

**AMERICAN ARBITRATION ASSOCIATION**

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In the Matter of the Arbitration	:	AAA Case No.
	:	01-19-0003-1621
between	:	
	:	Opinion & Award
FRATERNAL ORDER OF POLICE LODGE NO. 5,	:	
	:	Re: Lt. Charles Jackson -
	:	Suspension
“Union”	:	
	:	
- and -	:	Hearing: January 10, 2023
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CITY OF PHILADELPHIA,	:	
	:	
	:	
“City”	:	
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**APPEARANCES**

**For the City**

CITY OF PHILADELPHIA LAW DEPARTMENT  
Nicole S. Morris, Esq., Chief Deputy City Solicitor  
Ryan Mulgrew, Esq., Assistant City Solicitor

**For the Union**

WILLIG, WILLIAMS & DAVIDSON  
John R. Bielski, Esq.

**BEFORE:** David J. Reilly, Esq., Arbitrator

## **BACKGROUND**

The City suspended Lieutenant Charles Jackson for two days, effective April 15, 2019, and transferred him from the Narcotics Field Unit to the 16<sup>th</sup> District. It took these actions upon finding him guilty of a failure to supervise in violation of Section 8-§001-10 of the Police Department's Disciplinary Code of Conduct ("Disciplinary Code").<sup>1</sup> This violation stemmed from his actions regarding a police officer who had been assigned in June 2017 on a temporary basis to assist with an investigation being conducted by the Pennsylvania Attorney General's Bureau of Narcotics Investigation ("BNI"), where he then served as a supervisor.

The Union contends the City lacked just cause to impose either the suspension or the transfer. It asks that these disciplinary actions be reversed and Jackson be made whole for all pay and benefits lost as a consequence of those measures.

The basic facts of this case, including the areas of dispute, may be set forth succinctly.

### **Jackson's Employment History**

Jackson has been a member of the City's Police Department for over thirty-four years. During his tenure, the Department has promoted him multiple times. As of June 2000, he achieved his current rank of Lieutenant.

In 2002, at a Commander's request, he joined the Department's Narcotics Field Unit ("NFU"), where he had served previously. While there, he was assigned to a narcotics task force associated with BNI and assumed responsibility for supervising police officers detailed to BNI and other agencies outside the Department, such as the FBI, ATF and

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<sup>1</sup> The Department's Disciplinary Code is appended to the parties' collective bargaining agreement. (Joint Exhibit 1.)

Homeland Security.

Throughout his tenure with the Department, he has received annual evaluations from his superior officers rating his performance as satisfactory, which also included comments reflecting positively on his service. (Union Exhibit 5.)<sup>2</sup> In addition, the Department has awarded him numerous commendations for his actions on the job. (Union Exhibit 6.)

He has no record of active prior discipline. (City Exhibit 2.)

### **Department Directive 11.1**

Department Directive 11.1 details the procedure by which the daily status/activity of all officers is recorded. (City Exhibit 3.) In particular, the Directive specifies that the computerized Daily Attendance Report (“DAR”) will be used to: (1) maintain accurate attendance records for all Department personnel; (2) identify general assignment and hours worked by each employee; (3) report the reason for absences and amount of time used; and (4) show the number of hours and method of accrual for overtime or compensatory time earned. (City Exhibit 3.)

The Directive specifies that the platoon/unit Lieutenant bears responsibility for checking and certifying the accuracy of all entries made in the DAR for his/her reports.<sup>3</sup> For an officer who is “detailed out” of their district or unit, the Commanding Officer of the district or unit to which he/she is detailed assumes the obligation to accurately record his/her daily activity in the DAR. (City Exhibit 3 at Appendix F.)

Lieutenants and other supervising officers, who have responsibility for completing DARs, maintain a Daily Complaint Summary, also referred to as a SARS. This form is used

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<sup>2</sup> For example, in his two most recent evaluations, his rating officer remarked, “You not only look for ways to improve your squad and our district, but you have also been an excellent role model for younger officers.” “You are highly regarded for your integrity.” (Union Exhibit 5.)

