

AMERICAN ARBITRATION ASSOCIATION

-----X
In the Matter of the Arbitration :
 :
 between : AAA Case No.
 : 01-19-0004-1452
 :
 CITY OF PHILADELPHIA, : Opinion & Award
 :
 “City” : Re: Discharge of
 : Stephen Postell
 - and - :
 : Hearing: February 26, 2021
 : March 15, 2021
 :
 F.O.P, LODGE NO. 5, :
 :
 “Union” :
 -----X

APPEARANCES

For the City

CITY OF PHILADELPHIA LAW DEPARTMENT
Brian Rhodes, Esq., Senior Attorney – City Solicitor’s Office Labor &
Employment Unit

For the Union

WILLIG WILLIAMS & DAVIDSON
Thomas M. Gribbin, Esq.

BEFORE: David J. Reilly, Esq., Arbitrator

BACKGROUND

The Sheriff's Department discharged Sergeant Stephen Postell, effective April 9, 2018. It did so based upon finding that he had engaged in conduct unbecoming a Deputy Sheriff Officer by engaging in acts of sexual harassment and sexual assault towards a fellow officer. This charge stems from an [REDACTED] complaint filed by Deputy Sheriff D [REDACTED] R [REDACTED].

The Union contends the City lacked just cause to impose this discipline. It asks that Postell be reinstated to his former position with the Department and be made whole for all pay and benefits lost as a consequence of his discharge. It also requests that the City be directed to revise Postell's personnel records to expunge all reference to his discharge to the extent consistent with governing law.

The relevant facts of this case, including the areas of dispute, may be set forth succinctly:

Sexual Harassment Policy & Training

The Department has adopted Directive 38 as its policy on sexual harassment in the workplace. It defines sexual harassment as: "(1) any unwanted, unwelcome, sexual advances, requests for sexual favors; (2) verbal/non-verbal and physical contact of a sexual nature; (3) any behavior designated to demean or humiliate by calling attention to sexuality; and (4) the displaying of sexually explicit magazines, paraphernalia, etc. and/or being subjected to sexually explicit jokes, stories or gestures, etc." (City Exhibit 3.)

The Directive declares, "sexual harassment in any manner is unlawful, inappropriate, offensive, unprofessional and unacceptable." (City Exhibit 3.)¹ It

¹ City Executive Order No. 4-11 also proscribes sexual harassment by all of its employees. (City Exhibit

specifies that employees engaging in sexual harassment, regardless of gender or rank, will face “severe disciplinary action.” (City Exhibit 3.)²

John Hodges, the Sheriff Department’s acting human resources manager, testified that all Department employees are trained as to Directive 38 upon hire. (Tr. I-163.)³ In addition, he said, supervisors (i.e., ranks of sergeant and above) receive periodic re-training. (Tr. I-164.) As for Postell, he confirmed, the Department’s records reflect he last received sexual harassment training on April 20, 2012. (Tr. I-164-165; City Exhibit 6.)

Hodges also averred that the Department posts notices of Directive 38 in and about its facilities, including the area where Postell and R [REDACTED] worked. (Tr. I-165.) The postings, he said, include information regarding the manner by which employees may report or file complaints of sexual harassment. He related that the channels for filing complaints are not limited to the employee’s supervisor. (Tr. I-171.)⁴

Postell’s Employment History

Postell’s employment with the City began in 2001 with his hire as a correctional officer in its prison system. (Tr. II-6.) His service with Department dates to 2003. During his tenure there, he received promotions in June 2015 and January 2017 to the ranks of deputy sheriff and sergeant, respectively. (Tr. II-7-8)

² Article V of Directive 38 includes a schedule of disciplinary actions to be taken against offenders. It begins with a written warning and mandatory counseling for a first offense, continues with a 3-day suspension for a second and culminates in termination upon a third infraction. (City Exhibit 3.)

³ References to the transcript of the hearing in this case will be identified as “Tr.” followed by the applicable volume and page number(s). For example, a reference to page 163 of the transcript of the February 26, 2021 hearing (i.e., Volume I) would be cited as “Tr. I-163.”

⁴ Article IV of Directive 38 specifies that complaints should be made to the employee’s supervisor and/or the designated human resources person. (City Exhibit 3.)

As a sergeant, he supervised approximately eight officers within the Department's civil unit, to which he was assigned. (Tr. II-8.) These officers included R ■■■■■, as well as two other female deputies. (Tr. II-8-9.)

He has no record of prior discipline. Nor has he ever been the subject of accusations of inappropriate behavior towards female employees within the Department. (Tr. II-20.)

Civil Unit

Within the Department's civil unit, the deputy sheriffs generally perform their duties outside the office, which include the service and enforcement of writs and other court orders. One deputy, however, works the office desk, answering the telephone and performing administrative functions. In 2017, Deputy Sheriff K ■■■■■ held this assignment. (Tr. II-29.)

In K ■■■■■'s absence, another deputy sheriff would be assigned to perform this office duty, including closing the office at the conclusion of the day. This assignment was generally undesirable, as it could require the deputy tasked with it to remain at office until as late as 7 p.m. (Tr. II-29-30.)

