

AMERICAN ARBITRATION ASSOCIATION

Fraternal Order of Police, Lodge #5	:	AAA Case Number: 01-21-0018-0619
	:	
Claimant,	:	
v.	:	Opinion & Award
	:	
City of Philadelphia	:	
Respondent.	:	Re: Discharge of Peter A. Berndlmaier
	:	
Grievant: P/O Peter A. Berndlmaier (262939)	:	

Hearing: February 23-24, 2023

APPEARANCES

For the Union

WILLIG, WILLIAMS & DAVIDSON
John R. Bielski, Esq.
Joseph B. Salamon, Esq.

For the City

CITY OF PHILADELPHIA LAW DEPARTMENT
Diana P. Cortes, Esq.
Lindsey Cordes, Esq.

BEFORE: James T. Giles, Arbitrator

INTRODUCTION

This arbitration arises from the decision of the Philadelphia Police Commissioner, [REDACTED], [REDACTED], (“Commissioner”) to discharge an officer who had an unblemished service record of fourteen (14) years. Hotel surveillance video displayed irrefutable evidence that on the early evening of [REDACTED], while off-duty and on vacation outside of the Key West, Florida hotel where he was staying, Grievant, P/O Peter Berndlmaier, punched his wife and a friend, shortly separated in time and distance, with a closed right fist to their heads and later pushed them down several steps located in the front of the hotel. The Commissioner charged Grievant with three instances of assault and battery. In Key West, he had been arrested at the hotel and charged with one count of domestic battery for punching his wife. The friend had declined to press charges. Promptly upon his return to Philadelphia, Grievant reported his arrest to the Internal Affairs Division of the Philadelphia Police Department (“PPD”). Its investigation ensued. Based upon its review of the surveillance video, Internal Affairs recommended to the Commissioner that Grievant be suspended for 30 days with notice of intent to dismiss for violating three sections of the Code of Conduct which are part of the Collective Bargaining Agreement (“CBA”) in effect for the period of July 1, 2021 to June 30, 2024 between the City of Philadelphia (“City”) and the Grievant’s union, the Fraternal Order of Police, Lodge No. 5 (“Union”). Grievant’s dismissal was noticed for violations of Article 1: Conduct Unbecoming: Sections: 1-§026-10 (arrest for conduct where sentence could exceed one (1) year); 1-§001-10 (unspecified); and 1-§021-10 (conduct unbecoming an officer.) Each section charged carries the potential discipline of dismissal. The Commissioner’s action was challenged by the Union through the CBA’s grievance procedure without resolution. The demand for arbitration was made on the date of Grievant’s separation from service.

The undersigned was appointed arbitrator through the American Arbitration Association's procedures on January 19, 2022. By agreement of the parties, the hearing was held on February 23-24, 2023. Post-hearing briefs were filed on April 10, 2023.

ISSUES PRESENTED

Did the City have just cause to discharge Grievant, effective December 20, 2021, for November 3, 2021 misconduct and, if not, what should be the remedy?

THE HEARING WAS NOT TRANSCRIBED

The hearing was not transcribed. Evidence material to this Award is not in dispute. In their post-hearing briefs, the parties have set forth their recollections of evidence in support of their arguments. To the extent there is disagreement as to testimony, Arbitrator's recollection controls.

RELEVANT EXHIBITS ADMITTED WITHOUT OBJECTION

- A. All exhibits offered by the City, except the hotel surveillance video.
- B. All documents offered by the Union.
- C. Key West police vehicle video/audio recording of Grievant under arrest when seated on the rear seat of vehicle, handcuffed with his hands behind him, first alone and when driven by the arresting officer to the Key West detention center for processing and arraignment.

RELEVANT EXHIBITS ADMITTED OVER UNION OBJECTIONS

- A. Hotel surveillance video of events on the evening of [REDACTED] from which Key West police found probable cause for Grievant's arrest and charge of domestic violence.
- B. The arresting officer's investigation report (admitted with deletions of statements of persons who did not testify).