<sup>3</sup> In the platoon/unit Lieutenant’s absence or if one is not assigned, another supervisor will be designated to certify the DAR. (City Exhibit 3.)

to record information, such as the officers being supervised, search warrants, property receipts, investigations/activities and reporting and departure times. The SARS, in turn, serves as a reference tool for certifying the DAR.

**Temporary Assignment of Police Officer [REDACTED] to BNI**

In or about June 2017, Police Officer [REDACTED], who was then assigned to the NFU and reporting to Sergeant [REDACTED] within the Department's Narcotics Bureau, became involved with an ongoing BNI investigation.<sup>4</sup>

In testifying, Inspector [REDACTED] who commanded NFU and the Narcotics Bureau's Strike Force, recounted a June 2017 meeting at which [REDACTED] assistance with this investigation was discussed. He recalled that the BNI representatives at the meeting, which included Jackson, expressed their desire to have [REDACTED] detailed to BNI, so he could work full-time on the investigation. He related explaining to them that it would not be possible to do so, because [REDACTED] was needed on his assigned squad within NFU.<sup>5</sup>

According to [REDACTED] the meeting concluded with the understanding that [REDACTED] [REDACTED] would remain in his NFU squad, working a rotating schedule, but would be available to assist BNI, as needed. As a result, [REDACTED] he averred, remained under [REDACTED] supervision, except when performing BNI work, during which time Jackson had responsibility for supervising him.

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<sup>4</sup> The Department's Narcotics Bureau consists of three branches: (1) Strike Force; (2) NFU; and (3) Task Force. In 2017, Inspector [REDACTED] commanded the first two branches, while Inspector [REDACTED] had responsibility for the third, under which narcotics officers were assigned to work with federal and state task forces, such as BNI.

<sup>5</sup> When interviewed by IAD, [REDACTED] in explaining his decision not to detail [REDACTED] to BNI, stated, "I did not want to lose P/O [REDACTED] to BNI. I did not want BNI to think they had him for other investigations. This was a case specific lending of an officer to an outside agency." (Union Exhibit 2.)

In his testimony, Jackson confirmed the outcome of this meeting, as recounted by [REDACTED]. He related that his efforts to convince [REDACTED] to detail [REDACTED] to BNI proved unsuccessful. In seeking to avoid that outcome, he recalled informing [REDACTED] “If you want me to supervise [REDACTED] you need to give him to me.” He averred, in this regard, expressing concern as to supervising a police officer who worked on a different schedule, as he and the officers reporting to him were assigned to a 10 a.m. – 6 p.m. shift; whereas [REDACTED] worked a rotating shift (i.e., 8 a.m. – 4 p.m.; 4 p.m. – 12 a.m.; 12 a.m. – 8 a.m.).

According to Jackson, following this meeting and through November 2017, he continued to raise this apprehension through his commanding officer, [REDACTED]. [REDACTED] he learned, remained unyielding in his refusal to detail [REDACTED] to BNI.

In practice, he reported, [REDACTED] rotating shifts impeded his ability to perform work for the BNI. He noted, in this regard, that [REDACTED] lack of access credentials to the BNI facility prevented him from entering or remaining there when working hours outside of the BNI schedule.

Jackson averred that during the period from June 2017 – December 2017, he did not maintain [REDACTED] on his SARS, because [REDACTED] carried him on his SARS in NFU. The only exception, he said, was when [REDACTED] participated in special assignments for BNI, such as executing a search warrant. However, on cross-examination, he clarified that [REDACTED] was never included on his SARS, but was listed on operational plans when he performed work for BNI.

#### **Internal Affairs Division (“IAD”) Investigation**

In December 2017, IAD received notification of suspected misuse of overtime in the

Narcotics Bureau. In particular, the report alleged that [REDACTED] was being paid for overtime to which he was not entitled, as he was receiving the same overtime earned by his NFU squad, even when working for BNI. (City Exhibit 1.)

