American Arbitration Association
Arbitration Pursuant to Agreement of the Parties
Before Timothy J. Brown, Esquire

In the matter of:

AFSCME DISTRICT COUNCIL 33, LOCAL 1927	:	
	:	**AAA Case No. 01-20-0005-3146**
and	:	**(Michael Williams)**
CITY OF PHILADELPHIA	:	

Decision and Award

Appearances:

On behalf of AFSCME DC 33, Local 1927:
Neal Goldstein, Esq.
Spear Wilderman, PC
230 S. Broad Street, Suite 1400
Philadelphia, PA 19102

On behalf of City of Philadelphia:
City of Philadelphia Law Department
Benjamin Patchen, Esquire
1515 Arch Street, 16th Floor
Philadelphia, PA 19102

DECISION

Introduction

This arbitration arises pursuant to the collective bargaining agreement (the Agreement) between **AFSCME DC 33, Local 1927** (the Union) and **The City of Philadelphia** (the City or the Employer). In its underlying grievance, the Union alleges the City violated the Agreement by dismissing bargaining unit employee **Michael Williams** (Grievant). The parties were unsuccessful in resolving the dispute through their grievance procedure and the Union

thereafter filed a demand for arbitration. The parties selected the undersigned arbitrator through the processes of the American Arbitration Association to conduct a hearing on the grievance and render a final and binding arbitration award. The matter was heard by the undersigned on November 23, 2020 and January 14, 2021 via the Zoom virtual platform. The parties were afforded the opportunity for argument, examination and cross-examination of witnesses and the introduction of relevant exhibits. Grievant was present via Zoom for the entire hearing and testified on his own behalf. Following the hearing the parties elected to submit written post-hearing argument, upon the receipt of which by the AAA, the dispute was deemed submitted at the close of business March 5, 2021.

This decision is made following careful consideration of the entire record in the matter, including my observation of the demeanor of all witnesses.

Issues

The parties stipulated that the arbitrator has the authority to render a final and binding decision and award in the matter, and that the issues presented by the subject grievance may accurately be described as:

1) Is the grievance arbitrable?
2) If so, did the City have just cause to issue Grievant a suspension with intent to dismiss Grievant and to dismiss Grievant, and if not, what shall be the remedy?

Evidence and Facts

By Notice served upon Grievant May 1, 2020[1] he was notified of his suspension with intent to dismiss. The May 1 Notice concluded:

…By admitting that you did make the 'wait until 3 o'clock and see what

[1] All dates hereinafter are 2020 unless otherwise indicated.

> happens outside' comment and by admitting that you were using profanity during the argument with D[redacted] you have violated the City's Workplace Violence Policy and the City's Dignity Clause. As a result, along with the fact that you are under a last chance agreement for similar behavior, it has been determined that you serve a 30-day suspension with intent to dismiss.

Thereafter, by Notice served May 27, Grievant was notified of his dismissal. That Notice concludes:

> On May 1, 2020, you received a 30-day suspension with intent to dismiss for violation of your last chance agreement: Threatening Remarks & Behavior.
> Following your 30 day suspension, which ends Tuesday, June 9, 2020 you will be dismissed effective Wednesday, June 10, 2020.

The City's Dignity Clause referenced in the Notice of suspension provides, in part; "*The City managers and its employees should treat other employees and the public with respect, dignity, and in a manner that is not offensive."* The City's Workplace Violence Policy provides, in part:

> **A. Statement of Commitment**
>
> The City of Philadelphia is committed to providing a safe workplace free from violence and threats of violence. The workplace includes any place where City business is conducted, including City buildings and property, City vehicles, private vehicles used on City business, other assigned work locations and off-site training.
>
> The City will not tolerate violent behavior or threats in the workplace. Any violent behavior related to the employee's work or work relationships, on or off City property or City workplaces, is prohibited. Violations of this policy will be investigated, and if substantiated, the City will take disciplinary action in accordance with established procedures.
>
> **B. Violent Behavior**
> Employees should not be subjected to physical, written, or verbal conduct that is violent in nature related to the employee's work or work relationships. In addition, no employee is permitted to engage in

> violence or threaten violence to another employee, supervisor, manager, union representative, customer, resident or any other person.
>
> Violent behavior includes physical violence and/or threats of physical violence that would lead a reasonable person to fear for his or her safety. Violence may be either verbal, written or physical.