WITNESSES

For the City:

- A. Key West Police officer who placed Grievant under arrest and was the principal interviewer of the witnesses at hotel scene.
- B. Key West Police officer who downloaded hotel surveillance camera video during investigation at hotel scene.
- C. Detective [REDACTED], Internal Affairs Division who conducted the investigation and made initial recommendation of dismissal discipline.
- D. Deputy Commissioner [REDACTED], who testified about her review of the hotel video, her recommendation to the Commissioner and the Commissioner's decision.

For the Union:

- E. [REDACTED], Vice President of the Union and Grievant's Representative throughout the grievance process.
- F. Grievant, called by both parties for direct examinations.

Non-Testifying Attendees:

- G. [REDACTED], PPD Labor Unit

THE VIDEO WAS PROPERLY ADMITTED

The Union objected to the admissibility of the hotel video surveillance recording, claiming that it did not meet reliability factors under Pennsylvania case law. After hearing argument, the recording was admitted into evidence because it did meet reliability criteria.

A Key West officer testified that he downloaded the recording offered as evidence by the City directly onto his recording device from the hotel surveillance camera system and did so close in time to his response to a 911 call from the hotel. He testified that he was experienced in such downloading, having done so on many occasions in response to crime scene investigations at local business establishments. He testified that he viewed the hotel recording and recognized that persons seen in the video were the persons being interviewed at the scene. Particularly, he

recognized the distinctive tee shirt being worn by the female who was seen injured upon his arrival at the hotel and saw on the video how she was injured. He selected the portion of the recording to download. He testified that the downloaded recording was the same as what he had viewed and the same as what he showed to his fellow officer who was in the process of interviewing persons at the scene, that it was the same recording as the copy sent to Philadelphia Internal Affairs and was the same as was being offered as an exhibit in the hearing.

The interviewing officer testified that the persons seen in the video offered by the City were the same persons that he interviewed at the scene and from whom he took statements. Both officers identified the persons in the video by recollections of physical features and by the same clothing being worn by them in the video as was being worn at the scene. Both officers identified Grievant in the hearing as the person seen in the video.

UNDISPUTED EVIDENCE

The recitation of facts does not disclose the names of individuals who are not employed by the PPD in order to respect their privacy and to respect a Florida expungement court order entered as to Grievant's arrest, criminal charge and related proceedings.

On the evening of [REDACTED], at about 8 p.m., after his return to Philadelphia, Grievant, then assigned as an aide to Internal Affairs Inspector, [REDACTED], duly reported his [REDACTED], Key West arrest and criminal charge for domestic battery to his immediate superior, who was [REDACTED] Inspector [REDACTED] made an official incident report to Internal Affairs. Grievant was reassigned to desk duty in a division outside of Internal Affairs, effective [REDACTED]. The Internal Affairs assigned investigation of the reported incident to Detective [REDACTED]. She began her investigation on [REDACTED].

She requested from the Key West Police Department all investigation reports, including any officer body-camera evidence. She received the arresting officer's investigation report and a copy of the hotel surveillance video. The detective reviewed the video, formed her own conclusions and made a report to her superior with a recommendation of suspension for 30 days with notice of intent to dismiss. It is undisputed as to what she concluded from the video and the Key West arresting officer's investigation report. Arbitrator's summary of those conclusions follows.

Around 7 p.m. on [REDACTED], in front of and near the entrance steps of the hotel where he was staying in Key West on vacation with his wife and their friends, a married couple, vacationing with them, Grievant punched his wife with a closed right fist with such force that she immediately collapsed to the ground, falling onto her side and back. Subsequently, police photos showed a hematoma below the left eye and bruising to the left side of her head. After punching his wife, Grievant strode away a few steps, then returned near where his wife had fallen and raised both arms in a gesture in the direction of his wife and the traveling couple wife who was helping Grievant's wife to sit up. Grievant then strode to the hotel steps, which were several steps high, where the traveling husband was standing and punched him in the head with a right closed fist. The friend's head moved from the force of the blow. There was a struggle between Grievant and the friend that went out of camera view. Grievant's wife ran up the steps in direction of the struggle. A few moments later, Grievant, his wife and friend came back into camera view. Then, Grievant pushed or threw his friend and Grievant's wife. They fell together in a heap at the base of the hotel steps. Grievant gestured to them and then walked towards the camera and exited camera view. The surveillance camera was mounted in a position above the steps.

