

AMERICAN ARBITRATION ASSOCIATION

In the Matter of Arbitration between

Fraternal Order of Police, Lodge 5 : AAA Case No. 01-21-0017-3804

and :

City of Philadelphia : Grievance: P/O James D. McGorry  
Discharge

Opinion and Award

Hearing Date: December 9, 2022

Arbitrator: Thomas P. Leonard, Esquire

Appearances:

FOP Lodge 5

William Campbell, Esquire  
Willig, Williams & Davidson

City of Philadelphia

Joseph Scopelitis, Esquire  
Cozen O'Connor

## **Procedural History**

Pursuant to the terms of a Collective Bargaining Agreement (CBA) between the Fraternal Order of Police, Lodge 5 (FOP or Union) and the City of Philadelphia (City) and the Labor Arbitration Rules of the American Arbitration Association, the undersigned arbitrator was appointed to hear and decide the dispute described below. Upon due notice, an arbitration hearing was convened on December 9, 2022, at the American Arbitration Association in Philadelphia.

At that time, the parties presented testimony, cross-examined witnesses and introduced documentary evidence. The parties made closing argument and the record was closed.

## **Issue**

Did the City have just cause to dismiss Police Officer James McGorry? If not, what shall be the remedy?

## **Facts**

Police Officer James D. McGorry (Grievant) has been employed by the Philadelphia Police Department since 2006.

On July 27, 2020, McGorry was in [REDACTED] on a week's vacation with his family. That day, he began drinking at 4 p.m. By approximately 1:49 a.m. on July 28, had consumed multiple drinks. He admitted that he was intoxicated. At that time he got involved in a dispute with other individuals. The North Wildwood Police Department (NYPD) arrived. The officers had body cameras. The audio and video showed that McGorry was loud and intoxicated. He swore at the officers, berated them and told them that he was an officer with the Philadelphia Police Department and that he was a real police officer while they were

not. The officers repeatedly requested that McGorry leave. McGorry did not comply with their request. They arrested McGorry. He physically resisted the arrest. Took him to the police station and charged him with disorderly conduct. The next day he pleaded guilty to a noise ordinance violation and paid a fine.

The North Wildwood police dismissed the disorderly conduct charge. When McGorry returned to work the next week, he did not report the arrest to his commanding officer or supervisor. He testified that he did not realize that he needed to report the incident because he was only fined.

The NWPD did notify the City of Philadelphia Police Department of McGorry's arrest. On August 18, 2020, the Department's Internal Affairs Division (IAD) initiated an investigation into the incident.

On October 27, 2020, IAD investigator [REDACTED] interviewed McGorry and showed him the North Wildwood police body camera video of the night in question. McGorry agreed that the video showed his actions. He explained to the investigator that he had been seeing a doctor and was taking prescription medicine due to stress from a near deadly encounter with a suspect in 2018 and from the protests against police in 2020. The medicine reacted badly with the alcohol. He told the investigator that he was embarrassed and humiliated by his actions.

On May 21, 2021, the Department filed a Statement of Charges against McGorry, charging him with three (3) Departmental violations:

- **Article 1: Conduct Unbecoming; Section 1- § 026-10:** Engaging in any action that constitutes the commission of a felony or a misdemeanor which carries a potential sentence of more than one (1) year.

Engaging in any action that constitutes an intentional violation of Chapter 39 of the Crimes Code (relating to Theft and related offenses).

Also includes any action that constitutes the commission of an equivalent offense in another jurisdiction, state or territory.

Neither a criminal conviction nor the pendency of criminal charges is necessary for disciplinary action in such matters.

- **Article VI: Disobedience; Section 6-§ 003-10** : Failure to immediately notify the department about any involvement of which they are aware in criminal litigation as the defendant.
- **Article I: Conduct Unbecoming; Section 1-§021-10** : Any incident, conduct, or course of conduct which indicates that an employee has little or no regard for his/her responsibility as a member of the Police

On August 3, 2021, the Police Board of Inquiry (PBI) held a hearing and found McGorry guilty of the three (3) Departmental violations.

