

AMERICAN ARBITRATION ASSOCIATION

In the Matter of Arbitration Between the

FOP LODGE 5,

"Union,"

-and-

CITY OF PHILADELPHIA,

"Employer."

**OPINION
AND
AWARD**

AAA Case No. 01-21-0000-1418

(Lt. Jonah T. Conway (#228565) – Demotion without just cause)

**Before
Robert C. Gifford, Esq.
Arbitrator**

Appearances:

For the Union:

Thomas M. Gribbin, Esq.
Willig Williams & Davidson

For the Employer:

Lindsey Cordes, Assistant City Solicitor
City of Philadelphia Law Department

FOP Lodge 5 and the City of Philadelphia are parties to a collective bargaining agreement ["Agreement"]. [Ex. J-1]. On October 30, 2020, the Union filed a grievance alleging that the City violated the Agreement by demoting Jonah Conway ["Grievant"] from the rank of Lieutenant without just cause. [Ex. J-3]. After the City denied the grievance, the Union submitted the unresolved grievance for binding arbitration. [Ex. J-4]. On April 2, 2021, AAA notified me that I was chosen to serve as arbitrator.

Arbitration proceedings were held at AAA's Philadelphia offices on January 18, 2023, at which time the parties were afforded the opportunity to argue orally, present witnesses and submit documentary evidence into the record. Testifying on behalf of the City were Lieutenant Brent Conway and Inspector Edward Appleton. Testifying on behalf of the Union was the Grievant. The parties provided oral closing arguments whereupon the record was declared closed.

ISSUE

The parties stipulated to the following issue:

Whether the City had just cause to demote the Grievant?

CITED CONTRACT PROVISIONS

ARTICLE XX. DISCIPLINE AND DISCHARGE

A. General

No employee shall be disciplined or discharged except as is consistent with the Home Rule Charter and the Regulations of the Civil Service Commission.

BACKGROUND

Grievant Jonah Conway has been employed by the City of Philadelphia Police Department for approximately 25 years. Grievant Conway was promoted to the rank of Lieutenant in February 2015. From 2015 through 2018, the Grievant received satisfactory ratings. [Ex. U-1]. In the annual performance report for 2018, the Grievant's supervisor described him as a "talented and dedicated supervisor". [Ex. U-1]. The evidentiary record does not reflect any prior discipline for the Grievant. The Grievant was assigned to the Forensic Services Division at the time of his demotion from Lieutenant.

During an Internal Affairs Investigation of an EEO complaint against the Grievant, the charges of which were either not sustained or determined to be unfounded, Internal Affairs obtained information concerning false entries that the Grievant made into the Daily Attendance Report ["DAR"] System on behalf of Police Officer [REDACTED] and Sergeant [REDACTED] Sergeant Brent Conway, who was assigned to the City of Philadelphia Police Department's Internal Affairs Division, compiled an Internal Affairs Investigation Report ["IA Report"] that was reviewed and approved by the Commanding Officer of IAD on June 14, 2019 and the Chief Inspector of the Office of Professional Responsibility on July 1, 2019. The IA Report includes a narrative of the Grievant's interview. The portion of the narrative pertaining to the false entries provides:

Lieutenant Conway stated that Officer ██████ worked twenty-four hours straight starting at 10 PM on 05-04-18 and ending at 10 PM on 05-05-18. Lieutenant Conway states that Officer ██████ was originally scheduled to work overtime from 10 PM to 6 AM and then her normal tour of duty from 6 AM to 2 PM on 05-05-18. Lieutenant Conway states that at 2:30 PM on 05-05-18, Officer ██████ sent him a text message asking who she was working with because she was working by herself. Lieutenant Conway was not working when he received Officer Lewis' text message and did not have the overtime list for the Forensic Security Unit with him. Lieutenant Conway states that he called Officer ██████ and asked her to work overtime from 2 PM to 10 PM on 05-05-18, because he knew she would work overtime whenever it was available. Lieutenant was not aware that Officer ██████ worked the previous two tours when he called her because he did not have the overtime list with him.

Lieutenant Conway states that on 05-07-18, Officer ██████ stated to him that she and Sergeant ██████ had a conversation about switching the days they worked to avoid Officer ██████ being shown as working twenty-four hours straight on 05-05-18. After he talked to Officer ██████, Lieutenant Conway sent Sergeant ██████ a text message asking him if he was okay with changing his (Sergeant ██████) overtime. Lieutenant Conway states that Sergeant ██████ responded with text messages that stated, "Ok, good thinking" and "Got it."