Someone associated with the hotel, either a guest, employee or supervisor, called 911 and reported a physical disturbance at the hotel. The two Key West police officers who testified at the hearing responded to the scene in separate vehicles. All participants in the events related above were still present, except for Grievant who had gone to his room.

The Key West officers found Grievant's wife sitting with an ice pack on her left arm and the left side of her face resting on the ice pack. The reporting person was interviewed as to what she had seen. Grievant's wife and the male friend were then questioned separately. In furtherance of their investigation, with the consent and aid of the hotel manager, the surveillance camera's recordings were viewed by one of the officers to see what may have happened that explained Grievant's wife's injuries. He saw the described Grievant's wife's battery, the battery of the male friend, and the push or throw of Grievant's wife and friend to the ground. From the hotel surveillance camera console, that officer made a recording onto his device, then shared it with the interviewing officer who, by that time, had taken a statement from Grievant. The interviewing officer viewed the video presented to him by his fellow officer and determined that there was probable cause for Grievant's arrest for domestic battery. He also determined that there was probable cause for battery charges as to the friend. When asked, the friend declined to press charges.

Before the video was reviewed by the arresting officer, Grievant had told him that he had been drinking all day and twice stated that he had no memory of anything that would account for his wife's injuries.

The arresting officer took photographs of Grievant's wife's injuries to the left side of her face and head and to her arm. Later, at the Key West Detention Center, the same officer took pictures of Grievant's hands. There was redness on the knuckles of his right hand.

Grievant's wife is listed on the investigation report as a victim and not as a charging party. Under Florida's domestic battery statute, when a police officer has probable cause at the scene to believe domestic violence occurred, the officer is obligated to make the charge or must explain in the investigation report why that was not done. In addition, the officer must give the victim a brochure that explains victim's rights. This officer called for EMT response because, based upon the Grievant's wife's complaints of pain in her left arm that he could not assess, he decided that her injuries should be evaluated and treated by the EMTs or at a hospital. Grievant's wife was transported from the scene to a local hospital by the EMTs.

After his arrest, Grievant was placed in the arresting officer's vehicle where he sat for a short time before being driven to the Key West Detention Center. There, he was evaluated, photographed, processed and held for arraignment. Grievant was arraigned. A stay away order was entered and a trial date was set. Grievant testified that he recalled waking up in jail and had no memory of how he got there or of anything that had happened since the mid-afternoon of the preceding day. The most he recalled, he said, as being released from custody and asking police at the jail for walking directions back to the hotel.

Later, from Philadelphia, Grievant obtained Florida counsel who entered a court appearance on November 15, 2021 and began a process of negotiating with the prosecution an agreement by which Grievant, who qualified under Florida's statutes for such consideration, could enter into an Accelerated Rehabilitation Disposition ("ARD") Program, and upon successful

completion, apply to the court for dismissal of the criminal charges and then apply for expungement of all public records of his arrest and charge. The charge was dismissed on May 6, 2022. An expungement order was entered on October 17, 2022. Grievant satisfied the Florida court that he successfully completed an anger management course, qualified for early termination of pre-trial suspension, had not been arrested subsequent to the Key West arrest and had complied with the core provision of the stay away order which required that he not physically harm his wife.

Grievant's discharge occurred on December 20, 2021. That same day, the dismissal action was grieved by the Union on the bases that the discharge was in violation of the CBA, that the punishment was too severe and that it was not consistent with the punishment meted out of officers who had committed the same or similar acts.

THE CHARGES FROM THE GNIOTEK HEARING

On November 23, 2021, Grievant, represented by Union counsel, appeared in Internal Affairs for a Gniotek hearing, which is likened to an arraignment in a criminal case where the accused is read the charges, advised of his right to remain silent and then of the right and opportunity to speak. Each of three charges carries the possible discipline of dismissal for the first offense. The Specification identified three separate assaults. In part, the record of the proceeding is as follows:

“Police Officer Berndlmaier, you are being charged with the following violations of the Philadelphia Police Department’s Disciplinary Code:

ARTICLE I : 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 (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 CONSITITUATES 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 I : CONDUCT UNBECOMING
SECTION 1-§001-10 : UNSPECIFIED

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 DEPARTMENT.