Grievant

Grievant began working for the City in 2014 as a Trades Helper in the City's Tire Shop. In or about 2016 he was promoted to Auto Maintenance Helper. He is uniformly considered a good worker. His disciplinary history includes a one-day suspension in September 2015 for yelling at a co-worker and an allegation that he threatened to shoot the coworker. An element of the one-day suspension required Grievant to attend an anger management class. In October 2015, Grievant received a five-day suspension for violation of the City's Workplace Violence Policy; a suspension that was later reduced to a two-day suspension and a related Last-Chance Agreement (LCA). The October 9, 2015 LCA provides:

> LAST CHANCE AGREEMENT
>
> WHEREAS, Michael Williams, is currently employed by the CITY OF PHILADELPHIA OFFICE OF FLEET MANAGEMENT (the "City") and represented by AFSCME, District Council 33 (the "Union");
>
> WHEREAS, Michael Williams and the Union acknowledges that Michael Williams violated the Work Place Violence policy by exhibiting Threatening and Abusive language and behavior, and that the Office of Fleet Management has just cause for termination of employment;
>
> WHEREAS, the parties, the Union, Michael Williams (the employee) and Office of Fleet Management, intending to be legally bound, hereby enters into the following Agreement:
>
> 1) The Office of Fleet Management agrees to reduce the recommended 5 day suspension to a 2 day suspension to be served

on 10/14/15 and 10/15/15, provided that the Union and Michael Williams agree to the following as conditions of continued employment:

2) Michael Williams recognizes and understands that there is zero tolerance for Work Place Violence.
3) Michael Williams agrees to adhere to the Work Place Violence Policy and to refrain from exhibiting any further language or behaviors that can be perceived as threatening, abusive or insulting.
4) Michael Williams understands that he was offered a promotion to Automotive Maintenance Technician. Michael Williams understands that as a result of his 1-day suspension on 9/8/15 for Arguments and his 2 day suspension on 10/14/15 and 10/15/15 for Threatening and Abusive Language and Behavior, the offer of promotion has been rescinded.
5) Michael Williams understands that he can be considered for promotion in 1 year from the date of this agreement provided there are no other disciplinary actions of any nature. Michael Williams understands that for future considerations for promotion, he must apply for and pass a civil service examination.
6) Michael Williams understands that he must attend Anger Management sessions which will be scheduled by the Office of Fleet Management. Michael Williams understands that this was a stipulation along with the suspension on 9/18/15.
7) Michael Williams understands that he can be considered for promotion in 1 year from the date of this agreement provided there are no other disciplinary actions of any nature. Michael Williams understands that in order to be considered for promotion, he must apply for and pass a civil service examination.
8) Michael Williams understands that this Agreement serves as a 'Last Chance' for employment. Michael Williams understands that any additional violation that would constitute Work Place Violence will result in his immediate dismissal.
9) In the event Michael Williams is discharged for violation of this Agreement, Michael Williams and the Union agree that said discharge will not be grieved by the Union or Michael Williams or taken to arbitration by the Union
10) This Agreement will be signed by Michael Williams and the Union as the agreement for this infraction and no Grievance will be filed by the Union pertaining to this matter.

Intending to be legally bound, the parties hereby affix their signatures below.

The 2015 LCA was signed by Grievant, the Local Union's vice president and two

representatives of the City.

In or about September 2018 Grievant was the subject of proposed discipline of a 30-day suspension for allegedly being involved in a confrontation with a City of Philadelphia Police Officer outside of Grievant's assigned tire shop. In addition to the 30-day suspension, the City proffered a LCA for Grievant's and the Union's execution. In part, the 2018 proposed LCA included language providing:

> 2. Mr. Williams and the Union understand that this is a Last Chance Settlement Agreement. If Mr. Williams should have any further infractions or instances of hostile or aggressive behavior, whether verbal or physical in nature, towards any person, co-worker or superior, he will be dismissed.

The record establishes that Grievant disputed the discipline and refused to signed the 2018 LCA, and that the City did not pursue the matter further.

Events of [redacted]

On [redacted] Grievant's shift was scheduled to end at 3:00 pm. He arrived back to the tire shop from an assignment five to ten minutes prior to the end of his shift.

