

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: Andrew Frysiak
AAA Case No. 01-19-0000-7456

Before

Margaret R. Brogan, Esquire
Arbitrator

Appearances

For the Employer

Kia Ghee, Esquire
Assistant City Solicitor
City of Phila. Law Department
Labor and Employment Unit
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 December 21, 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 and the matter was deemed submitted for determination by the arbitrator as of the end of the hearing.

At hearing, Sergeant Z [REDACTED] K [REDACTED] and Captain Christine McShea testified on behalf of the City. Captain John Hoyt, Lodge 5 Recording Secretary, and the grievant, Police Officer Andrew Frysiak, testified in the Union's case.

ISSUE

The parties stipulated that the issue before me is whether there was just cause for the 10-day suspension imposed upon the grievant, Andrew Frysiak, and if not what shall be the remedy?

FACTS

This grievance protests the City's imposition of a 10-day suspension upon the grievant, a 14-year police officer, for allegedly lying in an Internal Affairs investigation. The grievant was charged with Conduct Unbecoming, Disciplinary Code Section 1-§009-10 (Lying or attempting to deceive regarding a material fact during the course of any Departmental investigation.)¹ The investigation was related to the grievant's activities in responding to the report of an accident on [REDACTED], and was

¹ The grievant also received a reprimand for Neglect of Duty, Section 5-§005-10 (failure to make a required written report.) That discipline is not before me.

conducted pursuant to a complaint made by a citizen, S ■■■ E ■■■. E ■■■ did not testify at arbitration. The City did not indicate whether any efforts were made to secure her testimony. 911 tapes were introduced into evidence which the City asks be taken for the truth. (CXs 2 and 3)

The grievant and his partner, Police Officer A ■■■ C ■■■, riding in Car ■■■, were dispatched to a complaint of an accident at Hartville and Allegheny Streets, Philadelphia, at 6:51 AM. At the time, the grievant was working in the 25th District. Hartville and Allegheny is the dividing line between the 24th and 25th Districts. E ■■■ had called 911, on 6:33 AM, 6:35 AM, and 6:42, to report that a man had hit parked cars in the vicinity, including E ■■■, and the man was high, was attempting to leave, and people were holding him at the location. Dispatch advised the grievant and C ■■■ that the driver was allegedly high and the situation was escalating.

When arriving at the scene at about 6:53 AM, the grievant saw that the accident was on the 24th District's side of the street, and the grievant immediately requested that they send out a 24th District car. According to the grievant's testimony, he took down the relevant information from the complainant, ran the vehicle tags driver's license, and waited until a 24th District car arrived, at which time he handed off the information to the District 24 officer and then left. The grievant could not remember the name of the District 24 officer or the number of the car. The grievant testified that, as he was waiting, it was pouring rain, and the complainant waited at times in a medical building nearby. The grievant said he told E ■■■ to stay on the scene and did not tell her to go down to the 24th District to report the accident. The grievant did not write an accident report himself. The grievant testified that he would not have left the scene unless he

had passed on the information to a 24th District officer. There is no 911 recording in which E [REDACTED] complains about any officer.

At 8:26 AM, K [REDACTED], from the 24th District, was dispatched to Hartville and Allegheny. K [REDACTED] arrived at the 8:30 AM and reported that there was no one at the location and no accident. K [REDACTED] testified that he was told that the complainant was at the 24th District filing a report. Because there was no one on the scene and no accident, K [REDACTED] coded it as Unfounded. There is also a record that shows that the grievant sent an MDT message to K [REDACTED] right after K [REDACTED] was dispatched to the scene, in which the grievant asked K [REDACTED] to call the grievant. Neither the grievant or K [REDACTED] could remember whether that call took place, or what, if anything, was said in that call.