Lieutenant [REDACTED] testified to being assigned to investigate this matter on December 20, 2017. In recounting her investigation, she reported interviewing seventeen members of the Department, including Jackson, [REDACTED]. In addition, she collected and reviewed numerous documents, totaling thousands of pages, including [REDACTED] DARs and the DARs for all member of his NFU squad, records of [REDACTED] overtime earnings and his non-court overtime slips. (City Exhibit 1.)<sup>6</sup>

She averred that in reviewing Jackson's SARS for the period from June 15, 2017 – December 31, 2017, none listed [REDACTED] as being under his supervision. In contrast, she noted, each of [REDACTED] SARS for the same period identified [REDACTED] [REDACTED] as one of the officers he was then supervising.

Ultimately, in addition to establishing Disciplinary Code violations by five other officers, she affirmed that her investigation substantiated that Jackson had failed to supervise [REDACTED].<sup>7</sup>

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<sup>6</sup> As a consequence of the allegations being investigated, the Department placed Jackson on restricted duty, effective January 24, 2018, assigning him to Court Liaison. In that capacity, he was precluded from performing any official police functions, and was thus ineligible to work any overtime involving such duties. His overtime opportunities were limited to administrative functions. Jackson remained on restricted duty until his disciplinary transfer to the 16<sup>th</sup> District as of February 21, 2019.

<sup>7</sup> The sustained misconduct committed by other officers included a determination that Evers violated Department policy by failing to supervise his command. In particular, Garvey found, "As a result of Inspector Evers not detailing P/O [REDACTED], it caused confusion as to who had the overall supervisory responsibility for P/O [REDACTED]. Because of Inspector [REDACTED] neglect, there were two separate supervisors from two separate units, being held accountable for one subordinate, which caused chaos.... Ultimately, Inspector [REDACTED] is directly responsible for all of the issues related to this investigation, because of his refusal to officially detail P/O [REDACTED] to BNI, over the objections of the supervisory staff of the Narcotics Division." (City Exhibit 1.)

In support, she stated that despite being directed to supervise [REDACTED] when he was working for BNI, Jackson failed to maintain SARS or any other documentation recording the activities performed by him. Maintaining accurate records of such data, she said, is extremely important to ensuring officer safety and tracking productivity.

The IAD report documenting Garvey's investigation notes further as to this violation:

During his interview, Lieutenant Jackson admitted he washed his hands of P/O [REDACTED] because he believed Inspector Evers was too hands on by communicating directly with P/O [REDACTED] about the case P/O [REDACTED] was working on at BNI.... Lieutenant Jackson also felt he had less responsibility for P/O [REDACTED] because he was not officially detailed to BNI.

(City Exhibit 1.)<sup>8</sup>

### **Police Board of Inquiry ("PBI")**

The IAD report of this investigation, after being circulated through the chain of command for review and approval, was referred to the Charging Unit of the PBI. In response, it proffered charges against Jackson, alleging two violations of the Department's Disciplinary Code: (1) Section 1-§011-10 – Conduct Unbecoming (Abuse of Authority); and (2) Section 8-§001-10 – Failure to Supervise (Unspecified). (City Exhibit 2.)

At a PBI hearing held on February 5, 2019, the three-member board found Jackson not guilty of the first charge, but guilty of the second. As a penalty, they recommended a two-day suspension and a transfer in assignment. (City Exhibit 2.)

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<sup>8</sup> Garvey testified that her investigation also substantiated Jackson had violated Department Policy by abusing overtime. This finding, she said, was based upon his instructing [REDACTED] regarding the entry of overtime in DAR for [REDACTED]. Inasmuch as this charge was not sustained by the PBI and did not form the basis for the discipline at issue here, I will, for brevity sake, dispense with a more detailed account of Garvey's analysis.

Inspector Edward Appleton, who served as the Board President for Jackson's PBI hearing, testified that the recommended discipline reflected the gravity of Jackson's proven misconduct. He averred further that the Board concluded a transfer was warranted because of the heightened need for close and careful supervision within the Narcotics Bureau.

### **Jackson's Suspension and Transfer**

On April 15, 2019, then Police Commissioner Richard Ross adopted the PBI's recommended penalty. (City Exhibit 2.) Thereafter, the Department issued Jackson written notice of his two-day suspension, commencing April 15, 2019. The notice also confirmed that Jackson's February 21, 2019 transfer from the Narcotics Bureau to the 16<sup>th</sup> District constituted a part of the disciplinary response to his failure to supervise. (Joint Exhibit 3.)