Tire shop employee **D[redacted] B[redacted]** testified that on [redacted] he was closing up the shop just before 3:00 pm, and recalled going to the second bay door to attempt to raise the door. If the door raised, which it did, B[redacted] explained, that meant no one had turn off the circuit breakers. B[redacted] testified that as the door raised, he saw Grievant was standing outside of the bay door. At that time, Grievant called B[redacted] a "dick head." B[redacted] closed the door and went to the foreman's office to ask if another employee was still out on the road (if not he could turn off the circuit). In the office were his foreman S[redacted] S[redacted] and Supervisor R[redacted] Z[redacted]. B[redacted] returned to the shop, and went to the breakroom and sat down next to his tools. Also sitting down in the break room

were Grievant and employee W[redacted] M[redacted]. According to B[redacted];

> …I heard Mike [Grievant] yelling the whole time calling me a dick head. He was venting out or venting to me – screaming at --- about me to W[redacted] M[redacted].
>
> I told Mike, Mike, I'm the one who opens the shop in the morning, I turn the compressors on. I get there – sometimes we get trucks in the shop, I take the trucks out. I hook up the air lines, what have you.
>
> And the Mike was getting louder. I told Mike, I said, Mike, can you hear me. I told him – my voice – as I start talk – trying not to talk over him, I was trying to, I said, listen, Mike – before I knew it, my foreman and my supervisor were to the left of my toolbox.
>
> I kept my eyes on Mike the whole time. He was leaning over to me. He was approximately, maybe seven feet away. He was sitting down looking at me. And W[redacted] M[redacted] was sitting to the right side of Mr. Williams.
>
> Mike started getting louder. My supervisor told me, D[redacted] don't say nothing. Mike got out of the chair. He started to approach – started to approach me, waving his arms. And he had a cell phone in his hand.
>
> As he was getting up waving his arm, he kept calling me a bitch again and again and again, waving his arms walking towards me while I was sitting down the whole time.
>
> He said he was going to hit me with his cell phone. He was going to see me at 3 o'clock outside. This is his neighborhood, I don't belong there.
>
> As he walked away, [past] the foreman and supervisor that were on the left of me standing up, the last thing Mike Williams called me, he said I don't know nothing and I'm retarded.
>
> He stormed out of the building…

B[redacted] testified that he found Grievant's conduct of throwing his arms in the air, repeatedly calling B[redacted] a bitch, walking toward B[redacted] and saying he was going to hit B[redacted] with his cell phone; threatening. He also felt threatened by Grievant's saying he was going to wait for B[redacted] outside at three o'clock.

According to B[redacted], when he first sat down in the break room, Grievant was speaking to M[redacted] and that B[redacted] said something to Grievant, and Grievant then started yelling at B[redacted]. B[redacted]

does not know when his foreman and supervisor first arrived as they were to his back, but testified, they came in after Grievant began to yell. B[redacted] admitted that he raised his own voice to Grievant, and further testified that when his supervisor told B[redacted] not to say anything further. B[redacted] complied and thereafter did not speak.

Foreman S[redacted] S[redacted] testified that at the end of the workday on [redacted], his attention was drawn by yelling from the shop floor. He believes he heard yelling from more than one person. He got up to investigate and told Supervisor Z[redacted] – whose office is ten feet away from S[redacted]'s – there was someone yelling in the shop. The two then went into the shop. S[redacted] testified that he observed Grievant and B[redacted] arguing back and forth. The two employees were yelling back and forth, S[redacted] testified. In addition to Z[redacted], employee M[redacted] was also in the shop. M[redacted] was sitting next to Grievant. Grievant and M[redacted] were approximately 5 to 7 feet away from B[redacted]. S[redacted] testified that the supervisors told both B[redacted] and Grievant to calm down. S[redacted] testified that Grievant then continued and called B[redacted] a "retard" and "a fucking dickhead." According to S[redacted], Grievant then got up and walked by S[redacted] and Z[redacted] saying; "I'm not going to take this in my neighborhood," and turned back toward B[redacted] and said to B[redacted]; "wait until 3:00 pm, and I'll meet you out in the street." S[redacted] testified that as Grievant referenced the street he pointed to the street. and walked out of the building. S[redacted] testified that he took Grievant's final statement to B[redacted] to be a threat and that Grievant was going to wait for B[redacted] outside.

S[redacted] testified that after the incident, B[redacted] came into his office and said he felt threatened and was afraid to go outside. According to S[redacted], he, B[redacted] and Z[redacted] left the building together at about 3:15 pm. Grievant was not outside. S[redacted] also testified that there are security cameras in the shop, but that they are pointed at the shop floor and not the break area.

Supervisor R Z testified that he was present for some of the incident, documented the incident, attempted to take statements from all of the individuals present during the incident and eventually submitted a recommendation for dismissal of Grievant relating to the incident. He testified that he gathered statements from B, M, S and himself; and that Grievant declined to give him a statement because Greivant wanted to seek his Union representative.

