

AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration Between

AFSCME District Council 47 :
and : AAA Case No. 01-21-0000-2324
: Grievance: 2187-21-01
: William Sullivan – Three-Day Suspension
: City of Philadelphia :

OPINION AND AWARD

Hearing Date: November 5, 2021
Arbitrator: Thomas P. Leonard, Esquire

Appearances:

AFSCME District Council 47
Jessica Brown, Esquire
Willig, Williams & Davidson

City of Philadelphia
Elizabeth Okakpu, Esquire
Lisa Swiatek, Esquire
City of Philadelphia Law Department

Procedural History

AFSCME District Council 47 (Union) and the City of Philadelphia (City or Employer) are parties to a collective bargaining agreement for a unit of employees in the City's Department of Licenses and Inspections (L&I). The CBA has a grievance procedure with the right to binding arbitration administered by the American Arbitration Association (AAA). On January 27, 2021, the AAA notified the undersigned that the parties had selected him as the arbitrator for a grievance filed over the three day suspension William Sullivan.

A virtual hearing was held on November 5, 2021 on the Zoom platform. At the hearing, the parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The parties made closing arguments on the record.

Issue

Whether the three day suspension of William Sullivan was for just cause? If not, what shall be the remedy?

Relevant Contractual Provision

16. DISCIPLINE AND DISCHARGE

- A. JUST CAUSE. It is agreed that management retains the right to impose disciplinary action or discharge provided that this right, except for an employee in probationary status, is for just cause only.
- B. DISCIPLINARY ACTION HEARINGS. An employee subject to disciplinary action shall not be suspended without pay or discharged prior to completion of Step III of the Grievance Procedure unless in the judgment of the appointing authority or designee said employee poses a threat to himself/herself or other person or persons.

- C. PROGRESSIVE DISCIPLINE. The City shall have the right to discipline or discharge an employee in the bargaining unit for just cause only. Disciplinary actions shall be progressive in nature where appropriate. The City and Local 2187 agree that discipline should be directed toward maintaining or improving the City's services. This clause does not apply to probationary employees.

Facts

William Sullivan (Grievant) is employed by the City of Philadelphia's Department of Licenses and Inspections (L&I) as a Building Inspector in the East District. He is 68 years old. He is the Union's steward for the East District. Before this discipline he had no other discipline.

In the Spring of 2020, the COVID-19 pandemic was beginning to ravage Philadelphia and the nation. Daily infection rates were climbing as were hospitalizations and death rates. Sullivan and the other inspectors were deemed essential employees. Sullivan continued to work despite his family's concern that his age made him vulnerable to serious illness if he contracted the virus. He wore a mask on those days he had to be in the office. At the time, the Department did not require masks. The office did have social distancing guidelines, which Sullivan observed.

On [REDACTED] Sullivan complained to [REDACTED] C [REDACTED] C [REDACTED] about a colleague, T [REDACTED] D [REDACTED] who was seated next to him. D [REDACTED] was not wearing a mask, was continuously coughing and refused to go to another area of the floor in compliance with the social distancing guidelines in place at the time.

C [REDACTED] went to Sullivan's supervisors, J [REDACTED] L [REDACTED] and B [REDACTED] M [REDACTED]. The supervisors addressed the complaint by moving D [REDACTED] to the afternoon rotation where he would not come into contact with Sullivan. The City had divided the employees into an "A" (morning) and "B"

(afternoon) rotation schedule so that on those days when the inspectors had to be in the office, social distancing could more easily be maintained because the number of employees in the office was reduced by one-half. Sullivan remained on the morning rotation.

On June 26, 2020, the City issued a broad mandate to wear masks indoors and outdoors for persons who could not maintain six feet of distance. This applied to city offices and work sites.

On the morning of [REDACTED], Sullivan and D [REDACTED] had a dispute in the parking lot of the East District. This is what occurred, based on the testimony of Sullivan and R [REDACTED] P [REDACTED], another employee who viewed the dispute.