SPECIFICATION : On Wednesday, 11-3-21, you were arrested and charged with Domestic Assault while on vacation in Key West, Florida. Video surveillance was obtained of the incident which showed you involved in a physical altercation with your wife, [REDACTED], and your friend, [REDACTED]. The video shows you punching your wife on the side of her face, and the punching [REDACTED]. You were then observed a short time later pushing your wife and [REDACTED] to the ground. [REDACTED] received injuries to her face and arm.

You were subsequently charged with Battery, F.S.S. 784.03 (M1) under the F.S.S. 741.28 Domestic Violence provision. The Key West Police Department Case Number is 21-006183.

As a result of the aforementioned incident, you are being charged with the following violation of the Philadelphia Police Department's Disciplinary Code:

1-§026-10: You were arrested and charged with the following criminal offense:

Battery, F.S.S.
784.03 (M1).

1-§001-10: Your actions during this incident are conduct unbecoming of a police officer.

1-§021-10: Your actions and behavior as described, which resulted in you being arrested, indicates that you have little or no regard for your responsibility as a member of the Police Department.

By your actions, you have indicated that you have little or no regard for your position as an employee of the Philadelphia Police Department. Based on the investigation conducted and the information available at this time, the Police Commissioner has ordered that you be suspended for thirty (30) days with the intent to dismiss. Therefore, you will be terminated after the thirty day suspension. At this time, you have the opportunity to offer a response and explain why you should not be terminated.”

On the advice of Union counsel, Grievant did not make a statement.

THE BURDEN OF PROOF

The evidentiary standard applied to the City's burden of proof is "clear and convincing", both as to the allegations of misconduct and as to penalty. The Union had no burden of proof. Both sides had full opportunity to present evidence, arguments, and briefs.

ARBITRATOR'S AUTHORITY

An arbitrator's authority derives solely from the collective bargaining agreement. "As the United States Supreme Court provided in *Steelworkers v. Enterprise Wheeling & Car Corporation*:

When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency. An arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

363 U.S. 593, 597 (1960)." Union's Post-Hearing Brief, p. 20 (emphasis added by Arbitrator).

The parties' CBA states that "the arbitrator selected has no authority to add to, subtract from or in any way alter the terms of this contract." (XXI, Section 5 p. 83).

JUST CAUSE REVIEW FACTORS

The seven factors of just cause that arbitrators generally follow are whether: (a) there was notice of the possible or probable disciplinary consequences of the conduct; (b) the work rule or managerial order is reasonably related to the orderly, efficient and safe operation of the employer's

business and the performance properly expected of the employee; (c) the employer conducted an investigation to determine if the misconduct occurred; (d) the investigation was fair and objective; (e) whether substantial evidence or proof supported the finding of misconduct; (f) the employer applies its rules, orders, and penalties fairly and without discrimination to all employees; and (g) the discipline is proportionate to the offense and employee's record.

THE CITY'S POSITION

- The issue presented is whether the City had just cause to dismiss Grievant from employment for criminal assaults upon his wife and friend.
- The discharge action was justified under the disciplinary code of the CBA because of the criminal conduct. The Code does not preclude discharge for such conduct and does not limit the penalty that the Commissioner may impose for such conduct. The CBA recognizes that the Commissioner is the final authority on all disciplinary matters.
- The evidence produced at the hearing that Grievant committed criminal assaults upon his wife and friend is clear and undisputed.
- Grievant reluctantly admitted, only on cross-examination by the City, that he assaulted his wife and, in doing so, showed a continuing mind-set of denial as opposed to acceptance of wrongdoing.
- There was sufficient, prompt and fair investigation by Internal Affairs of the Key West Police Department's charge of Grievant's criminal conduct. There was independent viewing of the hotel surveillance video evidence by Internal Affairs, and that viewing confirmed the material elements of the Key West police investigation report and gave clear bases for dismissal discipline.