Note: During his interview, Lieutenant Conway was provided copies of the DAR entries that were made for Officer ██████ and Sergeant ██████ on 05-05-18 and 05-06-18, as well as copies of the S&Rs that were produced for the Forensic Security Unit on 05-05-18 and 05-06-18.¹

Lieutenant Conway states that he does not recall who changed the DAR entries for Officer ██████ and Sergeant ██████ on 05-05-18 and 05-06-18.

Note: A review of the DAR entry that was made for Officer ██████ for 05-05-18, revealed that the entry was "last-

¹ Lieutenant Conway testified that S&Rs are daily sheets usually completed by officers in the operations room for the purposes of documenting the daily events. S&Rs are usually more detailed than DARs.

updated" by Sergeant [REDACTED] Officer [REDACTED] was shown as working overtime from 10 PM through 6 AM and her normal tour of duty from 6 PM to 2 PM on 05-05-18. A review of the DAR entry that was made for Officer [REDACTED] for 05-06-18, revealed that the entry was "last-updated" by Lieutenant Conway. The DAR entry made for Officer [REDACTED] on 05-06-18, reflects her working her normal tour of duty from 6 PM to 2 PM and overtime from 2 PM to 10 PM. A review of the DAR entry that was made for Sergeant [REDACTED] for 05-05-18, revealed that the entry was "last-update" by Lieutenant Conway. The DAR entry made for Sergeant [REDACTED] on 05-05-18, reflects him working overtime from 2 PM to 10 PM. A review of the DAR entry that was made for Sergeant [REDACTED] for 05-06-18, revealed that the entry was "last-updated" by Lieutenant Conway. The DAR entry made for Sergeant [REDACTED] on 05-06-18, reflects him as being on his scheduled day off.

The DAR entries that were made by Officer [REDACTED] and Sergeant [REDACTED] on 05-05-18 and 05-16-18, were not certified by a supervisor.

Lieutenant Conway states that Officer [REDACTED] changed the S&Rs for 05-05-18 and 05-06-18, to reflect that she did not work twenty-four hours straight on 05-05-18. Officer [REDACTED] changed the S&R for the 2 PM to 10 PM tour of duty on 05-05-18, to reflect Sergeant [REDACTED] working overtime from 2 PM to 10 PM. Lieutenant Conway states that the original S&R for the 2 PM to 10 PM tour of duty on 05-05-18, showed Officer [REDACTED] working overtime from 2 PM to 10 PM. Officer [REDACTED] also changed the S&R for the 2 PM to 10 PM tour of duty on 05-06-18, to reflect her working overtime from 2 PM to 10 PM. Lieutenant Conway states that the original S&R for the 2 PM to 10 PM tour of duty on 05-06-18, showed Sergeant [REDACTED] working overtime from 2 PM to 10 PM.

Lieutenant Conway states that he did not order Officer [REDACTED] to change the S&Rs for 05-05-18 and 05-06-18; however, he was in agreement with her changing the S&Rs because he did not believe "anything was being violated" as everyone was paid for the hours they worked. Lieutenant Conway stated that the changes were done in an attempt to avoid a contract violation.

Lieutenant Conway states that neither Officer [REDACTED] or Sergeant [REDACTED] expressed to him any concerns with the DAR entries that were made for them on 05-05-18 and 05-06-18, being changed.

Lieutenant Conway states that Officer [REDACTED] did not work overtime from 2 PM to 10 PM on 05-06-18 and that Sergeant [REDACTED] did not work overtime from 2 PM to 10 PM on 05-05-18.

Lieutenant Conway admits that the changes to the DAR entries and the S&Rs were made in attempt to hide or omit the fact that Officer [REDACTED] worked twenty-four hours straight on 05-05-18.

Lieutenant Conway states that he was not made aware that Officer Lewis was aware of the changes Officer [REDACTED] made to the S&Rs for 05-05-18 and 05-06-18. Lieutenant Conway denies telling Officer Sadowski to inform Officer Lewis that he (Lieutenant Conway) "got in trouble" for Officer [REDACTED] working twenty-four hours straight.

[Ex. C-1, Conway 014-016].