Sullivan was on the morning rotation, coming into the office at about 9:20 a.m. He saw D [REDACTED] coming toward the building. This was a surprise to Sullivan, because no one told Sullivan that D [REDACTED] would be there during the morning rotation. Sullivan pointed toward D [REDACTED] and told him he could not come in the building that morning. D [REDACTED] was not wearing a mask. D [REDACTED] kept walking toward Sullivan, getting in his space. Sullivan kept pointing. As D [REDACTED] got closer, he poked D [REDACTED]

D [REDACTED] got angry and said "Don't poke at me." D [REDACTED] then screamed "fuck you." He got within inches of Sullivan's face. Sullivan poked him again and told him he could not come in the building. D [REDACTED] shouted a second time, "fuck you." In this encounter, coffee from Sullivan's carry cup spilled on D [REDACTED].

Sullivan then walked away. He went to R [REDACTED] P [REDACTED], his supervisor. P [REDACTED] told him that he had given permission to D [REDACTED] to come to the office in the morning to use the office printer for his work. P [REDACTED] brought the incident to the attention of B [REDACTED] M [REDACTED], his supervisor, who

then reported it to Kaitlyn Coughlin, L&I's Human Resources Manager. Sullivan was very upset and left work for the day. Sullivan also complained to the [REDACTED] C [REDACTED] who advised him to write everything down immediately. Sullivan did so. His written recollection is evidence in this hearing.

The next day, HR Manager Coughlin visited the work site. She talked with P [REDACTED] who told her what he observed. Before this incident, P [REDACTED] did not know either employee. Neither D [REDACTED] nor P [REDACTED] filed a workplace violence incident report. Coughlin determined that both Sullivan and D [REDACTED] violated the Department's Workplace Violence Policy and the Code of Ethics.

The Department's Workplace Violence Policy states, in relevant part:

Workplace violence is any intentional verbal or physical conduct affecting the workplace that causes any individual to reasonably fear for his or her personal safety, the safety of his or her family, friends, co-workers and/or property.

The Department's Code of Ethics states, in relevant part:

"[Employees] will maintain the highest standards of integrity" and "will treat all persons courteously and fairly" and "will carry on contacts with other members of the Department with cooperation and loyalty to the aims and purposes of the Department of Licenses and Inspections and the City of Philadelphia."

On [REDACTED], Sullivan filed a Workplace Violence Incident Report over his encounter with D [REDACTED]. Sullivan listed P [REDACTED] as a witness. Sullivan filed the Report because he felt that D [REDACTED] threatened him.

On July 31, Coughlin conducted a Department hearing for both employees. Sullivan's hearing would be first, then D [REDACTED]'s. Present were L&I Commissioner Ralph DiPietro and

supervisors J [REDACTED], B [REDACTED] M [REDACTED] and R [REDACTED] P [REDACTED]. Sullivan was present with his Union Representative April Gigetts and [REDACTED]. Sullivan told his side of the story. The panel intended to hear from D [REDACTED] right after Sullivan. D [REDACTED] decided not to attend. Nor did D [REDACTED] attend a separate hearing for his own suspension. The Department issued D [REDACTED] a 20 day suspension.

The Department hearing panel decided that D [REDACTED]'s supervisor authorized him to be there that day to use the office printer. The panel found that Sullivan's behavior toward D [REDACTED] was intimidating, inappropriate and provoked a threatening response from D [REDACTED]. The panel found that Sullivan should have gone to his supervisor if he was concerned with D [REDACTED] being there. Instead, without any authority, he pointed at D [REDACTED] and told him that he was not supposed to be there. The Department panel found that Sullivan's actions - getting so close to D [REDACTED] that he touched him, poked him and spilled coffee on him - met the definition of workplace violence and therefore violated the Department's workplace violence policy and Code of Ethics.

The panel recommended that the Department issue Sullivan a three day suspension.