As for the incident itself, Z testified, when he approached the area where Grievant and B were, he observed that both employees were using raised voices back and forth to each other. He recalled Grievant yelling at B and calling B a dick head. He recalled B yelling It's my job. It's my job. I'm doing what I was told. I'm doing what I was told. Z asked both employees to calm down. He recalled specifically saying directly to B; "just be quite." Grievant continued to shout. Z asked Grievant to calm down. Grievant did not cooperate. Grievant yelled at B saying the employee was worthless and stupid. Grievant called B a bitch. Z again said calm down to Grievant. Grievant continued, he got up and started to walk away twice and came back. Z testified that Grievant got up just waving his arms and yelling at Z and B, walked away and the came back and yelled more. Grievant at one point yelled at Z that he won't be disrespected in his neighborhood, and then Grievant turned back to B and said to B "we can wait until 3:00 pm and see what happens outside there," pointing to the street.

Z testified that B did not receive any discipline for the incident because the employee did not make any derogatory remarks against Grievant and when Z told the employee to be quiet, the employee adhered to the supervisor's instructions.

Z testified that M is still employed at the tire shop. Z also testified that he

initially decided to recommend dismissal of Grievant for his conduct of [redacted] alone based upon hostile work environment policies and Grievant's threat. At that time he was not aware that Grievant had signed a LCA. He was later informed of the LCA before the recommendation was finalized. Z[redacted] testified that the shop has cameras, but he is not sure if the camera caught the [redacted] incident; he did not review the recording, and the system has since failed and been replaced.

City Office of Fleet Management Commissioner Christopher Cocci testified that he concurred in the decision to dismiss Grievant. He testified that he based his decision on the fact that this was Grievant's third violence in the workplace issue; that in this instance Grievant had a violent outburst, and in other incidents he had threatened his coworkers. From what he learned from Grievant's supervisors, Grievant was an excellent worker. Cocci testified that when he reviewed the matter Grievant's work performance was considered and that it was a difficult decision. But, Cocci testified, it was his responsibility to make sure that employees have a safe place to work and he concurred with the decision to terminate the employee.

Monica Miller is the City Human Resources Business Partner for the Office of Fleet management. She testified that she was involved in the decision to dismiss Grievant. Grievant had two prior suspensions for violence in the workplace-related conduct, and the second suspension included a LCA. Grievant agreed in the LCA that if he engaged in prohibited conduct in the future he would be discharged. Grievant violated the LCA. Although it is true that Grievant had no incidents between the time of his signing the LCA in 2015 and his April 2020 conduct, the LCA has no expiration date – it is effective forever – and Grievant violated the terms of the LCA.

Grievant testified that on [redacted] he returned to the shop at about 2:55 pm. He denied

that he spoke to B[redacted] outside of the shop before Grievant entered the shop. In the shop, Grievant testified, he walked to the back of the shop where his co-worker W[redacted] M[redacted] was speaking with another co-worker D[redacted] S[redacted]. According to Grievant, he sat down next to M[redacted] and M[redacted] then told Grievant; "he's following you around again." Grievant asked who? And M[redacted] responded D[redacted] B[redacted]. Grievant testified that he then told M[redacted] that he was going to report B[redacted] for following Grievant around. At about this time, Grievant testified, B[redacted] walked into the back area, looked directly at Grievant and asked if Grievant was talking about B[redacted]. Grievant testified that he answered yes, and that B[redacted] then said; "fuck you, I don't give a fuck about you, I'm not scared of you." Grievant described B[redacted]'s voice as being very high and testified that his own voice was "a little elevated."

Grievant testified that he never said Grievant was a fucking dick head. Grievant testified that he heard the testimony of S[redacted] and Z[redacted] about the [redacted] matter and that the testimony of the foreman and supervisor was not accurate. Grievant testified that he did not threaten B[redacted] on [redacted] in any way. He testified that he did not call B[redacted] a bitch and that testimony by others that he did is a lie. He testified that he did not call B[redacted] a dick head and that testimony of others that he did is not accurate. Grievant testified that he did not tell B[redacted] that he would see him outside, and that the testimony of S[redacted] and Z[redacted] in such regard is also not accurate. Grievant testified that there was a camera stationed right over the area where he was sitting with M[redacted] on [redacted].

Grievant confirmed that he signed the 2015 LCA, and explained that he did so because the Union vice president told him if he did not the City would fire him. Grievant testified that he complied with the terms of the LCA, that he received his promotion one year later and that he has had no discipline between the time he entered the 2015 LCA and the events at issue here.