- The surveillance video evidence, conclusive of the accused criminal conduct, was presented and reviewed by Internal Affairs hierarchy for Code of Conduct violations. The Police Commissioner approved the unanimous recommendation for dismissal and the recommendation for Commissioner Direct Action (“CDA”).
- The Commissioner formally signed the CDA form on November 24, 2021.
- Grievant’s misconduct warranted dismissal action under each of the charged violations of the disciplinary code 1-§026, first offense, 30 days or dismissal; 1-§001, first offense, reprimand to dismissal; and 1-§021, first offense, 30 days or dismissal.
- No progressive discipline is required where the penalty is 30 day or dismissal. Either the offense is categorized as less than serious or serious. Grievant’s misconduct was serious.
- A Gniotek hearing was held on November 23, 2021, where Grievant was present, was given the required warnings and where Inspector [REDACTED] Internal Affairs, Captain [REDACTED], Internal Affairs, [REDACTED], Esquire, Union attorney, [REDACTED], Union representative, [REDACTED] nnett, Internal Affairs, and Sgt. [REDACTED], Internal Affairs were present.
- Detective [REDACTED] conducted the hearing and questioned Grievant and recorded the warnings and Grievant’s responses.
- Grievant was accorded all Gniotek warnings, notified of all rights, including the right to remain silent, and was accorded the opportunity to make a statement.
- Grievant declined to make a statement on the advice of Union counsel.
- After the Gniotek warnings on November 23, 2021, Grievant received his Notice of Intent to Dismiss and was later personally served a copy on December 13, 2021. On December

21, 2021, Grievant was personally served notice of his dismissal effective December 20, 2021.

- Grievant is subject to the CBA as a member of the PPD and the Union. The disciplinary code sets out disciplinary infractions and corresponding penalties for the violation. The code contains an entire Article dedicated to actions that are considered unbecoming for a uniform officer to engage in, both on and off duty. Specifically, the bargained for code contains language delineating necessary discipline for “any incident, conduct, or course of conduct which indicates that an employee has little or no regard for his responsibility as a member of the Police Department.” Furthermore, the Union bargained for code makes it a violation to engage in any action that constitutes the commission of a felony or misdemeanor, or equivalent offense in another jurisdiction, carrying a potential sentence of more than one year. No conviction or pendency of charges is necessary for disciplinary action. Both of these sections have a bargained for punishment on first offense of thirty days or dismissal.
- Grievant testified that he understood the disciplinary code.
- Deputy Commissioner [REDACTED] highlighted in her testimony that the Code of Conduct directly relates to orderly, efficient, and safe law enforcement. Further, she testified to the trust that is paramount between a police officer and the citizens he serves. This trust is not only established through on-duty actions, but, more importantly, through off-duty actions and how an officer must carry himself or herself outside of the job and in the community.
- As a member of the PPD, engaging in conduct resulting in criminal charges reflects negatively not only on the individual but also on the department. It would be contradictory to continue to employ an employee who was criminally charged when a key component of

the job is to respond and keep communities safe from crime. Grievant clearly had little regard for his responsibility to represent the PPD as a member, evidenced by his inability to control his anger towards his wife and friend.

- Detective [REDACTED] testified to the entirety of her investigation. She was assigned the matter on November 5, 2021. She contacted Key West Police Department to obtain any arrest reports and video evidence. She received the arrest report, surveillance video footage of the assault, and body worn camera footage. She viewed the video surveillance and reviewed all police paperwork herself. Additionally, she contacted the Key West police department to obtain court documents on Grievant.
- The Union argued that the PPD failed to provide the evidence to Grievant at the time of his Gniotek interview. However, all documents were provided in the discovery phase prior to the arbitration. At no time did Grievant or the Union offer evidence to contradict Detective [REDACTED]'s investigation, any witnesses who should have been interviewed or not interviewed, or any reason to assume bias existed. Detective [REDACTED] reached out to all individuals present in the video surveillance to no avail.
- An employer who is bound by a collective bargaining agreement and disciplinary code, and one whose sole purpose is to protect the citizens of Philadelphia, should not be forced to reinstate an employee whose actions are in direct conflict with its purpose and mission.
- Deputy Commissioner [REDACTED] testimony highlighted the significance of Grievant's actions, and the damaging effects it would have on the PPD and community. Police officers are sworn to protect and serve communities in which domestic violence is a daily occurrence. They must respond to those calls, interact with victims, and ensure safety. It would be counter-productive to have an officer who engages in the same behaviors for

which he makes arrests. Part of engaging with victims of domestic violence is creating a sense of trust. Reinstating Grievant would effectively say to the community that the PPD cares more about protecting its officers than protecting victims.