In order to distribute this duty fairly among the eight deputy sheriffs, the unit established a rotation system, known as "the wheel." Whenever there was a need to staff the office desk in K ■■■■■'s absence, the assignment would be made sequentially using the wheel. If the deputy sheriff next up on the wheel was unavailable (e.g., vacation), he/she would be skipped and the assignment would be given to the next deputy in line. (Tr. II-30.)

Internal Affairs Unit's Investigation of R█████'s Complaint

Deputy Chief Angelinel Brown testified that in October 2017, Deputy Chief Jennifer Algarin, at then Sheriff Jewell Williams' direction, assigned her to investigate a sexual harassment complaint R█████ had made against Postell. (Tr. I-111-112.)⁵

In response, she reported interviewing R█████. According to Brown, R█████ recounted occasions when Postell engaged in inappropriate conduct towards her while they were in his office. His behavior in this regard included a remark following his promotion to sergeant in January 2017, asking if becoming a supervisor came with sexual favors; namely giving him "pussy." (Tr. I-114.) She also recalled R█████ stating that there were instances when Postell "rubbed up against her." (Tr. I-114.)

In addition, she related R█████' account of an incident that occurred in Postell's personal vehicle while they were on assignment in ██████. According to Brown, R█████ reported: (1) "[Postell] exposed himself and placed her hand on his genitalia" and "kissed her about the neck;" (2) he persisted in this behavior despite her requests to stop; (3) the doors to the vehicle were "secured" and she "was not free to leave;" and (4) the incident concluded when she beeped the horn, screamed and flailed her arms at passersby. (Tr. I-114-115.) At that point, R█████ said, Postell unlocked the door and she exited the vehicle. (Tr. I-115.)

Brown averred that in connection with this investigation, she also interviewed Lieutenant S█████ T█████, as to whom R█████ had also made a complaint of sexual harassment. (Tr. I-117.) According to the complaint, T█████ had made physical contact with her body and commented regarding her breasts. (City Exhibit 5.)

⁵ In 2017, Brown held the rank of Sergeant. Currently, she is a lieutenant and is commissioned as a deputy chief by the Department's administration. (Tr. I-110-111.)

Brown averred ultimately finding it necessary to suspend her investigation and refer the matter to Police Department's SVU Unit. She reported doing so as a consequence of the [REDACTED] vehicle incident related to her by R [REDACTED]. (Tr. I-121-122.)

She confirmed documenting her investigation in a report submitted to Deputy Chief Algarin. (Tr. I-121; City Exhibit 5.) The report, she said, recorded her findings that Postell had violated Directive 38 and City Executive Order 4-11 by his conduct towards R [REDACTED]. (Tr. I-123; City Exhibit 5.)⁶

D [REDACTED] R [REDACTED]' Testimony

In testifying here, R [REDACTED] recounted her complaints of sexual harassment by Postell.

She averred that the first incident occurred in [REDACTED], following Postell's promotion to sergeant. According to R [REDACTED], after she congratulated him on his promotion, he remarked, "Well does that mean your're going to give me some pussy now?" Her response, she said, was "No." (Tr. I-44.)

She also recalled that on other occasions, he would: (1) stick his tongue out; (2) make "sexual innuendoes; (3) brush his body up against her; and (4) grab her "butt" and "breast" while in his office with the door closed. (Tr. I-44-45.)

In one instance in early 2017, she described that after confiding in Postell regarding a personal issue concerning her son, he hugged her and grabbed her buttocks. (Tr. I-85.) Immediately thereafter, she related that he escorted her to the Internal Affairs Unit, where she secured contact information for a family services resource. (Tr. I-85.)

⁶ Brown's report does not reflect any finding as to R [REDACTED]'s complaint against T [REDACTED]. (City Exhibit 5.) In his testimony, T [REDACTED] denied these allegations and confirmed that no action was taken against him in response to them. He noted being subsequently promoted to Captain. (Tr. II-126-127.)

While there, she recalled seeing Brown and arranging to use her office to contact the service provider. (Tr. I-85-87.)

On or about [REDACTED], she related, he assigned her to work with him in checking [REDACTED]. All members of the unit, she said, were assigned to work in pairs that day. (Tr. I-46.)

While they were travelling between [REDACTED] in his personal vehicle, she reported, he stopped the vehicle and then “hit [her] and . . . pulled out his penis.” At that point, she said, “he jumped over on [her]” and “asked why [she did not] want to be with him.” (Tr. I-50.)⁷ She also recounted him grabbing her by the back of her hair and kissing her. (Tr. I-50.) According to R [REDACTED], he ignored her requests to stop and get off of her. (Tr. I-51.) The incident, she said, concluded when she beeped the vehicle’s horn and he observed pedestrians walking by the vehicle. (Tr. I-52.)⁸

She stated that following this incident, he continued to her harass her and was also verbally abusive. When she would attempt to speak with the Captain I [REDACTED], she recalled, he would yell at her and say she was not permitted to go to human resources without permission from him or a supervisor. (Tr. I-53.)⁹ She averred further, “he was giving me a lot of work, other people’s work to do.” (Tr. I-53.)

⁷ She testified that when interviewed in October 2017, by detectives from the Police Department’s Special Victims Unit, she identified the location of this incident as the intersection of 16th and Westmoreland Streets in Philadelphia and reported being beneath an overpass. (Tr. I-92.) Photographs of the area introduced by the Union reflect that the nearest overpass is located three blocks away. (Union Exhibit 2.)

