

AMERICAN ARBITRATION ASSOCIATION

In the Matter of Arbitration Between:

**FRATERNAL ORDER OF POLICE
LODGE #5**

and

CITY OF PHILADELPHIA

**AAA Case #01-22-0001-7790
(Gr: Lt. Michael Rafferty Demotion)**

Walt De Treux, Arbitrator

Hearing Date: 3/10/23

Decision Date: 4/14/23

Appearances: For the FOP – Thomas M. Gribbin, Esq., *WILLIG WILLIAMS & DAVIDSON*
For the City – Samuel Ritterman, Esq., *AHMAD ZAFFRESE*

Introduction and Statement of Relevant Facts

On April 7, 2020, City of Philadelphia police responded to a radio call for a person with a gun. The complainant asserted that [REDACTED] drove by her daughter’s home and someone in the vehicle fired shots. When Lt. Michael Rafferty arrived at the scene, [REDACTED] pulled up behind him. Lt. Rafferty and another officer took [REDACTED] to the ground and secured him in handcuffs. When the officers lifted [REDACTED] to his feet, the suspect repeatedly asked for his eyeglasses. Lt. Rafferty grabbed [REDACTED] by the neck, pushed him back, and said, “Shut the fuck up, motherfucker.” Another officer stepped between [REDACTED] and the lieutenant, who continued to yell at the suspect. According to the lieutenant, he later apologized to [REDACTED]

On June 12, 2020, police responding to a domestic call found [REDACTED] [REDACTED] irate and screaming. [REDACTED] was in a dispute with a female and wanted to retrieve his belongings from the property. Lt. Rafferty arrived on scene and took the lead in dealing with [REDACTED] Inside

the property, he and other officers assisted [REDACTED] in retrieving some of his belongings while [REDACTED] behaved in an agitated and aggressive manner. Once outside, [REDACTED] demanded to go in to the property again to retrieve all his belongings. When Lt. Rafferty handed him a trash bag with the belongings they had collected, [REDACTED] threw it to the ground. He continued to yell and pace aggressively in front of the property. He threatened to break out the windows of the property. Lt. Rafferty advised him that he would not be doing that. [REDACTED] with his hands down at his side and a cell phone in one hand, stepped toward the lieutenant. Lt. Rafferty punched him in the face. [REDACTED] staggered back, and Lt. Rafferty and the other officers took him to the ground and subdued him. [REDACTED] was subsequently committed involuntarily to a mental health facility.

On July 23, 2020, the Internal Affairs Division initiated an investigation into these two incidents and another incident not relevant to the present proceeding. After investigation, IAD sustained charges against Lt. Rafferty for physical abuse and related charges. On March 2, 2022, a Police Board of Inquiry (PBI) held a hearing on the charges. The PBI found Lt. Rafferty guilty of conduct unbecoming related to the use of unauthorized or excessive force. The lieutenant pled guilty to two counts of inappropriate language and one count of neglect of duty, for which he accepted a 9-day suspension (3 days per charge). The PBI recommended a 5-day suspension for the [REDACTED] use of force and demotion for the [REDACTED] use of force. The Police Commissioner subsequently determined that both excessive force charges warranted demotion to the rank of sergeant.¹

¹ Pursuant to Civil Service regulations, the Commissioner could only demote Lt. Rafferty one rank.

The FOP timely grieved Lt. Rafferty's demotion, arguing that the demotion was not for just cause and that the City violated the collective bargaining agreement and the principle of progressive discipline by consolidating the incidents into one PBI hearing. The parties were unable to resolve the grievance through the contractual steps and referred the matter to arbitration. On March 10, 2023, a hearing was held at the Philadelphia offices of the American Arbitration Association, during which time both parties had a full and fair opportunity to present documentary and other evidence, examine and cross-examine witnesses, and offer argument in support of their respective positions. The parties closed their presentations with oral argument and submitted the matter to the Arbitrator for a decision.

Issues

The parties stipulated to the following issues,

- 1) *Did the City of Philadelphia violate the collective bargaining agreement by consolidating two incidents at Lt. Rafferty's PBI hearing? If so, what shall be the remedy?*
- 2) *Did the City have just cause to demote Lt. Michael Rafferty? If so, what shall be the remedy?*

Analysis and Decision

PBI Hearing

The parties have codified the concept of progressive discipline, a hallmark of the just cause standard, in their collective bargaining agreement and the negotiated disciplinary matrix. The FOP argues that by consolidating two separate incidents of alleged misconduct, the City failed to progressively discipline Grievant in violation of the contract. The City counters that the Police Commissioner found that each incident warranted demotion so no harm resulted from the consolidation of the incidents before the PBI.

The PBI imposed a 5-day suspension for the Santiago incident and demotion for the Gonzalez incident. Deputy Commissioner Naish recommended a 5-day suspension and demotion for each incident, and the Commissioner accepted that recommendation. While the Commissioner did not apply progressive discipline, the PBI was inclined to do so, lending support to the Union's argument that incidents should not have been consolidated before the PBI.