The IA Report includes the conclusions drawn from the investigation. With respect to the Grievant's conduct involving the DAR entries, as well as [REDACTED] and [REDACTED]'s participation, the Report provides:

The investigation **SUSTAINED DEPARTMENTAL VIOLATIONS** on the part of Lieutenant Conway [], Forensic Services, when he made false entries into the DAR.

Lieutenant Conway knowingly made false DAR entries for Officer [REDACTED] and Sergeant [REDACTED]. Lieutenant Conway stated that Officer [REDACTED] did not work overtime from 2 PM to 10 PM on 05-06-18 and that Sergeant [REDACTED] did not work overtime from 2 PM to 10 PM on 05-05-18, despite them both being entered in the DAR as working those tours. In both instances (Officer [REDACTED] - 05-06-18 and Sergeant [REDACTED] -

05-05-18), Lieutenant Conway was the last supervisor to update those DAR entries. Lieutenant Conway admitted that the DAR entries were made in an attempt to hide the fact that Officer ██████ worked twenty-four hours straight starting at 10 PM on 05-14-18 and ending at 10 PM on 05-05-18.

The investigation **SUSTAINED DEPARTMENTAL VIOLATIONS** on the part of Police Officer ██████ [], Forensic Security Unit, as she falsified official police documents.

Officer ██████ admitted to changing the S&Rs for 05-18-18 and 05-06-18, after she worked twenty-four hours starting at 10 PM on 05-04-18 and ending at 10 PM on 05-05-18. Officer ██████ stated the S&Rs were changed to reflect her working overtime from 2 PM to 10 PM on 05-06-18 and Sergeant ██████ working overtime from 2 PM to 10 PM on 05-05-18. Officer ██████ stated that she did not work overtime from 2 PM to 10 PM on 05-06-18.

Officer ██████ stated she was not ordered to change the S&Rs for 05-05-18 and 05-06-18. Officer Denton stated the changes were made after Lieutenant Conway informed her that he could switch her tour of duty (05-05-18) and Sergeant Cooper's tour of duty (05-06-18) if they were okay with him doing so. Officer ██████ stated she contacted Sergeant ██████ and explained to him what Lieutenant Conway suggested. Officer ██████ stated that Sergeant ██████ agreed with their tour of duties being changed.

The investigation **SUSTAINED DEPARTMENTAL VIOLATIONS** on the part of Police Sergeant Yusef ██████ [], Forensic Security Unit, as he failed to properly supervise when he failed to report that changes were made to official police documents.

As detailed in the three preceding sections, Lieutenant Conway and Officer ██████ made changes to DAR entries and S&Rs for 05-05-18 and 05-05-18, in an attempt to hide the fact that Officer ██████ worked twenty-four hours straight starting at 10 PM on 05-04-18 and ending at 10 PM on 05-05-18.

Sergeant ██████ admitted that he was aware that the DAR entries and S&Rs were changed in an attempt to hide or omit the fact that Officer ██████ worked twenty-four hours straight starting at 10 PM on 05-04-18 and ending at 10 PM on 05-05-18.

Sergeant [REDACTED] stated that he did not have any concerns with the changes that were made to the DAR entries or the S&Rs being changed because his immediate supervisor (Lieutenant Conway) was already aware of the changes.

As a supervisor in the Philadelphia Police Department, Sergeant [REDACTED] is required to report violations of departmental policy and should have been immediately reported.

The investigation **SUSTAINED DEPARTMENTAL VIOLATIONS** on the part of Lieutenant Conway [REDACTED], Forensic Services, as he failed to properly supervise he when permitted Officer [REDACTED] to work twenty-four hours straight and then allowed Officer [REDACTED] to make changes to the S&Rs in order to cover-up.

Lieutenant Conway permitted Officer [REDACTED] to work twenty-four hours straight starting at 10 PM on 05-04-18 and ending on 10 PM on 05-05-18.

Lieutenant Conway permitted Officer [REDACTED] to make changes to the S&Rs for 05-05-18 and 05-06-18, and did so in attempt to hide the fact that he permitted Officer [REDACTED] to work twenty-four hours straight at 10 PM on 05-04-18 and ending at 10 PM on 05-05-18.

As a lieutenant, Lieutenant Conway should have accepted responsibility for allowing Officer [REDACTED] to work the hours that she did. Lieutenant Conway should not have made changes to the DAR entries that were made for Officer [REDACTED] and Sergeant [REDACTED]; nor should he have allowed Officer [REDACTED] to making changes to the S&R for 05-04-18 and 05-05-18.