The complainant, E [REDACTED], filed a report of an accident on [REDACTED] at the 24th District, but did not file a complaint about officer misconduct until [REDACTED]. Captain McShea, who at that time was working in Internal Affairs, was the assigned investigator. McShea reviewed relevant records, including police logs, 911 tapes, and the MDT data terminal log. McShea interviewed the complainant E [REDACTED], K [REDACTED], the grievant and C [REDACTED]. The grievant's interview took place on August 7, 2017. In his interview, the grievant said that he passed the information off to a 24th District officer, but did not recall the officer's name or car number. The grievant said he did not tell E [REDACTED] to go down to the 24th District to report the accident.

McShea testified that she concluded the grievant was not accurate and not truthful in the investigation. McShea testified she based this conclusion on the fact that the grievant said he had handed the accident information off to a 24th District officer, but

K [REDACTED] said he did not meet with the grievant, and there is no record of another officer responding to that location. When asked on cross why McShea concluded that the grievant was lying, not merely mistaken, McShea testified that “there is not much of a difference – if you say you handed it off but you didn’t, that is lying.”

The grievant testified that he was truthful in his interview with McShea, specifically when he told her he handed off the information but he could not remember the name of the officer or car number, as it is not typical to record that information on a handoff. Frysiak testified that he and his partner typically respond to 10 radio calls a day, and are also flagged down. He worked during the period from the date of the incident to his Internal Affairs interview. The grievant testified that it was not unusual to have these jurisdictional issues in that area between the two Districts. The grievant testified that he realizes now he should have just written an accident report. As stated, the grievant was given a reprimand for failing to do so, and that discipline is not before me. The grievant testified that he did not know when E [REDACTED] left the location, as it was pouring rain, and the complainant was going in and out of the medical facility.

As a result of the investigation and PBI hearing, charges were made against Frysiak which were sustained by the Police Commissioner. On February 2, 2019, the grievant was notified of his 10-day suspension for Conduct Unbecoming (Lying or attempting to deceive regarding a material fact during the course of a Departmental investigation.) (JX 3). The basis for that determination is set forth in the notice:

During your Internal Affairs interview, you and your partner, P/O A [REDACTED] C [REDACTED] #3679, stated that you provided all of the information regarding the accident at Hartville Street & Allegheny Avenue to an unknown 24th district officer that responded to the scene; however, the complainant S [REDACTED] E [REDACTED] stated that no other officers were on the location at the accident. Ms. E [REDACTED] also stated that she was told by you and your partner, that she had to go to the 24th District to file the

accident report, which she subsequently did. Based on the information obtained, it appears likely that neither you nor your partner turned any information over to any 24th District officer regarding the auto accident.

DISCUSSION

The positions of the parties will be briefly summarized. The City contends that there is just cause for the 10-day suspension of the grievant. According to the City, the grievant lied when he said that he gave the accident information to another officer; if so, why did the complainant call 911 three times and come into the District to report it? The City opines that to believe the grievant requires me to find that K [REDACTED] was lying, as records show that no other officer was present at the incident scene. The City also points out that the grievant did not have a copy of the information he allegedly passed on. The City argues that it needs its officers to be truthful in their positions, and the facts show that the grievant provided false information. The City urges that the grievance be denied, and the minimum penalty imposed for the Charge of Conduct Unbecoming under the Disciplinary Code in the parties' CBA should be upheld.

To the contrary, the Union contends that there was not just cause for sustaining this very serious charge. The Union points out that the grievant already received a reprimand for failing to do the accident report, which he is not contesting. According to the Union, the facts show that this was truly a miscommunication issue with the two districts, and given the level of work the officers perform, not particularly important. The Union opines that the complainant did not come forward for three and a half weeks and the investigation was delayed. According to the Union, it is understandable that the grievant did not recall, and to demonstrate that the grievant was lying intent must be

shown which is not present. The Union urges that the grievance be upheld, and by way of remedy, that the suspension be removed from grievant's file, and he be made whole.

On the basis of the record evidence and the arguments of the parties, I find that the City, who bears the burden of proof in this proceeding, failed to prove just cause for the discipline.

Pursuant to the charge levied upon the grievant, the City has the obligation to prove that the grievant was intentionally untruthful and/or attempted to deceive. Such proof of intent is missing here.