- The Police Department issued a penalty proportionate to Grievant's misconduct. No amount of accolades can mitigate the fact that he engaged in a criminal act, and there is no amount of rehabilitation that would allow him to serve in his capacity as an officer again.
- The City applied its rules, directives, and the bargained-for disciplinary code fairly and without discrimination in both issuing disciplinary charges and administering the penalty associated with the charges.
- The Union further suggested the P/O [REDACTED] matter related most closely and that employee received only a suspension. In the [REDACTED] matter, there was no video surveillance, no police officers to corroborate what was shown in the video surveillance, and no pictures of the victim's injuries.
- The role of the arbitrator is not to supplant his decision-making over that of PPD, but rather to analyze whether dismissal was supported by just cause. The evidence is clear that the PPD met its obligations under the CBA in making the decision to dismiss Grievant.
- Reinstating Grievant would have a detrimental effect on the PPD and the inhabitants of the City. Having an officer who engaged in domestic violence patrolling potential domestic violence calls would be contradictory to the core values of the PPD.

THE UNION'S POSITION

- Grievant struck his wife but did not intend to do so because he was so severely intoxicated that he has no memory of his actions.
- The sole issue for arbitrator determination is whether the City has proven that there was “just cause” for Grievant’s discharge by a standard of clear and convincing evidence and, if not, what should be the remedy.
- Applying classic factors for determining “just cause”, the City failed to meet its burden of proof and reinstatement of Grievant to his officer status is required with full restoration of pay and benefits from the date of dismissal.
- Based on “just cause” principles, recognized in cited arbitrator opinions and articles written by respected labor arbitrators, the Commissioner should have applied progressive discipline and failed to do so. For that reason, full reinstatement is required.
- The City failed to consider mitigating factors before embarking upon termination of Grievant’s employment, namely, his seniority, his unblemished record of police service, the absence of any disciplinary history, the fact that the accused conduct occurred while Grievant was intoxicated and the fact that there were less harsh penalties available other than dismissal. For that reason, reinstatement is required.
- The discharge of Grievant was incongruous with the discipline of 15-day suspension incited out to P/O [REDACTED] [REDACTED] who was involved in a domestic violence event with her husband where he said that she struck him in the face several times as well as on other parts of his body.

- Unlike Officer [REDACTED] who knowingly struck her husband, Grievant testified credibly that he had no memory of the assault event because of severe alcohol intoxication and did not act knowingly. For reasons of disparate treatment, full reinstatement is required.
- The City could have chosen to assign Grievant to desk duty roles, the same or similar to those worked by him since 2016, so that he would not be in a position of arresting anyone for any crime and would not be called upon to testify or be in the position of having his Key West criminal assault conduct subjected to credibility scrutiny by criminal defense attorneys in domestic violence cases.
- Grievant has demonstrated by his post-Key West conduct that he presents no danger to public trust. He successfully completed an anger management course, avoided all alcoholic drinks, dedicated himself with steadfast determination to a life of sobriety, has maintained his marriage, and enjoys marital happiness.
- The City's concerns about his assault history having to be disclosed on a Brady/Giglio list provided to the District Attorney to alert to officers who would have testimonial credibility issues due to PPD discipline or arrest on criminal charges should not be credited because Grievant could be assigned to administrative duties and not be placed in a position of having to make arrests or testify in court proceedings.
- The City deprived Grievant of due process by conducting an inadequate investigation of the allegations of misconduct, that is, the friend and his wife and Grievant's wife were not interviewed by Detective [REDACTED] - [REDACTED] nor did she speak directly with the Key West arresting officers.

- The City produced no credible and competent evidence at the hearing that the Commissioner approved the dismissal action, despite Deputy Commissioner [REDACTED] testimony that the Commissioner did so.
- The Commissioner did not personally testify at the hearing as to her reasons for dismissal of Grievant and, therefore, as a matter of due process, there is no credible and competent evidence for the dismissal of Grievant.
- Arbitrator must exercise labor arbitrator authority and fashion a just remedy that considers all mitigation factors, even if that means returning the Grievant to the police force with reduced back pay and benefits.