The problem in this particular case is the timing of the incidents, the IA investigation, and the PBI hearing. The record evidence does not clearly indicate when the Department learned of Grievant's alleged use of excessive force. Grievant filed a Use of Force/Hospital Case Summary report for the April 7, 2020 incident, but he failed to state in that report that he grabbed [REDACTED] by the neck. He only mentions that he "grabbed him from behind and took him to the ground where he was handcuffed." Similarly, the Department Use of Force report only indicates that he used control holds. The Department would not have learned from those reports that Grievant engaged in unauthorized and excessive force.

Grievant wrote in the Use of Force report for the June 12, 2020 incident that he punched [REDACTED] when [REDACTED] "walked toward officer in threatening manner." A third incident, not relevant in this proceeding, occurred on June 17, 2020.

From the investigation report, it appears that Internal Affairs began investigating Grievant following the June incidents. The investigation report indicates that an investigation was initiated after an IAD investigator reviewed body worn camera footage on July 23, 2020. As the IAD investigation began after the incidents had occurred, any opportunity or necessity for progressive discipline had passed. The purpose of progressive discipline is to instruct the employee on the need for improvement and to give him the opportunity to correct his behavior. By July 2020, Grievant had already engaged in three alleged acts of excessive force. The purpose of progressive discipline cannot be served retroactively. Had the City knew of Grievant's misconduct in April and failed to act until he committed further infractions, the Union's argument would resonate. But since Grievant did not include it in the Use of Force report, the City presumably did not know of the April incident until after Grievant engaged in

further misconduct in June. The City cannot be faulted for consolidating the incidents into one PBI hearing when progressive discipline was no longer at issue given that the incidents occurred close in time and the City did not learn of the earlier offense until the later offenses had occurred.

For these reasons, I find that the City did not violate the collective bargaining agreement by consolidating two incidents at Lt. Rafferty's PBI hearing.

Excessive Force

Grievant admitted to grabbing [REDACTED] by the throat. He explained that he was "fired up" and "emotional" and had "overreacted." He reportedly apologized to [REDACTED] for "getting hot." Grievant admitted to punching [REDACTED] "to calm him down." Grievant claimed he felt threatened by [REDACTED] aggressive behavior.

As Grievant's case wound through the investigative and disciplinary process, police officials weighed in on the inappropriateness of Grievant's action, often specifically citing to his role as lieutenant. [REDACTED] [REDACTED] [REDACTED] of IAD concluded that [REDACTED] had his hands down at his side with a cellphone in one hand and "did not make any threatening actions toward Rafferty." [REDACTED] [REDACTED] [REDACTED] a PBI member, commented that the June 12 incident was "unprovoked and unnecessary + occurred in front of Lt. Rafferty's subordinates." He explained further, "Lt. Rafferty's actions are not reflective of how a PPD lieutenant should behave." [REDACTED] [REDACTED] [REDACTED] another PBI member, observed that Grievant's actions portrayed "the department in a bad light," adding that Grievant's actions "escalated on each encounter and he was a poor example for his officers and supervisors." The civilian PBI member remarked

that the April incident “shows as a bad example to subordinates” and the June incident “showed a bad example of leadership.” [REDACTED] [REDACTED] [REDACTED] [REDACTED] who advised the Commissioner on the level of discipline, faulted Grievant for not managing the [REDACTED] incident, but rather, going “hands on” with the suspect. She instructed that Grievant should have let [REDACTED] rant and “try to calmly bring him down.” If Grievant felt threatened, [REDACTED] [REDACTED] explained that he could have restrained or arrested him without punching him.

The Union argues that demotion is too harsh a penalty for “mere negligence...or carelessness.” Grabbing a handcuffed suspect by the neck because the suspect was asking for his glasses is not “mere negligence.” Grievant admitted he had “no good reason” to grab [REDACTED] by the neck. He attributed his actions to being “fired up” and “emotional.” Punching a suspect in the face “to calm him down” rather than engaging in de-escalation techniques or restraining him with the help of other officers is not “mere negligence.”

At the time of the incidents, Grievant had only been a lieutenant for several months. His actions raised concerns about his judgment and ability to control his emotions in that role and the example he was setting for subordinate officers. One of those subordinate officers had the uncomfortable task of separating Grievant from [REDACTED] and holding him back after the lieutenant grabbed [REDACTED] by the neck and continued to yell at the suspect. The police officials charged with reviewing Grievant’s conduct universally criticized his actions as inappropriate, unprovoked, unnecessary, and unbecoming of a supervisory officer.

Demotion is within the range of penalties mandated by the disciplinary matrix for unauthorized or excessive use of force. It is also within the range of appropriate penalties given

Grievant's unprovoked and unnecessary actions and the adverse effect those actions can have on the department as a whole and on those officers working under Grievant's command.

For these reasons, I find that the City had just cause to demote Lt. Rafferty.

Award

The grievance is denied.

Walt De Treux

WALT De TREUX