First, I turn to the basis for the charge of Conduct Unbecoming, as reflected in the Notice of Suspension. It is apparent that key facts relied upon were supplied by the complainant's statements that there were no other officers at the location of the accident, and that the grievant told her she had to go to the 24th District to file an accident report. E ■ did not testify at arbitration so we have no direct evidence of these allegations.

The grievant was the only witness at arbitration who could provide direct evidence of what occurred. The grievant denied that he told E ■ she had to go to the 24th District to file an accident report. He testified that he took down the accident information, ran the tags and license, and to his best recollection handed it off to a 24th District police officer. There is no evidence that belies the grievant's testimony. The grievant acknowledges he should have written up an accident report even though it occurred in the 25th District, but he has already been disciplined for that failing. The City has turned that mistake, which would have confirmed what the police dispatch records

showed – that the grievant was at the accident location – into alleged proof that the grievant was a liar. It simply falls short of reflecting any intent.

In terms of the holes in his recollection, there was an obvious time delay problem in putting the grievant on notice of the complaint, and taking his statement, making the grievant's claim more understandable that he could not recall the name of the officer to whom he passed on the accident information, or the car number. Moreover, the grievant described his typical busy day, and the density of his workload, and he was asked to recall facts related to an accident involving parked cars, with no cited injuries, three months after it occurred. Yet, instead of taking that delay into account in determining the grievant's credibility, the Department chose to conclude he was lying. In addition, it is not an uncommon occurrence for Police cars to be flagged down or to stop to check on an apparent incident in their district. If that happened here, there could have been a miscommunication between the districts, as the Union argues.

Even if we take E■■■■' 911 phone calls for the truth, as the City requests, the substance of those calls does not help the City's case. In those calls E■■■■ says nothing about any failures on the part of a police officer. Indeed, although the City points out that the complainant had to call 911 three times, arguing that this shows the grievant was not being responsive to E■■■■ at the scene, City records show that the grievant and his partner were not dispatched until *after* those 911 calls. The grievant credibly testified that while they were waiting for 24th District officers, it was pouring rain, so it is quite possible that when a 24th District car did arrive, the complainant did not see the officer as she was going in and out of a medical building as the grievant described. Testimony showed that it was not unusual for an officer to write information down on a

piece of paper to provide to another officer, supporting the grievant's recollection.

Moreover, E ■ did not complain about officer misconduct until almost a month later.

What we have left is the grievant's credible explanation, given the circumstances, including the length of time before he was questioned, that he had no specific recollection as to whom he handed accident information. I do not find, as the City suggests, that the grievant's testimony is internally inconsistent with that of K ■'s. The grievant testified that he did not recall whether K ■ was the officer for the 24th District to whom he handed off the accident information, and K ■ testified that it was not him.

Captain McShea's testimony shows that the Internal Affairs analysis was flawed. She testified that in making her recommendation for discipline, she concluded there was not much of a difference between finding an officer to be mistaken about doing something, and an intentional lie. I disagree. The City had an obligation to prove that the grievant intentionally fabricated a false story in the investigation.

To agree with the City in this case, I would have to conclude that the grievant engaged in a conspiracy with his partner to lie about assisting a complainant over a parked car accident, and then lie about leaving the scene without providing any aid. There is simply not enough here to draw those conclusions.

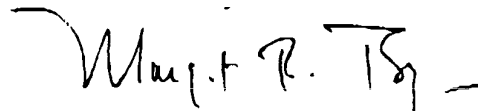
I find, therefore, that the City failed to prove just cause for the suspension of the grievant. Accordingly, the grievance will be upheld and an appropriate remedy shall be ordered.

AWARD

I find that the City failed to shoulder its burden of demonstrating that the City had just cause for the 10-day suspension of the grievant, Andrew Frysiak.

Accordingly, the grievance is upheld. By way of remedy, the City is ordered to make the grievant whole for monies lost as a result of the 10-day suspension, and ordered to remove all references in his record to this discipline.

The Arbitrator will retain jurisdiction for 90 days on remedy, and only in the event that the parties do not agree.



Margaret R. Brogan, Arbitrator

Date: January 13, 2021