As for the penalty for these violations, all three members of the PBI voted for a penalty of thirty (30) days suspension for each of the three charges, except one member voted for his dismissal on Article I: Conduct Unbecoming; Section 1- Sec. 026-10; Engaging in any action that constitutes the commission of a Felony or a Misdemeanor, which carries a potential sentence of more than one (1) year. In addition, two members of the PBI panel voted that a transfer be a part of the discipline involved. (City Exhibits 11, 12 and 13)

Police Department Commissioner Danielle Outlaw received the PBI recommendation. Under the Department Disciplinary Code, which is incorporated into the CBA, the Commissioner is not bound by the PBI recommendation. (“The Disciplinary Code shall in no way limit any penalty which the Police Commissioner may impose. The Police Commissioner is the final authority on all disciplinary matters.” Disciplinary Code, page, page 2)

She reviewed the NRPD body worn camera footage and the PBI recommendation. She then met with a Law Department representative, the Deputy Commissioner in charge of PBI and

the Deputy Commissioner in charge of Standards and Accountability. They reviewed the IAD investigation, its findings and the PBI's recommendations.

The Commissioner decided not to accept the PBI's recommendation as to the level of the penalty for the three violations. She decided that the penalty should be the dismissal of McGorry and not the 30 day suspensions for each violation. She issued her dismissal order on September 21, 2021. (See City Exhibit 9, 10 and 11)

In this arbitration hearing, Commissioner Outlaw testified that she had several reasons for deciding that dismissal was appropriate. First, there were three charges, not just one. One of the charges was that McGorry was arrested and he did not notify the Department of his arrest. Second, McGorry's behavior that July night raised several aggravating factors. McGorry refused numerous opportunities to leave the scene as NRPD requested yet he did not. McGorry himself brought up the fact that he was a Philadelphia Police Department officer, which brought the Department into disrepute. He then physically resisted arrest, thereby prolonging the encounter.

Finally, she testified that another factor was that the Department had recently disciplined McGorry on January 3, 2020 for three violations of the Disciplinary Code, including Conduct Unbecoming -1--§ 011-10, Abuse of Authority, stemming from his arrest of an individual in 2018.

Commissioner Outlaw testified that in deciding on the penalty of dismissal, she did not take into account McGorry's work history, his good annual performance reviews and his commendations and awards. She did not take into account that the Discipline of January 3, 2020 was reduced by a June 1, 2021 arbitration award because she was not aware of it. (The

arbitrator reduced the 30 day suspension “for repeatedly violating Directive 4.1 (for violating Section 5-§ 011-10, Neglect of Duty) to a five (5) day suspension. )

Under the Disciplinary Code, for a first offense for these three charges in the present case, the range of penalties that the Department could issue were either 30 days or dismissal. Outlaw testified that there were aggravating factors in each of the three charges that that gave her reasons to render the higher penalty of dismissal.

On September 21, 2021 the FOP filed a grievance on behalf of McGorry, alleging that the City terminated his employment without just cause.

In McGorry’s 14 year career before the 2020 incident, he worked a variety of details in the 14<sup>th</sup> District, including plainclothes and narcotics. He received numerous commendations from the Department. At this arbitration hearing, he produced eleven (11) such commendations. He also received a complimentary letter from the Department of Human Services for his investigation into suspected sexual abuse of a child. During the last seven years of his career before he was terminated, he went between the NETS Team (Narcotics Enforcement Team (NETS) and Five Squad, which typically had riskier and more difficult assignments than routine patrol.

In 2018, McGorry and his partner stopped two male suspects, who then resisted and fought with the officers. One of the suspects pointed a gun at McGorry’s chest. The suspect did not drop the gun. McGorry made a split second decision not to use deadly force. The suspect then threw the gun to the side. Backup final arrived. After the incident, McGorry went into a deep depression. A psychiatrist diagnosed him with PTSD and prescribed him the medication he was on at the time of the incident at North Wildwood. The Police Commissioner at the time awarded McGorry a commendation for bravery.

As cited above, McGorry has one other significant discipline on his record arising out of an arrest he made on July 13, 2018 for which he was charged with three violations of the Disciplinary Code. On March 7, 2020, the Department suspended McGorry for 30 days for Conduct Unbecoming for repeatedly violating the Department's directive 4.1 for the use of cell phones. The Union grieved the discipline and took the grievance to arbitration. On June 1, 2021, the arbitrator reduced the 30 day suspension to five (5) days.