In regard to the 2018 LCA he was asked to sign, Grievant testified he did not sign the agreement because he had not done anything wrong. He was not suspended or subject to termination for his failure to sign that LCA.

On cross, Grievant testified that in regard to his one-day suspension in 2015, he did not yell at his co-worker P[redacted] and that he did not threaten to shoot P[redacted]. He testified that he received a two-day suspension also in 2015 and was accused of making disrespectful and threatening remarks to co-workers. He testified that he did not make the claimed threatening or disrespectful remarks. He again testified that all of the people who testified that he cursed B[redacted] on [redacted] were not accurately speaking about the incident. Grievant testified that he did not have any issues with B[redacted] prior to the [redacted] incident. Nor did he have any issue with Z[redacted].

Processing of the Grievance

Rebecca Hartz from the City Mayor's Office of Labor Relations, testified that the grievance-arbitration language governing the parties is contained in the parties' 1992 Bargaining Agreement, as modified by their 2016 Bargaining Agreement. The Grievance procedure requires referral of the grievance by the Union within 20 days of the step III answer (or its due date) to the Director of Labor Relations. Hartz testified that to address issues related to the COVID-19 pandemic, the Office of Labor Relations has established a separate email address for the filing of grievances and sent emails informing of the new grievance-related email address to all unions with bargaining agreements with the City. In addition, the Office has a member of its staff physically go into the office once a week to check the mail. Hartz testified that since establishing the email address, the Union has used the address to file grievances at step IV. However, she testified, the Office did not received a step IV demand form the Union relating to the instant

grievance.

Human Resources Manager Jeffery Easter testified that he was involved in the investigation of the matter, and, because Grievant had declined to give a statement, he and District Manager John Delco[2] conducted an April disciplinary hearing attended by Grievant, Union President Aaron Holiday and Union Business Agent Richard Jones. At the hearing, Grievant denied making the statement alleged by B[redacted] and claimed that B[redacted] stated to Grievant; "fuck you! I don't give a fuck about you." Grievant stated that at that point he had to not back down, and called B[redacted] useless and said B[redacted] doesn't do anything. Grievant also stated that he did not say this is my neighborhood, but rather said the is my house, meaning the garage. Easter testified that at the hearing Grievant admitted to the statement reported by Z[redacted]; "wait until 3:00 pm and see what happens." As to the 3:00 reference by Grievant, at the disciplinary hearing, the Union's representatives argued that such was not a threat, but an invitation to talk about the matter further after work.

Easter testified that Grievant was terminated for his incidents of violation of the City's workplace policies and not just because of his violation of his LCA.

Union Business Agent Richard Jones testified that he was present at the disciplinary hearing referenced by Easter, and that that was the first time he became aware of Grievant's 2015 LCA. Jones testified that the hearing was to be an opportunity for Grievant to give his statement, but the City representatives turned it into a grievance hearing. At the meeting, Grievant testified consistently with his testimony at the arbitration. Based upon Grievant's statement, employee M[redacted] was the only witness who was present for the entire event, and could say who said what from the beginning of the incident. In regard to M[redacted], Jones testified:

[2] The manager's last name is referred to variously in the record as Delco, Deleo and DiLeo.

Q. Did you ask Mr. DiLeo if he would
bring in Mr. M[redacted] to testify at this hearing?
A. I did ask, yes.
Q. What did he respond?
A. There's no need for him to be here.
Q. Did he explain why?
A. Because he had his statement.
Q. Did he show you his statement?
A. Yes. I believe he did, yes.
Q. Did what Mr. Williams said at the
hearing, at the meeting, whatever it was, did
that differ from what Mr. M[redacted] said at work or
apparently said?
A. Yes, it was different. And when we told Mr. DiLeo,
Mr. DiLeo's response was, I'll write W[redacted] up if
he tells you something different than he tells me.

Jones testified that he did not file a step IV grievance in the matter because of the position taken by the City at the meeting and the language in the LCA.

Positions of the Parties

The City

Arbitrability

The City argued that the matter is not arbitrable for two reasons. First, the clear terms of Grievant's 2015 LCA precludes arbitration of the City's decision to dismiss the employee for his violation of the Workplace Violence Policy and, second, because the Union failed to comply with the terms of the grievance provisions of the Agreement. The Union's argument contradicts itself, the City asserted. On the one hand, the Union claims the LCA was void from the start and on the other hand, the Union claims the language of the LCA prohibiting arbitration precluded the Union from moving the grievance to step IV. The Union cannot have it both ways.