The department hearing panel sent the recommendation to Kirk McLaren, L&I's Administrative Services Director and Coughlin's direct supervisor. McLaren listened to a recording of the meeting. McLaren approved the recommendation. He concluded that both Sullivan and D [REDACTED] acted in a manner that violated the workplace violence policy and Code of Ethics. He testified in this hearing that Sullivan's pointing at D [REDACTED] was not appropriate since he was not D [REDACTED]'s supervisor and that Sullivan should have known that this conduct would be inflammatory and likely to provoke a response from D [REDACTED]. As for the level of discipline to issue to Sullivan McLaren said that he made a judgment call since there were no

other comparable cases like this in the Department's disciplinary policy. He approved the panel's recommendation.

McLaren sent the recommendation for a 3 day suspension to Commissioner Ralph DiPietro, who approved it. The Union then filed this present grievance.

Sullivan testified in this arbitration hearing that his intention at pointing toward D [REDACTED] and telling him that he could not enter the building was to preserve his health. Coughlin testified that to her knowledge, D [REDACTED] did not tell anyone that he felt threatened or was in danger of physical harm.

Discussion

The Union's grievance alleges that the City's three day suspension of Sullivan was not for just cause. As relief, the Union seeks to void the suspension and make Sullivan whole.

The City, as the employer, has the burden of proving the suspension was for just cause.

The City contends that it proved that it had just cause to suspend Sullivan for three days. The City argues that the facts show that Sullivan made an inappropriate and unauthorized action against a fellow employee, T [REDACTED] D [REDACTED], which provoked D [REDACTED] to come back at Sullivan. Sullivan acted without authority to stop D [REDACTED] or any employee from entering the building. It contends that the facts show that Sullivan engaged in intimidation and aggressive behavior that is never appropriate in the workplace. The City also found D [REDACTED]'s reaction violated the workplace violence policy and issued him a 20 day suspension. The City would not have had to discipline either employee if Sullivan had not taken the first inappropriate action.

The Union argues that the City has not met its burden of proving that the suspension was for just cause, for two reasons. First, the City did not prove that Sullivan violated the workplace violence policy or the Code of Ethics. The Union concedes that Sullivan told D [REDACTED] he was not supposed to be here. However, the Union contends that he did not say that “you can’t come in the building” as P [REDACTED] testified. The Union also disputes that Sullivan spilled coffee on D [REDACTED]. Regardless of these facts, it is unfair to find Sullivan committed workplace violence since D [REDACTED] was the aggressor. It is unfair to find that Sullivan knew that he would have provoked D [REDACTED] or that an employee who was allegedly provoked should shift the blame for his actions to another employee.

Second, even if the City proved that he violated either the workplace violence policy or the Code of Ethics, the three day suspension was excessive and did not follow the CBA’s progressive discipline provision. This was Sullivan’s first discipline.

Analysis

To prove the workplace violence allegation, the City must prove that Sullivan violated the written policy. The words of the policy require proof that Sullivan engaged in “intentional verbal or physical conduct” that caused D [REDACTED] to “reasonably fear for his .. personal safety ...or property.”

I must note that Sullivan and P [REDACTED] are the only eyewitnesses who testified to the [REDACTED] incident. They had different recollections of some of the allegations such as the exact words Sullivan used when he saw D [REDACTED] coming toward the building, whether Sullivan poked D [REDACTED] and whether Sullivan spilled coffee on D [REDACTED].

However, certain other allegations are not disputed. D [REDACTED] walked toward Sullivan first. D [REDACTED] was not wearing a mask. The City had a mandatory mask policy. D [REDACTED] twice loudly cursed at Sullivan. D [REDACTED] got within inches of Sullivan's face.

Also, D [REDACTED] did not file a workplace violence report. He did not appear at the Department's administrative hearing. He did not testify in this arbitration hearing.