### **Procedural History**

These actions prompted the instant grievance. (Joint Exhibit 2.) When the parties were unable to resolve the matter at the lower stages of the grievance procedure, the Union demanded arbitration. (Joint Exhibit 4.) Pursuant to their contractual procedures, the parties selected me to hear and decide the case. (Joint Exhibit 1.)

I held a hearing on January 10, 2023, which, by agreement of the parties, 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 the conclusion of the hearing, I held the record open to allow the parties an opportunity to submit supporting authorities relative to their respective arguments regarding the damages issue. With the receipt of those submissions on January 23, 2023, I declared the record closed as of that date.



## DISCUSSION AND FINDINGS

### **The Issue:**

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

1. Did the City have just cause to suspend the grievant, Lieutenant Charles Jackson for two days, effective April 15, 2019, and transfer him from the Narcotics Bureau to the 16<sup>th</sup> District?
2. If not, what shall be the remedy?

### **Positions of the Parties**

Both parties made detailed closing arguments. Their respective positions are summarized below.

**City's Position.** The City contends that its suspension and transfer of Jackson was for just cause. It maintains that the evidence conclusively demonstrates that he violated Department Disciplinary Code Section 8-§001-10, by his failure to supervise [REDACTED] while he worked temporarily in BNI.

On the record here, it asserts, the relevant facts have been established beyond challenge. In particular, it cites: (1) Evers assigned [REDACTED] to work temporarily in BNI under Jackson's supervision; (2) for a period of approximately six months (i.e., June – December 2017), [REDACTED] performed duties in BNI, while continuing to work as a member of his assigned squad in the NFU; (3) Jackson protested [REDACTED] dual role without success; and (4) Jackson nonetheless neglected to supervise [REDACTED] when he worked in BNI.

These facts, it stresses, were substantiated by an IAD investigation, and thereafter, confirmed by a PBI Board, as evidenced by its finding Jackson guilty of the failure to supervise charge after hearing the supporting evidence. Further, it notes, on the basis of that

determination, the PBI Board recommended the two-day suspension and transfer being contested here, which is within the Disciplinary Code's prescribed penalty range for a first violation of Section 8-§001-10.

Accordingly, for all these reasons, it asks that the suspension and transfer be sustained and the grievance be denied.

**Union's Position.** The Union, on the other hand, maintains that the City lacked just cause to suspend and/or transfer Jackson. It submits that the City has failed to meet its burden of proof in this regard. Indeed, it stresses that the City's own witnesses and documents demonstrate just the opposite.

The evidence, it avers, confirms Jackson had no duty to review and certify [REDACTED] [REDACTED] hours worked and other data entered in the DAR. The responsibility to do so, it states, rested at all times with [REDACTED] NFU supervisor, Sergeant Toomer. In fact, it notes, the DAR system permits only one person to be designated as an officer's supervisor for this purpose. As such, it concludes, the system would not have allowed Jackson to access [REDACTED] data, if he had attempted to do so.

Moreover, it asserts, the City's own records make clear that by refusing to detail [REDACTED] to BNI, Inspector Evers bears sole responsibility for the mess and chaos that led to the discipline at issue here. It cites the findings of the IAD's investigation as confirming this conclusion. It notes further that in so acting, Evers disregarded repeated warnings from Jackson and others that this very situation would result.

In sum, it concludes, Inspector Evers' decision in this regard placed Jackson in an untenable situation. It maintains, the City, in turn, exacerbated this bad state of affairs by disciplining Jackson for somehow failing to effect his supervisory duties despite the obvious

and substantial impediment he faced due to Inspector Evers' refusal to detail [REDACTED] to BNI.

Accordingly, for these reasons, the Union asserts that its grievance should be granted, and the requested relief be awarded.

### **Opinion**

The City's Police Department, no doubt, has a right to expect that its officers will perform their duties in accordance with established standards and reasonable expectations. This right applies with particular force to the performance of supervisory functions by the Department's ranking officers. Indeed, the orderly and efficient operation of the Department demands as much. For this reason, officers who breach their responsibilities in this regard can and should expect that discipline will result.