⁸ During the course of the incident, she recalled attempting to open the door of the vehicle, but reported that it would not unlock. (Tr. I-95.) A video submitted by the Union depicting the operation of Postell’s vehicle showed that regardless of the particular gear engaged (e.g., park, drive), all of the doors to the vehicle can be unlocked and opened by pulling the door lever. (Union Exhibit 3.)

⁹ On one occasion, she recalled, he yelled at her in the presence of Captain I [REDACTED] and her peers in the unit. According to R [REDACTED], she remarked to the Captain, “Do you see this? He’s yelling at me like this. This isn’t right.” (Tr. I-53.)

The issue of workload, she said, was the subject of a meeting in or about October 2017 with Lieutenant T [REDACTED] and Brown. She reported informing them that she was being harassed and receiving an overload of other unit members' work. (Tr. I-54.)¹⁰

According to R [REDACTED], she also advised Brown that she wished to discuss other matters that she was uncomfortable addressing in T [REDACTED]'s presence given the sexual harassment to which he had subjected her. (Tr. I-54, 59-60.) Brown, she said, neglected to follow-up with her regarding these other matters, which concerned Postell and T [REDACTED]'s behavior. (Tr. I-100.)¹¹ Absent such initiative by Brown, she said, "I did not know how to go about doing this." (Tr. I-101.)

She reported formally complaining of sexual harassment during an October 2017 meeting with Sheriff Jewel Williams. (Tr. I-55.) In doing so, she averred informing him of the offensive conduct by both Postell and T [REDACTED]. (Tr. I-55.) Although unable to recall the specific sequence of their discussion, she confirmed also raising issues regarding her work assignments and her interest in being considered for Deputy Sheriff K [REDACTED]'s position upon his retirement. (Tr. I-74.) Her work assignment complaints, she said, involved the improper implementation of the wheel and being assigned other deputies' work. (Tr. I-77, 79.)

A meeting was then arranged with Brown, she said, at which she gave her official complaint. (Tr. I-56.)¹²

¹⁰ On cross-examination, she stated this meeting could have occurred in July or September 2017. (Tr. I-99-100.)

¹¹ In her testimony, Brown confirmed meeting with R [REDACTED] and T [REDACTED] in July 2017 regarding work assignments. She averred that during this meeting, R [REDACTED] never requested to meet with her privately. (Tr. I-136.) R [REDACTED], she related, did not make any reference to sexual harassment during this meeting; nor did she raise any issue requiring follow-up. (Tr. I-138.)

¹² R [REDACTED] confirmed subsequently commencing a lawsuit against the City based upon Postell's conduct. (Tr. I-61, 63; City Exhibit 7.) This suit, she said, was eventually resolved by settlement, the terms of which included a substantial monetary payment to her. (Tr. I-63-64; City Exhibit 8.) She also reported being

Stephen Postell's Testimony

Postell testified that throughout his tenure with the Department, including after his January 2017 promotion to Sergeant, he has had occasion to work with female deputy sheriffs. (Tr. II-9.) Other than the instant case, he averred never having been accused of engaging in inappropriate behavior toward a female officer. (Tr. II-20.)

He reported having a good working relationship with R [REDACTED]. Both before and after 2017, he noted, she confided in him regarding family issues. (Tr. II-11-12.) In April 2017, he reported, she purchased a vehicle from him. (Tr. II-11.)

Upon being promoted to Sergeant, he recalled being directed by Captain I [REDACTED] and Lieutenant T [REDACTED] to write her up for unsatisfactory work performance. According to Postell, upon conferring with R [REDACTED] and hearing of her family issues, he elected instead to assist her in securing resources to address her personal issues and afford her a further opportunity to rectify her deficient performance. (Tr. II-12-13.)

Despite these measures, he related that her performance did not improve, as he continued to receive reports of work that she failed to complete. (Tr. II-22-23.) In response, he recalled having continued counseling sessions with her. (Tr. II-23-24.) And, in June 2017, he placed her on a performance improvement plan, by which she was required to sign off on the work assigned to her each day. (Tr. II-26-27.) In doing so, he advised that she would be written up for any further failure to complete her assignments. (Tr. II-28.)

interviewed in October 2017 by detectives from the Police Department's Special Victims Unit. The interview, she related, focused on the May 2017 incident in Postell's car. She could not recall whether she mentioned any of the prior incidents when Postell allegedly hugged and grabbed her. (Tr. I-89.)

Addressing R [REDACTED]'s allegations of sexual harassment, he stated they are false. He denied ever making sexually suggestive comments or hugging or grabbing her at any time. (Tr. II-37-39.)

As for the alleged [REDACTED] incident on [REDACTED], he averred that either Captain I [REDACTED] or Sergeant A [REDACTED] scheduled the deputy sheriffs working in the unit that day, which included his pairing with R [REDACTED]. (Tr. II-40-41.) Their assignments, he recalled, involved visiting [REDACTED] throughout the City and addressing inappropriate conduct. (Tr. II-41-42.) He reported that they used his personal vehicle, a 2014 Ford Taurus SE, to travel to the [REDACTED]. (Tr. II-44-45.)