Furthermore, Lieutenant Conway made changes to the DAR entries that were made for Officer [REDACTED] and Sergeant [REDACTED], for 05-04-18 and 05-05-18, in an attempt to hide the fact that Officer [REDACTED] worked twenty-four hours straight starting at 10 PM on 05-04-18 and ending at 10 PM on 05-05-18. After making those changes, Lieutenant Conway failed to unsure those DAR entries were certified.

A copy of the report is to be sent to the Commanding Officer, Police Board of Inquiry for action. [Ex. C-1, Conway 022-024].

On April 9, 2020, the Grievant was served with Notice of Intention to Demote. [Ex. C-4]. A Police Board of Inquiry ["PBI"] was held on August 26, 2020. [Ex. C-3]. The Board found the Grievant guilty of the following sections of the Disciplinary Code: 1-§010-10 - Knowingly and willfully making a false entry in any Department record or report, and 8-§003-10 - Failure to properly supervise subordinates. [Id.]. The Board recommended a 10-day suspension for the violation of 1-§010-10 and a demotion for the violation of 8-§003-10. [Id.]. On September 20, 2020, Police Commissioner Danielle Outlaw demoted the Grievant based upon violations of 1-§010-10 and 8-§003-10.² [Id.]. The Grievant was also transferred from Forensic Sciences to the 18th District. Discipline imposed upon [REDACTED] and [REDACTED] was significantly less severe than the demotion imposed upon the Grievant. [REDACTED] was trained and counseled in lieu of formal disciplinary action. [Ex. J-5]. [REDACTED] received either a one (1) or two (2) day suspension for failing to properly supervise a subordinate but retired prior to serving the suspension. [Ex. J-6].

On October 30, 2020, the Union filed a grievance alleging that the Grievant was demoted without just cause. [Ex. J-3]. On January 11, 2021, the Union demanded arbitration. [Ex. J-4].

² The Grievant was served with a Notice of Demotion on November 9, 2020. [Ex. C-5].

Sergeant Brent Conway testified on behalf of the City. With respect to the charges that led to the Grievant's demotion, Conway's testimony was substantively similar to the contents of his IA report. Conway testified that based upon the Grievant's interview he concluded that the Grievant had an intent to deceive when he purposely entered inaccurate information into the DARs.

Inspector Edward Appleton testified on behalf of the City. Appleton has served as an Inspector within Forensics for approximately one (1) year. Appleton testified that the DARs are used for recordkeeping and, therefore, there is a need for accuracy. Appleton testified that the Grievant's conduct, by allowing the DNRs and S&Rs to be inaccurate, failing to certify the DNRs, and refusing to accept responsibility for his actions, was inconsistent with his duty to serve as a Lieutenant with honor and integrity. Appleton acknowledged that [REDACTED] and [REDACTED] did not receive compensation beyond what they were owed, but he testified that does not alter the fact that the records were inaccurate or that the Grievant made or allowed changes to the official records.

The Grievant testified as follows. The Grievant is familiar with the DAR tracking system that he has used for 25 years. Supervisors have the authority under the DAR policy to make adjustments/corrections, if needed. [See Ex. C-6]. There are times when the DAR system does not allow the entry of an overlap shift (i.e. a shift that begins on one day and ends on the next). In these instances, a

supervisor may adjust the shift forward or back on the DAR system to reflect that the shift was completed on a single day. This is a commonly accepted practice for which supervisors do not receive discipline. When this occurs, the DARs will differ from the S&Rs.

With respect to the incident that led to his demotion, the Grievant's testimony was substantively similar to the narrative of his IA interview. The Grievant testified that he was concerned that [REDACTED] would not be properly paid for her hours because she had worked 24 hours in a single day. The Grievant believed that if he did not make the adjustment in the DAR that it could have taken months to rectify the situation. The Grievant was also concerned about committing a violation of the parties' collective bargaining agreement. The Grievant testified that [REDACTED] suggested the changes in the system, but ultimately it was his decision as the supervising officer to follow through with the modifications. The Grievant did not foresee this as being an issue given that there was no difference in the compensation to be paid out to the officers and he had the authority as a superior officer to make changes on the DAR system. The Grievant stated that there was no theft of time, and he did not have any malicious intent behind his actions. He also did not find it necessary to send a memorandum to his commanding officer concerning the modifications he made. The Grievant indicated that he has had to make changes on the DAR system as a Sergeant in the 18th District in order to accommodate the system, when needed. The

Grievant stated that no one has challenged his ability or authority to do so, nor has anyone questioned his integrity.

