

AMERICAN ARBITRATION ASSOCIATION
VOLUNTARY LABOR ARBITRATION PANEL

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In the Matter of the Arbitration

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-between-

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CITY OF PHILADELPHIA - -

DEPARTMENT OF STREETS

("City" or "Employer")

:

AAA # 01-21-0015-9749

:

-and-

:

AFSCME DISTRICT COUNCIL 47

("Union")

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**ARBITRATOR'S
AWARD AND OPINION**

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Re: Kimberly Baxter, Grievant

:

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Before: Jay Nadelbach, Esq., Arbitrator

APPEARANCES

For the City:

Elizabeth U. Okakpu, Esq., Assistant City Solicitor
Karena Blaylock, Assistant Managing Director, Human Resources
Clinton Gibson, Senior Human Resources Associate
Wayne Garris, Labor Relations Specialist
Chris Newman, Deputy Commissioner, Department of Streets
Deborah McKee, Fiscal Officer, Department of Streets

For the Union:

Willig Williams & Davidson, Attorneys
By: William J. Campbell IV, Esq.
Tammy Murphy, Representative
Kimberly Baxter, Grievant
Andre Knox, Grievant's fiancé

This case involves a one-day suspension issued to the Grievant, Kimberly Baxter, after she was AWOL for one day. Specifically, she failed to sign in on her computer for work on

February 9, 2021 and she also failed to communicate with her supervisors until late in the workday. A hearing in this matter was held via a Zoom video-conference platform hosted by the undersigned Arbitrator on September 19, 2022. At that time, both sides were given a full and fair opportunity to present testimony, evidence, and arguments in support of their respective positions. The hearing was then deemed closed.

BACKGROUND

The Grievant is employed as an Accountant with the City's Department of Streets. She reports to supervisor Rosemary McLaurin and, in turn, to the Department's Fiscal Director, Deborah McKee.

During the COVID pandemic, the Department's fiscal office remained open, but staff mostly worked from home. The Grievant worked virtually every day. Similar to other employees, she had taken her City-issued desktop computer home and had arranged to have the computer connected through her home wi-fi to the City's server. Each day, the Grievant would log on to her computer, sign in to the City's secure system by entering her password, and then gain access by typing in a secondary random 6-digit security pass-code that she would receive via a text message on her Apple cell phone.

On the day in question, February 9, 2021, the Grievant did not sign in for work on her computer in the morning. She also did not contact her supervisors. She was marked AWOL and not paid for the day. In addition, under the Department's "Standard Schedule of Disciplinary Offenses and Penalties," she was issued a one-day suspension.

The Grievant challenged the suspension. As detailed below, the Grievant claimed that she was unable to log into the Department's system or to contact her supervisors because she had misplaced and could not find her cell phone. It was not until late afternoon, when her boyfriend returned her phone, that the Grievant discovered that she had mistakenly left the phone in his car. The Union, therefore, contended that the Department had unfairly rejected her explanation. The Union sought a rescission of or reduction in the penalty assessed.

ISSUE

The parties stipulated to the issue in dispute, as follows: Did the City have just cause to suspend the Grievant, Kimberly Baxter? If not, what shall be the remedy?

SUMMARY OF TESTIMONY

The Employer's case

██████████ oversees the Department's budget and accounting functions. ██████████ also handles all internal disciplinary matters and she was the management official who recommended/approved the Grievant's one-day suspension.

██████████ testified that, at approximately 10:00 a.m. on the day in question, supervisor Rosemary McLaurin called to notify her that the Grievant had not signed in to work on her computer. The Grievant also had not called in. ██████████ suggested that the Grievant be given some additional time. At 11:00 a.m., McLaurin indicated that the Grievant still had not at all communicated. ██████████, therefore, at 11:20 a.m. called the Grievant's cell phone. There was no answer and ██████████ left a voice-mail message. The Grievant did not respond.

It was after 4:00 p.m. only that the Grievant finally sent an e-mail. It read:

"I didn't sign I [sic] to work today because I was unable to find my phone until 15 minutes ago. I wasn't able to call either one of you because your numbers were in my phone. I was unable to email you because I need my phone to sign on the computer. I called and left a message on Rosemary's cell phone because I don't have her house number saved.

Hopefully my absence didn't cause a problem and I can use a vacation day. I will be signed in tomorrow as scheduled."

In her testimony, however, ██████████ made several critical points. First, McLaurin never received a message that day from the Grievant. And notably, no explanation was provided as to why the Grievant could not use another means to contact the office. Even if the Grievant truly did not have her cell phone and could not therefore obtain a texted 6-digit pass-code to access the Department's network, she should still readily have been able to get

on the internet in order to email via Microsoft Outlook, or she could have accessed Microsoft Teams to communicate with the office.¹ Simply put, the Grievant did not need a secure password to contact a supervisor via her computer. Equally important, [REDACTED] testified that prior to the instant arbitration hearing, the Grievant never offered the explanation that she had left her phone in her boyfriend's car. Indeed, throughout the grievance procedure, the Grievant offered no explanation whatsoever.

