed fist. Once the patient was on the ground, he recalled, Walsh kicked him multiple times in the leg. He described the patient's demeanor as aggressive and combative, but had no recollection of the patient flailing his arms or legs towards Walsh.

With the patient having been restrained, he reported leaving the immediate area and returning to his duties in the ER.

In his testimony, Walsh averred being present in the ER at [REDACTED] on [REDACTED] [REDACTED], in response to a shooting victim/robbery suspect having been brought there.

While in the ER with fellow officer F [REDACTED], he recounted hearing a loud noise near the exit. Upon investigating, he observed the patient heading towards the door and a woman on the floor nearby. When the patient reached the exit, he grabbed a nurse who was attempting to block his path.

Upon hearing the nurse yell for help, he reported intervening to prevent her from being injured. As he did so, he recalled, M [REDACTED] had the patient in a bear hug and five or six security officers were attempting to restrain him. Despite their efforts, he recalled, the patient was flailing his arms and kicking with his legs. When M [REDACTED] and the security officers lifted the patient off his feet, he confirmed punching him one or two times in the leg with a closed fist in attempt to gain control.

Once on the ground, he said, the patient continued struggling and swinging his legs. In response, he recalled kicking him twice in the thigh. At this point, he related, the patient ceased resisting and he handcuffed him.

According to Walsh, the patient did not sustain any injuries as a result of his actions.

Addressing his conduct, he explained that hand strikes were appropriate because the patient had assaulted two persons and did not appear to be stopping. Likewise, he averred, kicks were necessary to stop the patient from flailing his legs.⁶

As to the reporting requirements triggered by his use of force, he expressed being unaware of the obligation to notify his supervisor. He described his failure to file a use of force report as an oversight. According to Walsh, he went on vacation immediately following this incident and forgot to file the report upon his return.

IAD Investigation

Captain Christopher Bullick testified that on or about May 31, 2017, Dr. F [REDACTED]'s complaint of police misconduct by Walsh was referred to him for investigation, as a member of the Department's Internal Affairs Division.⁷ In doing so, he recounted: (1)

⁶ In testifying, Walsh acknowledged presuming the patient had mental health issues.

⁷ As of that date, Bullick held the rank of Lieutenant.

interviewing F [REDACTED], M [REDACTED], the hospital security officers that intervened with the patient and officer F [REDACTED], among others; (2) attempting unsuccessfully to obtain security video of the [REDACTED] incident from [REDACTED]; and (3) taking Walsh's statement. He also confirmed reviewing Directive 10.2 in light of the information obtained from these individuals. (City Exhibits 3-6.)

He averred that upon conclusion, his investigation substantiated: (1) Dr. F [REDACTED]'s allegation of physical abuse, involving Walsh's punching and kicking the patient on [REDACTED] [REDACTED] in violation of Directive 10.2; and (2) Walsh's failure to complete a use of force report, as required by Directive 10.2, in connection with his actions that day. (City Exhibit 5.)

PBI Hearing

On the basis of Bullick's investigation report, the Charging Unit of the Police Board of Inquiry ("PBI") proffered charges against Walsh, alleging violations of: (1) Disciplinary Code Section 1-§012-10 (Conduct Unbecoming – Unauthorized and/or excessive use of force in your official capacity); and (2) Section 5-§011-10 (Neglect of Duty – Failure to comply with any Police Commissioner's orders, directives, memorandums, or regulations; or any oral or written orders of superiors).

At a PBI hearing held on August 15, 2018, the designated board members found Walsh guilty of both charges. As penalty, they recommended a three-day suspension on the first charge and a one-day suspension on the second. (City Exhibit 8.)

Captain Edward Appleton, who served as the board president for Walsh's PBI hearing, testified that the three-day suspension for the first charge reflected the seriousness of his proven misconduct. He expressed that it was unusual for an officer to

use such force in a hospital setting when responding to a juvenile with mental health issues. As to the second charge, he averred, the recommended suspension reflected that Walsh's transgression was more than a mere administrative matter.

On August 20, 2018, Police Commissioner Richard Ross adopted the PBI's recommended penalty. (City Exhibit 8.) Thereafter, the Department issued Walsh written notice of his four-day suspension, commencing October 11, 2018. (Joint Exhibit 3.)

Procedural History

This action prompted the instant grievance. (Joint Exhibit 2.) When the parties were unable to resolve the matter at the lower stages of the grievance procedure, the Union demanded arbitration. Pursuant to their contractual procedures, the parties selected me to hear and decide the case. (Joint Exhibit 1.)

I held a hearing on November 23, 2020, which, by agreement of the parties, was conducted by videoconference. At the hearing, the parties each had full opportunity to present evidence and argument in support of their respective positions. They did so. Upon the conclusion of the hearing, I declared the record closed as of that date.

DISCUSSION AND FINDINGS

The Issue:

The parties have stipulated that the issues to be decided are as follows:

1. Did the City have just cause to suspend the grievant, Police Officer Brion Walsh for four days, effective October 11, 2018?
2. If not, what shall be the remedy?