The clear terms of the Agreement provide that the Union may move a grievance to arbitration only if the grievance is not resolved within 365 days of the initiation of the grievance

procedure "having been fully processed through step IV." Here, the Union BA admitted the grievance was never moved to step IV. Even if the Union believed the LCA precluded it from challenging the validity of the LCA in a grievance. They Union offered no mitigating circumstances that would excuse its failure. The Union was well aware of the grievance steps required before any filing of arbitration. The Union used the City's Covid-related process to file other arbitrations.

The Union and Grievant received valuable consideration for the LCA. As reflected in the language of the LCA - to which both the Union and Grievant agreed – the City had just cause to terminate the employee for violation of the City's non-violence policies as a consequence of his 2015 conduct. The Union and Grievant both received the benefit of their bargain. The terms of that bargain were clear and unambiguous. The matter is not arbitrable.

The Merits

The City has shown just cause for the termination of Grievant. Grievant had engaged in two prior violations of the related City policies and the evidence establishes that Grievant violated the important City policies for a third time on [redacted]. All three City witnesses consistently testified that Grievant called B[redacted] a "fucking dick-head" and threatened B[redacted] by saying he would see B[redacted] at 3:00 after work. Importantly, although Grievant testified at the arbitration that he did not make the after-work threat, during his investigatory interview Grievant admitted he made the after-work statement. The Union offered no reason to challenge the credibility of the three City witnesses and, instead, relied on the failure of the City to call W[redacted] as a witness. However, the City presented sufficient evidence to meet its burden of showing just cause and is not required to call every single witness to an incident, and there was nothing prohibiting the Union from subpoenaing W[redacted] if the Union believed W[redacted] would

support Grievant's testimony. The Union did not subpoena W[redacted] and there is no evidence that it even requested that he testify.

The City conducted an unbiased investigation, had ample reason to conclude the employee had violated the City's workplace violence policy for the third time and, under the circumstance, notwithstanding the employee's good performance record, had good reason to conclude that further discipline would not correct the employee's behavior and that in the interest of promoting a safe work environment, had cause to terminate the employee.

The grievance is not arbitrable. Even if the arbitrator should find the grievance arbitrable, the City has meet its burden of showing just cause for termination of Grievant. The grievance should be dismissed.

The Union

Arbitrability

In the Union's view, the City; (1) claims the LCA expressly denies Grievant and the Union the right to file a grievance, but (2) inconsistently asserts that the Union must waste time by following a four-step grievance process in the parties' CBA even though the City already decided to rely on the terms of the LCA to terminate Grievant. The City's argument is absurd. The fact is, the City was put on notice of the Union's and Grievant's challenge to the City's decision to issue discipline at the April investigatory Interview/hearing. Even that hearing was a waste of time as management representative DeLoe therein informed the Union that he had already determined to terminate Grievant.

To find that this matter is not arbitrable, the arbitrator must first determine that the City was permitted to unilaterally eliminate Grievant's right to arbitrate, but that the procedure agreed

by the parties in their bargaining agreement should have been adhered to. Section 903 of Act 195 provides that "Arbitration of disputes or grievances arising out of the interpretation of the provisions of a collective-bargaining agreement is mandatory." The City claims that its LCA with Grievant does just that. However, the LCA lacks the rational time limitations and the right to challenge the veracity of claims of the employee's violation of the terms of the LCA that are required for an LCA to be valid.

In addition, the arbitrator has a duty to consider mitigating factors. In that regard, Grievant had no violations of the underlying policy for an extended period from 2015 to the alleged violation herein of 2020; the Union did not have legal counsel review or advise during the negotiation of the LCA, and the LCA does not limit itself to a specific and reasonable period of time. Instead of a reasonable and defined period of time, the City imposed a life-time sentence on the employee. Additionally, there is no evidence that the City has in any way relied to its detriment on the Union's failure to file a written forth-step grievance.

The Merits

The City has failed to meet its burden of showing just cause for the termination of Grievant. The record establishes that the City failed to call W[redacted] to the stand; the only witness – an employee under the City's control – who witnessed the entire [redacted] incident. As a consequence of the City's failure, the arbitrator should find that had he testified, W[redacted] would have testified consistently with Grievant.