The City, of course, carries the burden of proof here. It must demonstrate by a preponderance of the credible evidence that Jackson committed the charged offense. It must also establish that the level of discipline imposed was appropriate.

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

After a careful and thorough review of the record and the parties' respective arguments, I am convinced that the City has failed to meet its burden. More specifically, although I am persuaded that Jackson failed to supervise [REDACTED] when he performed work for BNI, I do not find on the evidence presented that the City had just cause for the level of discipline imposed; namely, a suspension and transfer. My reasons for this conclusion follow.

It is obvious that the circumstances that led to the discipline at issue here, as well as

the discipline of several other officers, were set in motion by Inspector Evers's decision not to detail ██████████ to BNI during the period he assisted with an ongoing investigation there. By electing instead to have ██████████ remain in his NFU squad working rotating shifts, while assisting BNI on an as needed basis, Inspector Evers created a management quagmire, with two supervisors, Jackson and Toomer, having responsibility for supervising ██████████. Stated otherwise, Evers's decision placed Jackson in the difficult situation of supervising ██████████ when he performed ad hoc duties for BNI, even though he remained on a schedule in conflict with that worked by Jackson and the other Department officers under his supervision.

The City, I understand, does not dispute these factual conclusions. In fact, Lieutenant Garvey's testimony and the report of her IAD investigation confirm them. In particular, as stated in the IAD Report:

As a result of Inspector Evers not detailing P/O ██████████, it caused confusion as to who had overall supervisory responsibility for P/O ██████████. Because of Inspector Evers's neglect, there were two separate supervisors, from two separate units, being held accountable for one subordinate; which caused chaos.

\* \* \* \*

Ultimately, Inspector Evers is directly responsible for all of the issues related to this investigation, because of his refusal to officially detail P/O ██████████ to BNI, over the objections of the supervisory staff of the Narcotics Division.

(City Exhibit 1.)

In view of these circumstances, I am persuaded that Jackson can and should be properly excused for any supervisory lapses stemming from the confusion caused by Inspector Evers's decision. Indeed, the Department could not reasonably expect that

Jackson do more than make a good faith effort to fulfill his supervisory role as to [REDACTED] notwithstanding the obstacles that he faced.

That said, I am also satisfied that Inspector Evers's failings did not authorize Jackson to completely relinquish or disregard his supervisory role as to [REDACTED] relative to his ad hoc work for BNI. Yet, it stands admitted that he did just that. In his IAD interview, he acknowledged:

As a result of the combination of P/O [REDACTED] not being officially detailed to BNI and as well as Insp. Evers calling P/O [REDACTED] directly and no longer calling me, I relinquished any involvement and allowed Insp. Evers to control the investigation from the Police Department stand point and P/O [REDACTED] as well, however, I would be there if P/O [REDACTED] needed my support.

(Union Exhibit 1.)

Further, consistent with that decision, Jackson also affirmed that he did not record [REDACTED] on his SARS on days when he worked in BNI. Nor did he maintain any other official record of [REDACTED] time worked and activities performed in BNI.

Even accepting Jackson's assertion as to Inspector Evers's direct communication with [REDACTED] regarding his BNI work, it did not permit Jackson to unilaterally cede his obligation to supervise [REDACTED]<sup>9</sup> To the contrary, I am convinced that given his acknowledgement of having been directed to supervise [REDACTED] at BNI, such responsibility could be countermanded only by Inspector Evers or Jackson's superior, Inspector Cross. The Department's established chain of command compels as much.

Having found that the City has substantiated the charge of a failure to supervise by Jackson, there remains the question of whether a two-day suspension and transfer constituted an appropriate

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<sup>9</sup> In his testimony, Inspector Evers disputed assuming supervisory or oversight responsibility for [REDACTED]

measure of discipline for that offense. I conclude that it was not. To the contrary, under the circumstances, I am convinced that it was an excessive response.

While Inspector Evers's refusal to detail ██████████ to BNI does not excuse Jackson's failure to supervise, it provides context that must necessarily be considered in evaluating the appropriate level of discipline for the established offense. Simply put, when analyzed in this light, I am satisfied that Jackson's failure to supervise ██████████ represented an aberrational situation that is very unlikely to recur. Further, I find no aggravating circumstances raising the gravity of Jackson's offense. As such, consistent with the principles of progressive discipline inherent in the just cause standard, I am compelled to conclude that a lesser form of a discipline is called for here.