According to Postell, during the course of the day, he did not have any unusual interactions with R [REDACTED]. (Tr. II-43-44.) He recounted that they had lunch with two fellow deputies and later received separate assignments. (Tr. II-44.)

Postell's Discharge

Following Postell's March 2, 2018 arrest on criminal charges of indecent exposure, indecent assault forcible compulsion and simple assault, which related to R [REDACTED]'s complaint of the [REDACTED] incident, the Department served him with notices of suspension and intention to dismiss, effective March 12, 2018. (Joint Exhibits 3-4.) Subsequently, on April 9, 2018, the Department discharged him. (Joint Exhibit 5.)

The notice of dismissal issued to him identifies the reason as a Violation of Article I, Conduct Unbecoming a Sheriff Officer. In particular, the notice references R [REDACTED]'s [REDACTED] complaint of sexual harassment and assault and Postell's March 2, 2018 arrest on the referenced criminal charges. (Joint Exhibit 5.)

Procedural History

Union Vice President John McGrody testified to speaking with Sheriff Williams regarding Postell's situation at or about the time of his arrest. (Tr. II-162-163.)

Williams, he recalled, advised that as a matter of procedure, any sheriff's deputy would be discharged upon his/her arrest. (Tr. II-163.) During further discussion, he related informing Williams that upon disposition of the criminal charges in the deputy's favor, the City has the authority, upon the Union's request, to reinstate him/her to avoid the time and expense of the grievance and arbitration process. Upon stating his intention to follow this approach here, he recalled, Williams replied, "In that case, if he beats his charges, I'll bring him back to work." (Tr. II-164.)

Upon learning of Postell's acquittal on the criminal charges, McGrody confirmed sending a letter to Williams, dated July 24, 2019, requesting Postell's reinstatement to his position with the Department. (Tr. II-170-171; Union Exhibits 4-5.) According to McGrody, in follow-up conversations with Williams, he learned that in order to effect Postell's reinstatement, the City's offices of personnel and finance would need to be involved. (Tr. II-174.) As a consequence, he related filing a grievance on August 7, 2019, so that the Union would have more than his July 24th letter to rely upon in seeking Postell's reinstatement. (Tr. II-174-175; Joint Exhibit 2.)

The City denied this grievance by letter, dated November 8, 2019. (City Exhibit 1.) The City's Deputy Director Labor Relations Rebecca Hartz testified that in issuing this denial, she referenced the Union's failure to file the grievance within the fifteen-day period specified in the governing procedure set forth in the parties' collective bargaining agreement (the "Agreement"). (Tr. I-25-26; Joint Exhibit 1; City Exhibit 1.) She averred

being unaware of any agreement to extend this time limit. The Union, she noted, made no reference to such an extension during the grievance meeting. (Tr. II-36.) On cross-examination, she recalled inquiring at this meeting “why it took so long to file the grievance, because it’s way outside the timeline.” McGrody, she said, responded by referencing an understanding that Postell would be reinstated if the criminal charges were disposed of in his favor. (Tr. I-33.)

When the Union subsequently filed a demand for arbitration of the grievance with the American Arbitration Association, Hartz submitted a letter, dated December 9, 2019, stating that the grievance was not timely filed, and therefore, is not arbitrable. (Tr. I-26-27; City Exhibit 2.)

Thereafter, pursuant to the procedures of the Agreement, the parties selected me to hear and decide the case. (Joint Exhibit 1.) I held a hearing, which commenced on February 26, 2021 and continued on March 15, 2021. With the parties’ consent, the hearing 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 receipt of the transcripts of both days of hearing, I declared the hearing closed as of April 9, 2021.

DISCUSSION AND FINDINGS

The Issue:

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

1. Is the Union’s grievance arbitrable?

2. If so, did the City have just cause to discharge the grievant, Sergeant Stephen Postell, effective April 9, 2018?
3. If not, what shall be the remedy?

Relevant Contract Provisions

XXXV. GRIEVANCE PROCEDURE

A grievance shall be defined as a dispute or disagreement with the City concerning the interpretation or application of the specific provisions of this agreement. In the event a grievance arises, the following shall be the steps to resolve it:

Step 1. Within fifteen (15) working days of the incident giving rise to the grievance, an employee with or without the FOP shall submit the grievance in writing to the appropriate Deputy Sheriff Captain or immediate supervisor in the Register of Wills' Office. The Deputy Sheriff Captain or supervisor shall respond in writing within ten (10) working days of the filing of the grievance.

* * *

Step 4. If the grievance is not settled in accordance with the foregoing, the union may, within fifteen (15) working days after receipt of the Step 3 answer or its due date, refer the grievance to binding arbitration

The arbitrator shall have no authority to amend, modify, nullify, ignore, add to, or subtract from the provisions of this contract. The scale of wages established by this contract shall not be changed by any arbitration decision.

Saturdays, Sundays, holidays and other regularly scheduled days off shall be excluded from the time limits under this grievance and arbitration procedure.

Nothing in this grievance procedure shall preclude either party from attempting to settle any grievance informally, at any level, to promote orderly and cooperative relationships. Such informal attempts to resolve grievances shall in no way affect or negate any of the restrictions pertaining to timely processing of or responding to grievances contained herein. In processing any grievance, the formal procedure may be terminated at any time and at any level by mutual agreement of the parties on either side.