A Careful consideration of the testimony of B[redacted], establishes that the employee should not be credited. B[redacted]'s claim that he felt threatened by Grievant is inconsistent with the clear evidence that it was B[redacted] who interrupted Grievant's conversation. Additionally, contrary to his testimony that he did not raise his voice or yell, both City witnesses S[redacted] and Z[redacted] testified

that their attentions were drawn to the floor by shouting from both employees. This should not be viewed as a case of three against one, or that Grievant is accusing the two supervisors of lying. Grievant testified the two were not accurate, and considering the evidence establishes that the two supervisors did not witnesses the entire incident, Grievant's testimony as to the incident should be credited. Additionally, both supervisors did not support B[redacted]'s claim that Grievant walked toward B[redacted] and threatened B[redacted] with his cellphone. And, again, although there was a witness who could have cleared up the discrepancies of testimony, the City failed to call that witness. Under the circumstances, the City's failure to call witness W[redacted] is inexcusable. Such is particularly so here, where the evidence establishes that the City's District Manager announced to the Union at the grievance hearing that he had warned W[redacted] that if he changed his testimony W[redacted] would be written up. Finally, the City could also have cleared up the dispute between witnesses by providing video of the incident, but instead, relied upon the lame excuses that the camera did not cover the relevant area or the camera malfunctioned.

The City has not dealt fairly or in a forthright manner with Grievant or the Union in this matter. The City has not met its burden of showing just cause for the termination of Grievant. Grievant should be reinstated and made whole.

Findings/Discussion

After careful consideration of the full record in this matter, including all testimony, evidence, argument and my observation of the demeanor of all witnesses, I find that; (1) under the unique circumstances of this case, the grievance is arbitrable, and (2) the City has met its burden of showing just cause for the termination of Grievant.

Arbitrability

The Effectiveness of the LCA, Full Performance and/or Waiver

Enforceable last-chance agreements are important tools for management and bargaining representatives to resolve disciplinary/grievance disputes. Language agreed upon by parties to such agreements can, on an individual basis, be interpreted to supplant some, many, or perhaps all, of the requirements of the just cause standard. Because they remove protections of just cause otherwise afforded bargaining unit members, last chance agreements should be subject to narrow interpretation.

I am persuaded that by the time of Grievant's April incident, the provisions of the 2015 LCA – *whether enforceable at the time of their initial establishment or not* - barring Grievant from filing grievances or pursuing arbitration should the City decide to terminate the employee for violation of the terms of the LCA, had been fully discharged by Grievant's compliance with the terms of the LCA or effectively waived by the City.

Underlying any last chance agreement is the same duty to bargain in good faith that underlies all collective bargaining. Consequently, any effort by an employer to give an employee "a chance" whether a second chance, another chance or a last chance, should be interpreted as having been bargained by the parties in good faith and *in all sincerity* with the mutually agreed upon goal of correcting the subject employee's conduct.[3] That means that the last "chance" given an employee as the result of a last chance agreement must be a real and actual opportunity. It stands to reason then, that where, as in the instant case, a last chance agreement has no set term and the involved employee has corrected his or her conduct *to the satisfaction of the employer*, the employee should be considered to have completed his or her end of the bargain. Under such

[3] Such is the ultimate goal of the principle of discipline incorporated in the just cause standard.

circumstances, the parties having realized their mutual goal, the contract should be considered fully performed. Here, I find the evidence establishes that Grievant performed his end of the 2015 bargain to the satisfaction of the City. In reaching such a conclusion, I rely upon the following:

(1) The City's conduct in promoting Grievant a year after his entering the LCA is – at least arguably - an admission by the City that Grievant had satisfied the terms of the LCA; and

(2) Most importantly, the City's proffering of another LCA for Grievant's consideration and signature under threat of significant discipline of a 30-day suspension in 2018, is a particularly convincing admission that the City considered the 2015 LCA to be satisfied and no longer in effect.

Based upon such considerations, I find the that the City either considered Grievant to have fully performed his obligation under the terms of the LCA and/or that the City, through its conduct described in (1) and (2) above, effectively waived the no-arbitration provisions of the LCA. I find that arbitration of the matter is not barred by the terms of the LCA.

The Law Does Not Require a Useless or Futile Act

Whether the City was correct or not as to the applicability of the terms of the 2015 LCA to any grievance over the City's decision herein to dismiss Grievant, the evidence establishes that at the investigatory/grievance meeting held by the parties, the City made it plain to the Union's representatives that based upon the terms of the 2015 LCA the City would not entertain any further consideration of the grievance. To insist, as the City now has, that under such circumstances the Union should have nevertheless filed a step IV grievance, places form over function. The law generally does not require a party to engage in a useless act.