Consistent with the penalty range prescribed by the Department's Disciplinary Code for a first offense of a Failure to Supervise, Section 8-§011-10 (Unspecified), I am convinced that the appropriate level of discipline for Jackson's established violation of that section is a written reprimand.

Likewise, I find that the penalty of a transfer was unwarranted. In explaining the PBI Board's recommendation of that action, Inspector Appleton cited the heightened need for close and careful supervision within the Narcotics Bureau. Even accepting Inspector Appleton's assessment of the Narcotics Bureau, I am not persuaded that it supports Jackson's transfer to the 16<sup>th</sup> District.

As I have stated above, Jackson's failure here stems from circumstances that are very unlikely to recur. Further, his offense stands in stark contrast to his sixteen-year record as a supervisor in the Narcotics Bureau, which, by all accounts, was exemplary.

As such, on the record here, I am satisfied that Jackson is capable of heeding the message of the reprimand for his established offense, so as to resume his role as an effective Narcotics Bureau

supervisor.

Accordingly, for all these reasons, the Department is directed to: (1) convert the two-day suspension issued to Jackson for violating Department Disciplinary Code Section 8-§001-10 – Failure to Supervise (Unspecified) to a written reprimand; (2) rescind his disciplinary transfer to the 16<sup>th</sup> District and restore him to the Narcotics Bureau; and (3) make him whole for all pay and benefits lost as a consequence of that suspension and transfer, including overtime.

In regard to the make whole relief being granted here, the parties are in dispute as to what consideration should be given to Jackson’s purported loss of overtime during the period that he was on restricted duty (i.e., January 28, 2018 – February 20, 2019).<sup>10</sup>

The Union argues that its request for a make whole remedy, as stated in the grievance, necessarily includes redress of the adverse financial consequences that Jackson suffered while on restricted duty during the IAD investigation. In support, it asserts that Arbitrators routinely interpret the make whole concept, as describing a remedy that restores the grievant to his/her position before the imposition of the improper discipline. *See Kellogg USA*, 2001 BNA LA Supp. 108991 (Nolan 2001), Elkouri & Elkouri, *How Arbitration Works*, §13.1 (8<sup>th</sup> Ed.).

On this basis, it reasons, with Jackson’s restricted duty having been a part of his improper discipline, it follows that the make whole remedy here must include the overtime he lost while on restricted duty. It notes further that arbitral precedent involving the parties here supports this outcome. *See City of Philadelphia –and- FOP Lodge No. 5*, AAA Case No. 01-14-0001-5922 (Colflesh 2015) (sustained grievance contesting transfer and discharge of several officers, directing reinstatement and make whole relief for all monetary losses, including overtime); *City of Philadelphia –and- FOP Lodge No. 5*, AAA Case No. 14-390-01567-09 (Brown 2014) (held five-

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<sup>10</sup> The City does not dispute that if just cause is found lacking for Jackson’s two-day suspension and transfer, as I have determined, then Jackson is entitled to have those actions reversed and to be compensated for two-days’ wages and the overtime lost due to his transfer to the 16<sup>th</sup> District.

year restricted duty assignment pending Department investigation constituted a disciplinary transfer, directing grievant be made whole for all resulting losses of contractual entitlements, including lost overtime opportunities).

The City disputes that the instant grievance supports the Union's claim for make whole relief as to Jackson's period of restricted duty. To the contrary, it posits that such claim amounts to an improper expansion of the grievance, which, on its face, contests only his suspension and transfer. *See AAA Labor Arbitration Rules*, Rule 5(b) ("After the arbitrator is appointed, no new or different claim may be submitted except with consent of the arbitrator and all other parties."); *see also City of Philadelphia v. FOP Lodge No. 5*, 768 A.2d 291 (Pa. 2001) (held arbitrator exceeds his/her authority by considering matters not included in the initial demand).