The disposition of a grievance at any step of the grievance procedure by agreement between the City and the FOP shall be final. Any interpretation of this agreement agreed upon by the City and the FOP shall be binding upon the employees and other persons affected thereby.

* * *

The time limits may be extended for other reasons by mutual agreement of the City official and FOP official at any step of the grievance procedure.

* * *

Positions of the Parties

Following the presentation of evidence, both parties gave detailed closing statements. Their respective positions are summarized here.

As a preliminary matter, the City asserts that the Union failed to timely file the instant grievance, and therefore, it must be dismissed as not arbitrable.

It highlights that under the grievance procedure set forth in Article XXXV of the Agreement, the Union had fifteen working days from Postell's April 9, 2018 discharge to file the grievance. Yet, it waited 481 days before doing so. It avers that no basis exists to excuse this procedural failure by the Union.

The verbal agreement that the Union purportedly reached with Sheriff Williams, it maintains, is of no consequence. This agreement, it stresses, did not address the time limit for filing the grievance, but concerned only the potential outcome of Postell being acquitted of the criminal charges. As such, it reasons, this claimed agreement did not excuse the Union from the requirement to file the grievance contesting Postell's discharge within fifteen working days of that action.

It asserts further that Sheriff Williams was not the correct person with whom to address this matter. Union Vice President McGrody, it states, should have consulted with a representative of the City's Labor Relations Department. Also, consistent with the practice followed when City police officers are discharged following an arrest, he should

have known of the need to file a timely grievance before having any discussion as to the timing of further proceedings.

In sum, it submits, the Union unquestionably failed to file the grievance within the fifteen-day time limit stated in the Agreement. Therefore, it concludes, the grievance should be dismissed as not arbitrable.

Turning to the merits, the City contends that its discharge of Postell was for just cause. It asserts that the evidence presented conclusively demonstrates that he is guilty of the charged offenses of sexual harassment and assault.

Sergeant Brown's investigation, it stresses, confirmed that Postell violated both the Department's sexual harassment policy and the City's corresponding Executive Order 4-11. In fact, it highlights, based on her findings, she deemed Postell's conduct so outrageous that she referred the matter to the Police Department's Special Victims Unit for investigation.

It posits that on the evidence presented, Brown properly and fairly determined that R [REDACTED]' account was credible and should be accepted. Her finding in that regard, it reasons, compels the conclusion Postell did, in fact, violate Department policy and the City's Executive Order by sexually harassing R [REDACTED], which warranted his discharge.

Postell's acquittal on the related criminal charges, it avers, does not conflict with these conclusions. Given the much higher standard of proof for conviction in a criminal matter, it states, Postell's not guilty verdict on charges of indecent exposure and sexual assault does not exonerate him of the civil charge of sexual harassment at issue here.

It also asserts that the Union has not identified sufficient reason to question R [REDACTED]' credibility. The Union's reference to her delay in reporting Postell's offending

conduct, it states, does not cast doubt on the veracity of her account. In fact, it notes that in September 2017, just four months after the assault, she complained to T [REDACTED] that Postell was treating her unfairly as a woman and had yelled at her.

Further, it contends, a review of R [REDACTED]' testimony here bolsters her credibility. It notes in this regard that her account of Postell's inappropriate behavior and the [REDACTED] assault was very detailed and extremely precise. Her credibility as to these assertions, it argues, was so strong that it led to a criminal referral and the City paying a large monetary sum to settle her civil lawsuit for sexual harassment.

In sum, it concludes that the evidence establishes that Postell engaged in sexual harassment, as recounted by R [REDACTED]. For this reason, it had just cause to discharge him. Accordingly, it asks that Postell's discharge be sustained and the Union's grievance be denied.

The Union, on the other hand, maintains that the grievance is arbitrable and the City lacked just cause to discharge Griffin.

The City's arbitrability challenge to the grievance, it avers, fails given the informal resolution that it reached with Sheriff Williams in this matter, consistent with the terms of the parties' grievance procedure. Citing McGrody's testimony, it asserts that in or about March 2018, the Union and Williams agreed that Postell would be reinstated if he was acquitted of all criminal charges. As such, it concludes, no formal grievance was necessary at the time of his April 9, 2018 discharge.

The need to file a grievance, it contends, arose only when Williams failed to promptly reinstate Postell following his July 23, 2019 acquittal and indicated other City

offices would need to be involved as to that action. In response, it points out, that step was timely taken with the filing of the instant grievance on August 7, 2019.

Contrary to the City's claim, it maintains that in deciding this procedural challenge, no weight is due its practice for contesting the discharge of City police officers due to a an arrest. It notes that separate bargaining units exist for the officers of the Sheriff's Department and the Police Department, which are covered by separate collective bargaining agreements. As such, it concludes that no basis exists to equate the two units or to suggest that the practice followed as to one necessarily applies to other.

Accordingly, for all of these reasons, it submits the grievance should be found arbitrable and the City's procedural challenge denied.

Turning to the merits of the grievance, it submits that the City has failed to satisfy its burden of demonstrating that Postell is guilty of the charged offense. Under the circumstances here, it submits that the City should be held to a standard of clear and convincing evidence.