Considering the well-recognized, strong public policy promoting the resolution of collective bargaining agreement disputes through arbitration and the mutual desire of the parties to resolve their differences through arbitration as evidenced by the arbitration provisions of the Agreement, and considering the novelty of circumstances presented, I find that the Union should not be held to have lost its opportunity to proceed on the matter to arbitration merely because it did not engage in the futile act of filing a step IV grievance.

Under such circumstances, I find that the grievance is arbitrable on the merits.

Merits

Just Cause

An analysis of a case claiming discharge for just cause as is presented here requires consideration of all of the evidence admitted into the record to determine whether the discipline at issue was "fair." There is no single formula for making such a determination and each case must be considered based upon its own unique set of facts and circumstances. Some, but not all, of the several factors often considered by arbitrators when applying the just cause standard include whether or not; (1) the employer relied on a reasonable rule for the disciplinary action, (2) there was prior notice to the employee of the rule and the consequences for violating the rule, (3) the disciplinary investigation was adequately conducted and Grievant was provided a reasonable amount of due process, (4) the employer was justified in concluding that the employee engaged in the conduct as charged and (5) the discipline issued was appropriate relative to the gravity of the offense, given the employee's disciplinary record and appropriate use of progressive discipline. It is the Employer's burden to show that its decision to discipline satisfies the requirements of the just cause standard.

Having carefully considered the entire record in this matter including all evidence and arguments offered by the parties, I conclude that the City has met its burden of establishing just cause for the discharge of Grievant.

I am not persuaded by the Union's primary argument that the City has failed to meet its burden because witness W was the only nonparticipant who witnessed the entire incident and the City did not call W as a witness. In this regard, either party could have compelled W to testify, and as a consequence, I do not find that a reasonable presumption could be made that W would have testified against the interest of one or the other involved parties.

The City conducted a full and fair investigation by interviewing all individuals who witnessed the incident and offered Grievant the opportunity to present his side of the story. I find that the City has met is burden of establishing that Grievant engaged in the conduct alleged. In this regard, I particularly rely upon the testimony of Foreman S and Supervisor Z. The two supervisors testified consistently and there was no showing that either had any motive to either fabricate or fail to provide their own candid account of what they did, saw and heard during the incident. Although it is true that neither witness was present for the beginning of the argument between the two employees, the evidence establishes that after S and Z arrived in the break area, they witnessed Grievant engage in conduct prohibited by the City's important policies relating to demeaning and threatening conduct.

Even if, as Grievant insisted, B started the argument, such did not grant Grievant license to twice ignore directives from his supervisor to calm down, or to verbally degrade B or to threaten B by saying he would deal with the matter outside. In this latter regard, within the context of the exchange between the two employees, and considering the demeanor of Grievant as

described by B[redacted], S[redacted] and Z[redacted], I find that Grievant's outside-after-3:00 comment "would lead a reasonable person to fear for his or her safety" as prohibited by the City's *Workplace Violence Policy B. Violent Behavior.* Grievant's behavior was heated and there was absolutely nothing about the circumstances as described by any witness, including Grievant, that would support a finding that Grievant was merely inviting B[redacted] to have a calm conversation out in the street after work.

I also find that under the circumstances, the decision to dismiss Grievant was not disproportional to the gravity of his offense. Grievant had been twice disciplined for conduct in violation of the City's important policies relating to violence and threats of violence in the workplace. The policies implicated are important and notwithstanding that the 2015 LCA may not bar the instant grievance, the language of the LCA and the content of the policies referenced in the LCA, as well as Grievant's first notice of suspension, placed Grievant on clear and unambiguous notice of the gravity by which the City would considered any further violation of the policies by Grievant.

Where, as here, the employee was not a long-tenured employee, had violated the important policies on three occasions and had been subject to progressive discipline, I find the City's decision to dismiss the employee was well within the boundaries of fairness and reasonable managerial discretion recognized by the just cause standard.

Conclusions

Based upon the record as a whole, I find the matter is arbitrable and that the City has met its burden of showing just cause for the termination of Grievant.

AFSCME DISTRICT COUNCIL 33, LOCAL 1927	**:**	
	:	**AAA Case No. 01-20-0005-3146**
and	**:**	**(Michael Williams)**
CITY OF PHILADELPHIA	**:**	

AWARD

The grievance is denied.

Dated: April 5, 2021

Timothy J. Brown, Esquire
Arbitrator