Positions of the Parties

The City contends that its suspension of Walsh was for just cause. It maintains that the evidence conclusively demonstrates his guilt on both charges.

On the unauthorized/excessive use of force charge, the City argues that the unbiased and credible testimony of F [REDACTED] and M [REDACTED] confirm Walsh's violation of Department Directive 10.2. In particular, it points out, they verified that Walsh punched and kicked the patient when he had already been restrained. It stresses that his conduct in this regard was so shocking that F [REDACTED] felt compelled to report the matter to the Department.

Further, it stresses, that Walsh's own testimony provides proof of this charge. Walsh, it notes, confirmed understanding his obligations under Directive 10.2, including the instructions for responding to a subject that may have a mental impairment. Also, he verified making no attempt to use moderate force, such as a control hold, before striking the patient. In addition, he admitted employing offensive kicks against the patient, which are prohibited by the Directive.

The second charge, which concerns Walsh's failure to report his use of force, it asserts, stands admitted. Citing Walsh's testimony, it highlights that he acknowledged awareness of his obligation to submit a use of force report whenever force is used and confirmed his failure to do so in this instance.

In sum, it concludes that the evidence presented substantiates that Walsh committed both of the charged offenses, which plainly constituted just cause for the suspension imposed.

Accordingly, for all these reasons, it asks that the suspension be sustained and the grievance be denied.

The Union, on the other hand, maintains that the City lacked just cause to suspend Walsh based on the events of [REDACTED]. It submits that the City has failed to meet its burden of proof.

The City, it stresses, has a heavy burden here and for good reason. A charge of excessive force, it notes, is a very serious matter. If sustained, it carries a stigma that affects the subject officer's career with the Department, including his/her opportunities for advancement.

The City's evidence, it argues, falls short of meeting this standard.

The record, it contends, shows that Walsh, an officer with no prior discipline, properly intervened in response to the incident he observed on [REDACTED] at the [REDACTED] ER. Citing Walsh's testimony, it describes the situation as a chaotic melee. It highlights that as Walsh approached, the patient continued to thrash his arms and legs, despite the efforts of M [REDACTED] and several security officers to restrain him.

As a result, it maintains, Walsh had obligation to act so as to take control of the situation and restore order. In doing so, it avers, the evidence shows he responded appropriately and followed his training.

F [REDACTED]'s testimony, it argues, does not show otherwise. Her reported shock as to Walsh's actions, it states, necessitates examining her background. In particular, it points out that her training is in medicine and not law enforcement or hospital security. Therefore, it concludes, her being unsettled as to the manner by which Walsh subdued the patient does not establish the force used was excessive.

It notes further that M [REDACTED]'s reaction to the incident stands in contrast to F [REDACTED]'s. Seeing the situation as a routine occurrence, he stepped in, and when order was restored, returned to his duties without taking any further action.

In addition, it asserts that in evaluating the record, consideration must be given to the evidence the City did not introduce at the hearing in this case. It cites in this regard the City's unexplained failure to present testimony from Walsh's fellow officer F [REDACTED] or any of the security officers that intervened. As a result, it submits, an inference should be drawn that their accounts would have been adverse to the City's case.

In sum, it submits that on the evidence presented the City has failed to demonstrate Walsh used excessive force on [REDACTED], in intervening to restrain an out of control patient.

As to the second charge, it does not dispute Walsh neglected to file a use of force report, but maintains the offense does not support the penalty of suspension. Under the circumstances, it reasons, the appropriate response was, at most, a reprimand.

Accordingly, for these reasons, the Union asserts that its grievance should be granted, and the requested relief be awarded.

Opinion

There can be no question that the City's Police Department has a right and a duty to ensure that its officers adhere to certain standards of conduct when acting in their official capacity. The appropriate use of force is undoubtedly one area in which the enforcement of such standards is of paramount importance. The Department's obligation to safeguard the public, while also shielding itself from civil claims, demands as much.

To this end, the Department has the indisputable right to discipline an officer who engages in the use of unauthorized and/or excessive force.

The City, of course, carries the burden of proof here. It must demonstrate by a preponderance of the credible evidence that Walsh committed the charged offenses. It must also establish that the level of discipline imposed for each was appropriate.

The Union, on the other hand, has no corresponding burden. It need not disprove the charges against Walsh. Indeed, he is entitled to the presumption of innocence.

On review, the record convinces me that the City has met its burden on the first charge, but not the second. My reasons for these conclusions follow.

In responding to physical altercations and acts of violence, police officers, no doubt, are called upon to make split second decisions regarding the level of force to use in protecting themselves and/or others from serious bodily harm. When evaluating such decisions in the context of discipline for excessive use of force, I, as an arbitrator, must not second guess the officer's decision, nor attempt to substitute my judgment for that of the officer's. Instead, the general standard to be applied is whether the officer's actions were objectively reasonable in view of all the relevant circumstances, including, in particular, the severity of the crime, the immediacy of the threat, and the degree of active resistance by the subject. (City Exhibit 6.)