The parties provided the following arguments in support of their respective positions.

SUMMARY OF THE ARGUMENTS

The City's Position

The City contends that it had just cause to demote the Grievant from the rank of Lieutenant. The City maintains that the Grievant, rather than reporting and taking responsibility for what he believed to be a violation of the parties' collective bargaining agreement, provided a false narrative by choosing to sign off on records that he knew to be inaccurate. The City emphasizes the importance of maintaining accurate recordkeeping. The City submits that the Grievant's conduct shows that he lacks the integrity to serve as a Lieutenant. For these reasons, and the entire record, the City contends that discipline was warranted and requests that the demotion be sustained and the Union's grievance denied.

The Union's Position

The Union contends that the City has not met its burden to prove that it had just cause to demote the Grievant. The Union maintains that the Grievant is a dedicated and trusted officer who adjusted the DAR records so that his subordinates would be properly compensated for their overtime shifts. The Union points out that supervisors have the authority to adjust the DAR records given that the payroll system does not permit the entry of 24 hours of work on any given day. The Union also points out that the officers were paid no more and no less for the time they worked. The Union emphasizes that despite the Grievant's misunderstanding of the terms of the parties' collective bargaining agreement, there is nothing in the Agreement or Department policy which prohibits officers from working 24 straight hours. The Union also submits that even if discipline is determined to be warranted in this matter that the penalty of demotion for the Grievant's one-time error was excessive given that Officer [REDACTED] only received a counseling memo and Sergeant [REDACTED] a 1-day suspension.

For these reasons, and based upon the entire record, the Union requests that the Arbitrator sustain the grievance and order the City to reinstate the Grievant to the rank of Lieutenant, make him whole in all respects, and to expunge all references to the demotion and all charges not sustained from his personnel file.

DISCUSSION

I have carefully considered the arguments and evidence submitted into the record. The City has the burden to prove that it had just cause to demote the Grievant. The Grievant is charged with the following sections of the Disciplinary Code: 1-§010-10 - Knowingly and willfully making a false entry in any Department record or report, and 8-§003-10 - Failure to properly supervise subordinates.

The evidence shows that the Grievant erred when he altered entries in his report. It also shows that this was a single, non-repeated instance without personal or monetary benefit. The fact that the Grievant could have taken more prudent measures to rectify the situation (i.e. notify his supervising officer of an inadvertent mistake that he believed he made by allowing an officer to work 24 hours straight) is not reasonably debatable. Moreover, the record shows that the Grievant did not properly supervise his subordinates when he permitted the changes to the reports. The Grievant's subordinates also did not receive a monetary or personal benefit as a result of the changes that were made. However, the evidence establishes that the modification the Grievant was responsible for making went beyond the commonly accepted practice of reflecting an overlapping shift on a single day to accommodate the DAR system and was also inconsistent with DAR reporting requirements. For these reasons, and the entire record, I conclude that the City had a firm basis to discipline the Grievant for violating the sections of the Disciplinary Code cited above.

I now shift the focus to the penalty and whether there was just cause for demotion. The City demoted the Grievant for his infractions. In evaluating the degree of penalty, I note that there is an absence of evidence in the record that suggests or shows that the Grievant had a prior discipline record prior to the incident or that he failed to fulfill his supervisory role as a Sergeant since his demotion. Given the lack of prior discipline, the fact that this was an isolated instance without evidence of financial or personal gain, and the significantly lesser level of discipline imposed upon his subordinates for similar, but not identical actions, I conclude that a substantial penalty is warranted, but one that serves to correct the proven conduct and is less severe than the permanent loss of rank. This is consistent with a just cause principle that a penalty be commensurate with all of the circumstances surrounding the committed infractions. For these reasons, I conclude that the City shall reinstate the Grievant to the rank of Lieutenant within a reasonable time period but without any backpay or other emoluments between the time that he was demoted to Sergeant and reinstated to Lieutenant.

AWARD

The City had just cause to discipline the Grievant but did not have just cause to demote him from the rank of Lieutenant to the rank of Sergeant. For the reasons cited above, the Grievant shall be reinstated to the rank of Lieutenant within a reasonable time period but without backpay or other emoluments during the time between his demotion and reinstatement to Lieutenant.

Dated: February 17, 2023



Robert C. Gifford