A determination of whether D [REDACTED] reasonably feared for his safety will have to rely on the record as it is, particularly the testimony of the two witnesses and Sullivan's written statement made the day of the incident. From this record, the City has a high burden to determine whether D [REDACTED] was fearful of Sullivan so as to find Sullivan violated the policy.

The City has to explain why it should find Sullivan guilty when the facts show that D [REDACTED] was the first physical aggressor across space, after Sullivan pointed toward D [REDACTED] and told him that he was not supposed to be there (or in P [REDACTED]'s recollection, "You can't come in here.") The City explains that Sullivan "provoked" D [REDACTED]. Even if D [REDACTED] was provoked, it is hard to accept the City's argument that D [REDACTED] feared for his safety since it was D [REDACTED] who took the first movement of his body toward Sullivan. I instead conclude that Sullivan feared for his safety and that any poking by him was defensive. Sullivan's pointing at D [REDACTED] lacked the intention to put D [REDACTED] in fear of his safety, a necessary element to prove that Sullivan violated the workplace violence policy. The spilling of the coffee on D [REDACTED] was incidental to this encounter and would not have happened if D [REDACTED] not entered Sullivan's space. Assessing the evidence, I must conclude that the City has not met its burden of proof that Sullivan's conduct violated the workplace violence policy. Accordingly, the City lacked just cause to find Sullivan guilty of this allegation.

Code of Ethics Allegation

As for the allegation that Sullivan violated the Code of Ethics, the City must prove that Sullivan failed to “treat all persons courteously and fairly” and failed to “carry on contacts with other members of the Department with cooperation and loyalty to the aims and purposes of the Department.”

The particular section of the Code of Ethics at issue here falls into the category of work rules that are mandatory, i.e. rules that requires a certain conduct. This contrasts this with the workplace violence policy at issue above, which falls into the category of rules that are prohibitory, i.e. rules that forbids certain conduct

The Code of Ethics work rule requires the employee to act a certain way with other employees, with “courtesy” and with “cooperation.” Compare this to the Workplace Violence policy, which prohibits an employee from acting a certain way, from engaging in “intentional verbal or physical conduct” that “causes any individual to reasonably fear for his or her personal safety.”

Accordingly, the employer’s burden of proof is different for the Code of Ethics allegation.

Sullivan was surprised to see D [REDACTED] showing up that morning at the East District worksite on the same rotation. He thought that management had moved D [REDACTED] to the afternoon rotation. No supervisor had informed Sullivan that he would be there. It is reasonable that Sullivan would be upset to see D [REDACTED] at the worksite on the same rotation given his April experience with D [REDACTED] and that in July, the COVID-19 pandemic was still raging.

Nevertheless, his pointing at D [REDACTED] and telling him he was not supposed to be there was done without authority and was inappropriate. Sullivan’s conduct fell below the mandatory

duty that the Code of Ethics requires: to “carry[ing] on contacts with other members of the Department with cooperation.” Rather, Sullivan displayed the opposite of cooperation. He was acting like D [REDACTED]’s superior instead of a coworker. He could have asked D [REDACTED] why he was there. Or he could have sought an answer from his supervisor or chief union steward, as he had done in April. Sullivan’s concern with his preserving his health is understandable, but that concern did not excuse his action.

In light of all of the evidence, I must conclude that the City has met its burden of proof that Sullivan’s actions were not done “courteously and fairly” or done “with cooperation” as the Code of Ethics requires.

The Department had just cause to discipline Sullivan for this Code of Ethics violation. However, the discipline of a three day suspension was excessive because it did not comply with the requirement of progressive discipline as set forth in Article 16, Section C of the CBA. This was Sullivan’s first discipline. A supervisor should have taken Sullivan aside and given him counseling or a verbal warning.

Award

For the reasons stated above, the grievance is sustained in part. The City shall void the three day suspension of William Sullivan and make him whole for his losses.

December 6, 2021
Harrisburg, Pennsylvania


Thomas P. Leonard, Esquire