For this reason, it submits, if the grievance is sustained, Jackson should receive relief remedying only the consequences of the contested discipline. Namely, it states, he would be entitled to reversal of the suspension and transfer, as well as back pay addressing the two-day suspension and any overtime lost since his transfer to the 16<sup>th</sup> District.

In support, it cites that the parties, as a matter of practice, have treated restricted duty assignments and disciplinary actions to be separate and distinct matters for grievance purposes. *See, e.g., City of Philadelphia –and- FOP Lodge No. 5*, AAA Case No. 01-20-0009-6254 (Darby 2021) (held placing an officer on restricted duty does not constitute a disciplinary action and thus does not require a showing of just cause). In contrast to a disciplinary case, where the burden rests with the City, it notes, a successful challenge to a restricted duty assignment requires that the Union demonstrate that the time the officer spent on restricted duty was unreasonable under the circumstances. *See, e.g., FOP Lodge No. 5 -and- City of Philadelphia*, AAA Case No. 01-20-0009-6254 (Reilly 2022).



In sum, it concludes that with the Union having failed to expressly grieve Jackson's placement on restricted duty, it is barred from seeking a make whole remedy as to that action in this proceeding. Alternatively, it asserts, if the instant grievance is found to contest Jackson's restricted duty assignment, as well as his suspension and transfer, the Union has not met its burden of showing any unreasonable delay as to the IAD investigation or the imposition of discipline. As such, it concludes, under any circumstances, Jackson is not entitled to make whole relief relative to his period of restricted duty.

On review, I am satisfied that while placing and maintaining an officer on restricted duty does not, as general matter, represent the imposition of discipline, it does constitute a part of the disciplinary process. Indeed, as the record here and the other cases cited by the City show, the Department employs restricted duty to allow an IAD investigation to proceed, while removing the subject officer from police duties until a decision can be made as to possible disciplinary action.

In view of this interrelationship between restricted duty and discipline, I am convinced that a grievance challenging an officer's discipline also encompasses, where applicable, his/her placement on restricted duty. To mandate that the grievance also include a specific reference to the officer's placement on restricted duty would be at odds with basic tenets of arbitration. Simply put, in keeping with arbitration's less formal processes, grievances should be construed liberally, rather than being subject to the technical pleading requirements associated with civil litigation.

Having found that the instant grievance contests both Jackson's discipline and his placement on restricted duty, there remains the question of whether he is entitled to make whole relief for overtime lost while on restricted duty. On the record here, I conclude that the answer is no.

My decision that the City lacked just cause to suspend and transfer Jackson is not determinative of his right to make whole relief relative to his period of restricted duty. More

specifically, Jackson's placement on restricted duty was not discipline, and therefore, the propriety of that action is not judged by application of the just cause standard.

To the contrary, as the prior arbitration awards between the parties cited by the City reflect, the Department's placement and continuation of an officer on restricted duty represents an exercise of its management rights under the governing collective bargaining agreement. Therefore, the propriety of placing and continuing an officer on restricted duty is determined by applying a reasonableness standard to the totality of the relevant facts and circumstances. I see no reason to depart from that approach here.<sup>11</sup>

Judged by this standard, I am persuaded that the Department acted reasonably in placing Jackson on restricted duty relative to IAD's investigation of a suspected misuse of overtime in the Narcotics Bureau, as to which he was implicated. The facts known to the Department at that time supported such action. In particular, Garvey's testimony and the IAD Investigation Report reflect that as of January 2018, the Department had a reasonable basis to suspect Jackson of serious misconduct; namely, his directing Toomer to enter overtime in DAR for [REDACTED] based upon the overtime approved for his NFU squad regardless of whether he had worked those same hours. Such potential financial impropriety by Jackson justified removing him from regular police duties.

Turning to the Department's continuing of Jackson on restricted duty until his February 21, 2019 disciplinary transfer to the 16<sup>th</sup> District, I find, here too, the Department acted reasonably.

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<sup>11</sup> In determining the weight to be accorded prior arbitration awards, I note that the legal principle of *stare decisis* does not strictly control in the context of labor arbitrations. However, where, as here, the prior arbitration awards involve the same parties and the same contractual provision(s) or basic issue, they must be accorded substantial weight. Indeed, well-recognized principles of sound labor relations command as much. Continuity and consistency are essential components of the collective bargaining relationship between employer and union. Therefore, once the meaning of a contract provision has been established through an arbitrator's award, the parties are entitled to expect that the provision will have such meaning until modified or eliminated through subsequent collective bargaining.