In this case, however, I conclude that is unnecessary for me to perform such a facts and circumstances analysis to determine that Walsh used unauthorized or excessive force in subduing the patient at [REDACTED]'s ER on [REDACTED].

By his own admission, Walsh offensively kicked the patient, a utilization of force expressly proscribed by Department Directive 10.2. (City Exhibit 6, pp. 7-8.) As such,

regardless of whether the facts and circumstances rendered it objectively reasonable for him to respond to the patient with force greater than a physical control hold (e.g., hand strikes), I am compelled to find that his offensive kicking of the patient, standing alone, substantiates the charge of using unauthorized or excessive force.

Any claim that Walsh was unaware of the prohibition of offensive kicking does not cause me to reach a different conclusion. He had a responsibility to be familiar and comply with the terms of Department Directive 10.2, which clearly and unambiguously states: “Officers responding to any incident that may require the use of force, **WILL NOT: . . . 3. Offensively kick and/or stomp on a subject.**” (City Exhibit 6, pp. 7-8 (emphasis in original).) As such, ignorance offers no defense here.

Having found that the City has substantiated the charge of unauthorized or excessive use of force by Walsh, there remains the question of whether the three-day suspension he received was an appropriate measure of discipline for this offense. I conclude that it was.

The Department’s Disciplinary Code, which is appended to the parties’ collective bargaining agreement, sets a penalty range of reprimand to dismissal for a first offense of unauthorized or excessive use of force. Walsh’s use of a method of force expressly proscribed by Directive 10.2 (i.e., offensive kicking) is no doubt a serious offense that supports a penalty greater than the minimum. Further, his acknowledged understanding that the patient had a mental impairment that possibly impeded his ability to respond to commands exacerbates the gravity of his offense. Finally, giving due weight to all of the relevant circumstances, I do not find mitigating factors that would render a three-day suspension to be excessive here. Simply put, there is no basis for me to modify or reduce the discipline imposed for this offense.

Turning to the second charge, there is no dispute that Walsh violated Directive 10.2's requirement to immediately notify a supervisor of his use of force and submit a use of force report. Indeed, he concedes as much. His explanation that such failure was an oversight provides context, but does not excuse this violation.

The only question to be answered then as to this charge is whether the established violation warranted a one-day suspension. I conclude that it did not.

In explaining the PBI's decision to recommend a one-day suspension for this offense, Captain Appleton described it as being more than a mere administrative error. On the evidence presented, I find that claim unsubstantiated.

Walsh's testimony to the contrary stands uncontradicted. He explained being unaware of the requirement to notify a supervisor of his use of force, and averred starting a vacation the next day, [REDACTED], and forgetting to file the report upon his return to work.

I find nothing to substantiate that his reporting failures were willful, or worse, a conscious attempt to conceal his use of unauthorized or excessive force. For this reason, his guilt on the first charge of using unauthorized or excessive force can have no bearing on the appropriate penalty to be assessed for the second charge. Instead, it must be determined separately.

In view of Walsh's lack of prior discipline and the inadvertent nature of his transgression, I conclude that a one-day suspension was excessive. Instead, giving consideration to the prescribed penalty range of a reprimand to a five-day suspension for a first offense of Department Disciplinary Code Section 5-§011-10 (Neglect of Duty – Failure to comply with any Police Commissioner's directive), I am satisfied that a written reprimand constitutes the appropriate level of discipline. Therefore, the Department is directed to convert the one-day

suspension imposed for this offense to a written reprimand and make Walsh whole for all wages and/or benefits that he lost as a consequence.

Accordingly, for all these reasons, the Union's grievance is granted, in part, and denied, in part.

AWARD

1. The grievance is granted, in part, and denied, in part.
2. The City had just cause to suspend Brion Walsh for three days, effective October 11, 2018, for violating Department Disciplinary Code Section 1-§012-10.
3. The City did not have just cause to suspend Brion Walsh for one day, effective October 11, 2018, for violating Department Disciplinary Code Section 5-§011-10.
4. The City will convert the one-day suspension for violating Department Disciplinary Code Section 5-§011-10 to a written reprimand and make Brion Walsh whole for all pay and benefits lost as a consequence of that suspension. I will retain jurisdiction of this matter to resolve any dispute as to the implementation of this award, including the monies to be paid to or on Brion Walsh's behalf in providing the make whole relief.

December 18, 2021



David J. Reilly, Esq.
Arbitrator

STATE OF NEW YORK)
)
) ss.:
COUNTY OF NEW YORK)

I, DAVID J. REILLY, ESQ., do hereby affirm upon my oath as Arbitrator that I am the individual described herein and who executed this instrument, which is my Award.

December 18, 2021



David J. Reilly, Esq.
Arbitrator