[REDACTED] testified that she was not aware at that time that there was an award so she did not take into account the arbitrator's award reducing the 30 day suspension to a five (5) day suspension.

### **Discussion**

The City has the burden of proving that it had just cause to dismiss McGorry.

#### **The City's Position**

The City argues that it had just cause for discharging the grievant. The City has entrusted police officers with a level of responsibility to do the right thing and follow department regulations, even when off duty. On the night in question, McGorry, by his own admission, engaged in conduct unbecoming a police officer in two ways and did not follow department directives to report an arrest to his supervisor. McGorry's excuses for his behavior that rest on alcohol usage and interaction with prescription drugs should not be mitigating factors to void the Commissioner's decision. Those excuses should not be mitigating factors in this case. Furthermore, the Department recently disciplined McGorry in 2018 for three violations of the Disciplinary Code. McGorry's March 7, 2020 30 day suspension (which was later reduced to 5

days by an arbitrator) factored into her decision to dismiss McGorry, since it was so close in time to the 2020 incident at North Wildwood.

### **The Union's Position**

The Union argues that the City has not carried its burden to show that it had just cause to dismiss McGorry. The principles of just cause require that the City apply the Disciplinary Code in a manner by progressive discipline so as to encourage compliance with work rules and not merely to punish employees. By the City choosing the highest penalty of two choices, dismissal over a thirty day suspension, the City has not followed progressive discipline.

The principles of just cause also require that before the City issued the highest level of discipline that it should have looked beyond “the worst day” in McGorry’s career and taken into account the entirety of McGorry’s record: good annual performance records and numerous commendations, including one for bravery. Also, he admitted that he acted badly on the night in question and that he wants to return to serving the citizens of Philadelphia.

The criminal charge from North Wildwood was disorderly conduct, for which McGorry paid a fine the next day. He believed that this did not rise to the level of “criminal litigation” for which he had to notify his supervisor because it was resolved the day after his arrest. He lacked the intent to deceive the department.

### **Conclusion**

In reviewing all the evidence in this case numerous times and after considering the parties’ respective arguments, I must conclude that the City lacked just cause to dismiss McGorry.



There is no dispute about the material facts of the case. The dispute is over whether the City appropriately applied labor law principles of just cause in deciding to dismiss McGorry. The City is correct that the PBI is only a recommending step in the disciplinary system of the Police Department and that the Commissioner has the final say in the level of discipline. At first glance, the Commissioner's decision and the reasons for the decision are understandable. However, after closer scrutiny, the Commissioner did not apply two principles of just cause in McGorry's case.

First, discipline should be applied progressively, to serve as a means of encouraging compliance with workplace rules, rather than merely punishing the employee. In this case, the range of discipline choices for the Department for these violations was either a 30 days suspension or dismissal. The Commissioner chose dismissal. That choice did not follow the idea of progressive discipline. The 30 days suspension penalties recommended by the PBI is more consistent with the concept of progressive discipline.

Second, the discipline should take into account the employee's entire work record, including numerous commendations and good performance ratings. In this case, the Commissioner testified that she did not take all of McGorry's prior record of 14 years into account, but focused on the night of the incident. She did take into account recent discipline that he received for another incident, but that 30 day suspension was reduced by an arbitrator to a five (5) day suspension, of which she was not aware.

I must conclude that the Commissioner's decision to dismiss McGorry's without considering his work history and his record of commendations and awards does not comport with the notions of just cause.

Therefore, based upon the above discussion and the entire record, I must conclude that the City did not have just cause to dismiss Officer McGorry from his employment with the Philadelphia Police Department. The following award is entered.

### **Award**

The grievance is sustained. The City should modify the discipline imposed on Officer James McGorry from dismissal to the penalties that the PBI recommended, which are 30 days for each violation, or 90 days in total. The City should reinstate McGorry to the position that he held in the 14<sup>th</sup> District before his dismissal. The City should make him whole for all losses.

The arbitrator will retain jurisdiction to resolve any disputes over the implementation of the Award.

January 24, 2023  
Harrisburg, Pennsylvania

  
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Thomas P. Leonard, Esquire