R■■■■'s testimony, it argues, cannot serve to substantiate that Postell engaged in acts of sexual harassment and assault toward her. The inconsistencies in her testimony and prior statements, it avers, preclude crediting her account. For example, it asserts that her allegation of a sudden and unexplained change in Postell's behavior toward her beginning in January 2017, which involved a shift from a ten-year friendly relationship to one involving aggressive, profane and vulgar interactions, is simply too illogical to be accepted.

It also cites her delayed reporting of Postell's alleged sexual harassment despite earlier opportunities to do so. It highlights in this regard that immediately following the

January 2017 incident in Postell's office, when he supposedly made a lewd remark and hugged and grabbed her, she encountered Brown in Internal Affairs. Yet, she did not notify Brown of what had allegedly just occurred.

It also notes that her ongoing interaction with Postell during 2017 was at odds with her allegations of sexual harassment. In April 2017, it points out, she felt comfortable enough to meet with him outside of work to purchase a vehicle.

Further, it stresses, her account of the alleged [REDACTED] assault reflects numerous discrepancies. It highlights that she erred in claiming: (1) Postell, as opposed to Captain [REDACTED], assigned her to partner with him that day; (2) the presence of an overpass at the site of the alleged assault (i.e. 16th and Westmoreland Streets); and (3) the passenger door of Postell's vehicle was locked and could not be opened.

Finally, it cites inconsistencies between her and Brown's testimony, as well as her flawed claim of being unaware of how to lodge a complaint of sexual harassment.

In contrast, it avers, Postell testified credibly as to having had a good working relationship with [REDACTED] and denying the inappropriate behavior that [REDACTED] alleges.

The record here, it submits, is far more consistent with the conclusion that [REDACTED] has falsely asserted a claim of sexual harassment, so as to advance certain of her other interests. These include: her objection to certain work assignments; her desire to secure [REDACTED]'s desk assignment upon his retirement; and her need for a shield against discipline for poor work performance.

In sum, for all these reasons, it concludes that the City lacked just cause to discharge Postell. Accordingly, it asserts that its grievance should be granted and the requested relief awarded.

Opinion

I turn first to the City's procedural challenge, by which it asserts that the grievance is not arbitrable.

In determining whether the instant grievance is time-barred, I note that it is well recognized that contractual time limits for processing grievances and referring unresolved disputes to arbitration serve a valuable purpose. No benefit can be derived from allowing grievances to lay fallow or to fester. In fact, doing so is at odds with sound labor management relations. Instead, the labor management relationship is best served by the parties processing grievances as quickly as possible to conclusion through settlement, withdrawal or arbitration.

For this reason, an arbitrator is duty bound to honor the parties' intent in this regard. Where the parties have agreed to clear and unambiguous time limits in their grievance procedure, which have been consistently and uniformly applied, those time limits must be enforced in accordance with their terms.

At the same time, it is equally apparent that the labor management relationship is not well served by denying a party the opportunity to have its grievance heard in arbitration through a wooden application of procedural time limits without regard for the surrounding circumstances or the contract as a whole. Unresolved grievances that lack the outlet of arbitration do not necessarily fade away. Quite the opposite, they can undermine the parties' relationship. For this reason, there is a well-recognized presumption in favor of a finding of arbitrability over dismissing the contested grievance as time-barred.

Applying these principles here, I am persuaded that the instant grievance is arbitrable.

It is clear from the record that the parties, as the City maintains, never agreed to extend the contractual time limit for the Union to grieve Postell's discharge. However, the absence of such an extension is not determinative of this procedural issue.

Instead, on the basis of McGrody's testimony, I am satisfied that consistent with Agreement's terms, the Union and Sheriff Williams reached an informal resolution of any dispute as to Postell's discharge, and thereby obviated the need for the Union to file a grievance in response to that action in April 2018. Specifically, per their understanding, if Postell was acquitted of all criminal charges, the Department would reinstate him; and if not, his discharge would stand without recourse to the grievance procedure.

Simply put, as of April 9, 2018, no dispute existed as to Postell's discharge. As such, the Union had no basis to file a grievance, and, in turn, no need to obtain an extension of the time limit for doing so.

A grievable dispute regarding Postell's discharge did not arise again until on or about July 24, 2019, when Williams failed or was unable to comply with the Union's request for Postell's reinstatement per their prior informal resolution. As such, I am compelled to conclude that the Union's grievance filed fourteen days later on August 7, 2019 was timely under the parties' grievance procedure.

In crediting McGrody's testimony regarding this informal resolution, I take note that it stands un rebutted.¹³ Further, his subsequent actions were fully consistent with the

¹³ Williams did not testify at the hearing in this matter. Nor did the City offer testimony from any witness with first-hand knowledge contradicting McGrody's account of this informal resolution. In her testimony, Hartz averred that she had not spoken with Williams regarding this matter and did not have any knowledge of such an informal resolution. (Tr. I-32-33.) She noted, however, that at the grievance meeting, McGrody,

reported agreement and thereby serve to corroborate it. Namely, upon Postell's July 23, 2019 acquittal of the criminal charges, McGrody sent a letter to Williams the very next day requesting his reinstatement.