As a result of her wrongful conduct, the Grievant was assessed a one-day disciplinary suspension for being AWOL for the day. The penalty was consistent with the "Standard Schedule" of disciplinary penalties maintained by the Department and issued to employees. Being AWOL is a serious offense, [REDACTED] testified, and no mitigation or tolerance of the Grievant's behavior was required. The City, therefore, had just cause to mete out the one-day suspension.

The Union's case

The Union contended that the discipline was unwarranted and unfair. The Grievant's explanation was credible and should have been accepted by the Department. She had misplaced her cell phone and was unable to contact her employer. There was no intentional misconduct. The Grievant was not paid for the day -- why add an extra penalty of a one-day suspension?

The Grievant testified that she initially did not even realize that she had left her phone the previous night in her boyfriend's car. She did not have a separate home telephone line and did not have any other accessible means of communication. She tried to access the City's server on her computer, but she needed to obtain an authentication pass-code that is sent to her cell phone.

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The Department had used Microsoft Teams several times each week for employee meetings, [REDACTED] stated, and if necessary the employees had the ability to go onto a City website to obtain training in its use.

Instead, the Grievant testified, she spent the day searching for her phone. She had no other telephone available and, in any event, could not have called either supervisor because she did not know their numbers. The numbers were simply entered and saved on her phone. It never crossed her mind, the Grievant testified, to try and communicate via Microsoft Teams or to try a different method to call or email the office.² It was late afternoon only when her boyfriend found and returned her phone.

██████████, currently the Grievant's fiancé, testified that he was at work that day. During an afternoon break, he went to his car. While there, ██████████ heard a phone ring and found the Grievant's cell phone on the car floor. He left work to bring the phone to the Grievant's house. She then immediately contacted her employer.

DISCUSSION

Upon a careful review of the entire record presented by the parties, I find that the City had just cause to issue a one-day suspension to the Grievant, Kimberly Baxter. The grievance is, therefore, denied.

At the heart of this case is the undisputed, plain fact that the Grievant was AWOL on February 9, 2021. She neither logged in through her computer nor called in to work, as required. The burden was, therefore, on the Grievant to provide a sufficient reason and/or compelling circumstances to excuse or mitigate her wrongful conduct. The Grievant was not

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Specifically responding to ██████████'s testimony, the Grievant said that she did not have Microsoft Outlook installed on her computer.

Called as a rebuttal witness, ██████████, a City IT manager who worked with the Streets Department, confirmed however that an employee can simply turn on a computer, access the internet and Microsoft Teams, or just go to the Department's web address (with access obtained even without a pass-code) in order to email.

██████████ also noted that, when the Grievant is in the office, she sits a few cubicles away from him. Having consulted with him on occasion, the Grievant should have known to simply type in the Department's web address to gain access to her email.

able to meet this burden. Her actions on the day in question were deficient and questionable at best.

Leaving aside the underlying issue of the truthfulness of the Grievant's excuse that she forgot her cell phone in [REDACTED]'s car, the testimony and evidence offered by the City -- that the Grievant had other means readily at her disposal to contact her supervisors and/or the Department's fiscal office -- persuades me that the Grievant undertook no common sense efforts to report in. Without much difficulty, the Grievant could have borrowed or obtained a phone from a friend or neighbor, or she could have located a computer (again, whether from a friend, neighbor, or local store or library) for her immediate use. In addition, she could also have emailed a work colleague or she could have easily traveled to the office once she discovered that her phone was missing. The Grievant's testimony that she did not think of nor consider anything other than searching for her phone in her home is neither credible nor acceptable. Once the Grievant believed that she could not communicate via her computer, she took no further action. Had her boyfriend not located and returned the phone later that day, what would the Grievant have done thereafter? Would she continued to have just stayed home?

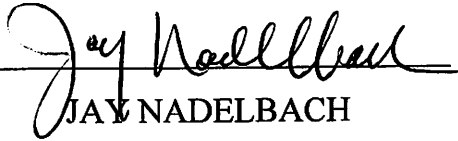
The record demonstrates that the Grievant was a seasoned employee, she knew the importance of reporting to work or calling in an absence, and she knew or should have known the ramifications of being AWOL. Quite apparently, the Grievant's conduct in failing to find the means to contact her office cannot be attributed to a mere lapse in judgment because her cell phone was missing. Rather, her behavior demonstrated a willful determination to simply stay home and not undertake any reasonable steps to report to work or to contact a supervisor.

Under all the circumstances presented, therefore, there is no legitimate basis to rescind or reduce the penalty imposed. The Department's judgment, based upon the Grievant's conduct and the Department's applicable disciplinary standards, was reasonable and must be upheld.

AWARD

The grievance is denied. The City had just cause to issue a one-day suspension to the Grievant, Kimberly Baxter.

Dated: October 7, 2022
 New York, New York


JAY NADELBACH

AFFIRMATION

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

I, JAY NADELBACH, affirm upon my oath as Arbitrator, that I am the person described in and who executed this instrument which is my Award.


JAY NADELBACH