Once the Department places an officer on restricted duty, it bears an obligation to promptly conclude its related investigation and then review the circumstances warranting that action, so as to restore him/her to full duty, if appropriate. Stated otherwise, it must act with reasonable diligence and expedience, as determined by an assessment of all relevant facts and circumstance. The Department's obligation to exercise its management rights "consistent with sound discretion" commands as much. (Joint Exhibit 1.)

As an initial matter, I am satisfied that Garvey acted conscientiously in conducting the IAD investigation of this matter from her receipt of the assignment on December 20, 2017, through the completion and submission of her investigation report approximately eight months later. During that time, she conducted seventeen interviews and gathered and analyzed several thousand pages of documents.

With her investigation having substantiated that Jackson had abused overtime in the manner alleged, it follows that the Department had a reasonable basis to continue him on restricted duty, pending issuance of disciplinary charges and a PBI hearing. Although the PBI hearing on those charges did not occur until more than five months after the issuance of the IAD Investigation Report, I find no basis on the record here to conclude that the timing of the PBI hearing reflected undue delay. Further, the Department removed Jackson from restricted duty and transferred him to the 16<sup>th</sup> District within slightly more than two weeks after that hearing.

In sum, for the reasons stated, I am persuaded that the Department did not exceed its managerial authority, per the parties' collective bargaining agreement, by placing Jackson on restricted duty, effective January 28, 2018, and continuing him in that status until his disciplinary transfer to the 16<sup>th</sup> District on February 21, 2019. As such, no make whole remedy is warranted as to that period.

Finally, a few comments are appropriate as to the make whole remedy granted for overtime compensation that Jackson lost due to his transfer to the 16<sup>th</sup> District. Per my ruling, Jackson's loss consists of the overtime he would have reasonably earned if had returned to the Narcotics Bureau upon the conclusion of his period of restricted duty, less the overtime he did earn while serving in the 16<sup>th</sup> District from February 21, 2019 through the date of his reinstatement to the Narcotics Bureau per my award in this case.

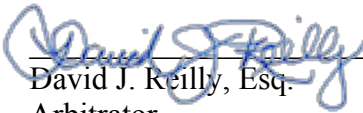
The record does not include any evidence of Jackson's damages in this regard. As such, the parties will need to meet and confer to determine the amount due him for lost overtime or return to me for a ruling in the event they are unable to do so. In addressing the matter of lost overtime, I note that the make whole award requires proof that is more than speculative. Instead, it necessitates showing to a reasonable degree of certainty that but for Jackson's disciplinary transfer, overtime would have been offered to him as a member of the Narcotics Bureau and he would have worked such overtime.

Accordingly, for all these reasons, the Union's grievance is granted, in part, and denied, in part and the City is directed to provide the relief referenced above.

**AWARD**

1. The grievance is granted, in part, and denied, in part.
  
2. The City had just cause to discipline Charles Jackson for violating Department Disciplinary Code Section 8-§001-10, Failure to Supervise (Unspecified), but the penalty of a two-day suspension and transfer was excessive.
  
3. The City will: (1) convert the two-day suspension for violating Department Disciplinary Code Section 8-§001-10, Failure to Supervise (Unspecified) to a written reprimand; (2) rescind Charles Jackson’s disciplinary transfer to the 16<sup>th</sup> District and return him to the Narcotics Bureau; and (3) make Charles Jackson whole for all pay and benefits lost as a consequence of the suspension and transfer, including two days’ pay and any overtime lost during his assignment to the 16<sup>th</sup> District. 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 or on Charles Jackson’s behalf in providing the make whole relief.

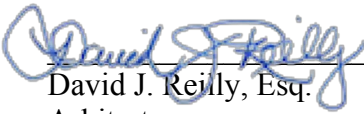
February 17, 2023

  
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 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.

February 17, 2023

  
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 David J. Reilly, Esq.  
 Arbitrator