I find unavailing the City's argument that notwithstanding the March 2017 informal resolution regarding Postell's discharge, the Union remained obligated, as a matter of practice, to file a grievance within fifteen working days of that event to preserve its rights under the grievance procedure. In asserting this claim, the City's reliance on the Union's reported practice of grieving the discharge of members of the Police Department following an arrest before discussing the timing of further proceedings is misplaced.

I take note in this regard that the police officers and sheriff deputies represented by the Union are members of separate bargaining units covered by separate collective bargaining agreements. Consequently, absent specific supporting evidence, no basis exists to conclude that the Union's practices as to the Police Department bargaining unit are applicable to the Sheriff's Department bargaining unit. From my review of the record, it is plain that no evidence was presented to support such application of the referenced practice. In fact, as McGrody testified, Postell's discharge was the first instance of a Sheriff's Department deputy being discharged following an arrest. As such, whatever practice the Union follows under such circumstances in representing the City's police officers simply has no application here.

I am also unpersuaded by the City's assertion that Williams lacked the authority to enter into such an informal resolution. Even if such authority formally lies with the City's Labor Relations Department, as it argues, I am satisfied that Williams exhibited

in explaining the timing of the grievance, cited the understanding that Postell would be reinstated upon being acquitted of the criminal charges. (Tr. I-33.)

the requisite apparent authority on which the Union reasonably relied. McGrody's un rebutted testimony confirms as much.

As McGrody described, shortly after Williams was elected Sheriff, he and the Union established a relationship of cooperation by which they attempted to resolve all contract disputes prior to filing a grievance. Through this arrangement, he said, the parties informally resolved numerous potential grievances, including the instant one.

Under these circumstances, I am persuaded that the Union reasonably concluded that Williams was the proper City representative with whom to reach an informal resolution regarding Postell's discharge. To conclude otherwise and deem such resolution to be a nullity as to the timeliness of the instant grievance would affect an injustice and undermine the parties' labor management relationship.

Accordingly, for all of these reasons, I find that the grievance was timely filed, and therefore, is arbitrable.

In moving on to the substantive issue presented, some preliminary comments are appropriate.

There can be no dispute as to the City's right to promulgate a policy proscribing sexual harassment. The same holds true for its expectation as to employee compliance with such policy. This responsibility applies with particular force to the officers in the Sheriff's Department given their sworn obligation to uphold and enforce the law.

The City thus has acted reasonably in setting standards of conduct designed to provide its employees with a work environment free from discrimination and objectionable behavior, which necessarily includes sexual harassment. (City Exhibits 3-4.) Indeed, the City's obligations under various applicable anti-discrimination statutes

and sound principles of effective employee relations mandate as much. To this end, the City undoubtedly has the right to discipline any employee who breaches his/her obligations under the sexual harassment policy.

The City, of course, carries the burden of proof when charging a violation of the policy, as it does so here. Doing so requires that it demonstrate by a preponderance of the credible evidence that Postell committed the charged offense. It must also establish that the level of discipline imposed is appropriate.

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

After a careful review of the record and thorough consideration of the parties' respective positions, I am convinced that the City has not met its burden. My reasons for this conclusion follow.

On the record here, the determination of whether Postell committed the charged offenses (i.e., sexual harassment and assault of R██████) involves a matter of credibility. The City's case rests entirely on R██████' testimony. No other witness with first-hand knowledge of the events at issue testified on the City's behalf. Nor did the City present any corroborating evidence for R██████'s account.

The absence of such supporting or corroborating evidence, of course, is not determinative of whether R██████'s account should be credited. Indeed, in cases of sexual harassment, it is not uncommon for there to be no eye witnesses. At the same time, R██████' testimony cannot be accepted at face value.

Instead, it must be carefully analyzed in light of all of the relevant circumstances to determine whether it possesses the hallmarks of truth. In doing so, I find her account lacking.

In particular, my review of the record reveals numerous factors that cast doubt on the veracity of her allegations against Postell. While any one or some of them might not have provided sufficient reason to reject her account, I am satisfied that in total, they preclude my acceptance of it.

As an initial matter, her account of Postell's offending behavior lacks a logical context. It rests on the premise that after a ten-year friendly working relationship, Postell suddenly began engaging in a series of escalating acts of sexual harassment toward her, which culminated in the [REDACTED] assault in his vehicle while they were on assignment together. Her suggestion that Postell's January 2017 promotion to supervisor triggered this sudden and dramatic change in his behavior strikes me as dubious. It would be far more consistent with real world circumstances for there to have been some signs in his prior behavior reflecting, at least, a tendency for such conduct. However, she offered none. Nor was any evidence presented showing that Postell had exhibited such a propensity with any other female employee of the Department.

Next, there is the matter of timing. She did not file her formal complaint of sexual harassment until more than five months after the alleged [REDACTED] assault in Postell's vehicle.

I note that such delay, standing alone, does not place her allegations in doubt. Indeed, many understandable reasons may exist for an employee's delayed reporting of sexual harassment, such as shame, embarrassment and fear.

R [REDACTED], however, did not proffer such reasons in addressing the timing of her complaint. Moreover, I find that the explanation she did provide lacks credibility. Namely, her claim of being unaware of the process for complaining of sexual harassment is belied by the facts. As Hodges testified, the Department's sexual harassment policy, which identifies the reporting channels (i.e., supervisor and human resources), was posted in various locations within the Sheriff's Department, including the sixth floor where she and Postell worked. Moreover, in October 2017, without any identified assistance or advice, she was able to present her complaint to Sheriff Williams.

Further, I note that her testimony regarding the timing of her complaint also reflects a glaring inconsistency with Brown's testimony. Specifically, during a meeting with T [REDACTED] and Brown as early as July 2017, she averred asking to speak privately with Brown, which she testified was for the purpose of reporting sexual harassment by Postell and T [REDACTED]; yet Brown failed to follow up. Whereas Brown testified unequivocally that during this meeting, R [REDACTED] never asked to meet privately or raised any issue requiring follow up.

In addition, her testimony regarding the alleged [REDACTED] assault in Postell's vehicle reflected inconsistencies. On the evidence presented, I am persuaded that she erred in stating that there was an overpass at the location of where the assault reportedly occurred (i.e., 16th and Westmoreland Streets). Likewise, her stated inability to open the vehicle's front passenger door by pulling the lever stands refuted.

These discrepancies are no small matter. Quite the opposite, they represent key elements of her account, and thus, warrant significant consideration in assessing its reliability.

Another factor weighing against crediting R [REDACTED]' account concerns her reputation for truth and honesty, including, in particular, as to making complaints of sexual harassment. Here, I am struck by her apparent unfounded complaint that T [REDACTED] had engaged in sexual harassment that paralleled Postell's alleged offending behavior (i.e., inappropriate remarks and unwanted touching). Plainly, the City did not credit that complaint, as it took no disciplinary action against T [REDACTED]. Absent an alternate explanation for that determination, and none was offered, I am left to conclude that her allegation against T [REDACTED] was deemed to be false or at least untrustworthy.

Finally, on the record here, it is clear to me that as of October 2017, R [REDACTED] plainly had reasons to harbor animus towards both Postell and T [REDACTED]. These include: (1) their failure to address her complaints regarding job assignments and the operation of the wheel; and (2) the potential job jeopardy that she faced due to their identification of and response to deficiencies in her job performance. With this context, the Union's claim that R [REDACTED]' allegations of sexual harassment were motivated by this animus and not any actual offending conduct by Postell is not illogical. Instead, I must conclude that it is, no doubt, plausible.

In sum, upon analyzing R [REDACTED]' testimony in light of the totality of the relevant circumstances, I do not find a sufficient basis to credit her account.

My review of the record does not terminate here. There remains the matter of Postell's testimony. It, too, cannot be accepted at face value, but must be assessed for credibility.

In doing so, I found his testimony denying that he had sexually harassed or assaulted R [REDACTED] to be clear and consistent. He did not equivocate or waiver in his

account, including during cross-examination. Further, no evidence was presented that reflected any inconsistencies in his assertions. As such, I determined that his testimony had the ring of truth.

Accordingly, in view of my credibility determinations, I am compelled to conclude the City, on the record here, has not demonstrated it is more likely than not that Postell engaged in the charged acts of sexual harassment and assault. As such, it follows that the City lacked just cause to discharge him.

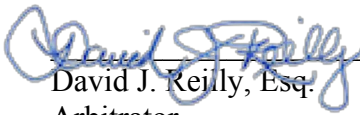
Therefore, the Union's grievance is granted. The City is directed to promptly reinstate Postell to his former position with the Department without loss of seniority. In addition, the City shall also make payment to Postell for all wages and benefits lost as a consequence of his discharge for the period from April 9, 2018 through the date of his reinstatement. The City shall also adjust Postell's personnel records to expunge all reference to his April 9, 2018 discharge to the maximum extent permitted by governing law.¹⁴

¹⁴ One final comment is in order. Jenne Ayers, Chief of Staff to current Sheriff Rochelle Bilal, testified to the Bilal administration's zero-tolerance stance toward sexual harassment within the Department. This commitment to maintaining a workplace free from the scourge of sexual harassment is highly commendable. I must note, however, the adoption of that standard did not alter the City's burden of proof here; namely, to demonstrate by a preponderance of the credible evidence that Postell committed the charged offense. For the reasons explained, such showing was not made on the record evidence presented.

AWARD

1. The grievance is granted.
2. The City did not have just cause to discharge Stephen Postell, effective April 9, 2018.
3. The City will promptly reinstate Stephen Postell to his former position with the Department without loss of seniority. In addition, the City will make him whole for all wages and benefits lost as a consequence of his discharge for the period from April 9, 2018 through the date of his reinstatement, less all outside wages and other earnings received by him as to this period. The City also will adjust his personnel records to expunge all reference to his April 9, 2018 discharge to the maximum extent permitted by governing law. 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 Postell and the issue of whether he has satisfied the obligation to mitigate his damages.

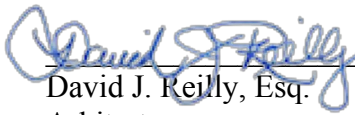
May 10, 2020


David J. Reilly, Esq.
Arbitrator

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

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.

May 10, 2021


David J. Reilly, Esq.
Arbitrator