DISCUSSION

Arbitrator, having considered all testimony, exhibits and the parties' post-hearing briefs, including authorities and arbitrator awards cited therein, concludes, for the reasons that follow, that the City met its burden of proof that there was just cause for discipline of Grievant and that the dismissal of Grievant was a just remedy. Arbitrator concludes that he lacks authority to impose a different remedy in this case.

A. Battery of Grievant's Wife and Vacationing Friend Was Proven By Clear and Convincing Evidence

1. The surveillance video proves beyond doubt that Grievant struck his wife on the left side of her head with a closed right fist, that at the time of the blow he was in no physical danger from her, and that his wife suffered a hematoma to her left eye and other bruises to her head as a result. Police photos of red marks on Grievant's right hand were consistent with his wife's injuries and the striking of his friend.

2. The surveillance video proves beyond doubt that Grievant struck his friend in the head with a closed right fist and that the friend's head moved backwards from the force of the blow. The video shows that Grievant struck the friend when Grievant was under no physical threat to his own physical well-being, and that the blow to the friend's face was uninvited and would have caused injury to some degree, however slight.
3. The surveillance video showed a physical struggle between Grievant and the friend and then a push of the friend and Grievant's wife from the hotel steps onto the ground or sidewalk at the base of the steps and that the fall was a probable cause of the wife's arm injury.

B. The City Proved By Clear and Convincing Evidence That Two of the Code of Conduct Violations Are Applicable to the Misconduct Observed in the Video Evidence

1. Article 1: Conduct Unbecoming – 1- §026-10 – 30 days or dismissal

This Section covers any action that constitutes the commission of a felony or misdemeanor which carries a potential sentence of more than one (1) year. Although Pennsylvania law is not stated as controlling in determining penalty, by virtue the parties being in the Commonwealth and the second sentence (“Chapter 39 of the Crimes Code” implying Pennsylvania’s criminal code) and the third sentence, referencing “another jurisdiction, state or territory”, it is reasonable to conclude that accused police officer conduct is expected to be reviewed by the parties by applying Pennsylvania law. However, the fourth sentence of the Section states that an out-of-jurisdiction “equivalent offense” is included but it is not stated there which jurisdiction’s statute is to be used in judging the penalty associated with the “equivalent offense”.

“Equivalent” means something that is substantially like another thing. The word “offense” could refer to the description of the misconduct and not to penalty. Pennsylvania’s statutory

definition of an intentional, wrongful touching of another that causes injury is “assault”, a misdemeanor in the second degree, while Florida’s statute labels the same misconduct as “battery”, a misdemeanor in the first degree. Pennsylvania’s potential penalty for simple assault in the second degree is a sentence up to two (2) years, while Florida’s maximum penalty for the same offense is a sentence up to one (1) year.

Here, the City has not supplied any rationale for how this Section is to be construed where the maximum sentence for the Florida charged equivalent conduct is a potential sentence that does not exceed one (1) year. It appears that the City erroneously assumes in its post-hearing brief that the Florida penalty for the domestic battery offense exceeds one (1) year. The Gniotek hearing notice and specification make the same assumption.

Because the City has not proven that Florida’s domestic battery charge, or Grievant’s total misconduct depicted in the video, carries a potential sentence in excess of one (1) year, or that the potential sentence requirement of “excess of one year” is satisfied by applying Pennsylvania law to the misconduct, Grievant’s discharge cannot be maintained under this Section.

2. Article 1: Conduct Unbecoming – 1- §001-10 – Reprimand to dismissal

This Section is labelled “unspecified”, meaning that, to the extent an officer’s accused conduct is not specifically described in the Code of Conduct but is determined by the Commissioner to impede the officer’s ability to perform his duties, the officer may be charged under the “unspecified” provision. While Grievant’s Florida misconduct penalty might not be specifically covered under foregoing Section 1-§026-10, and because Florida’s penalty for the equivalent conduct differs from Pennsylvania’s, Arbitrator determines that Grievant’s conduct is cognizable under this “Unspecified.” Section. Another jurisdiction’s potential sentence for the same or equivalent criminal conduct is not described in the Code of Conduct.

3. Article 1: Conduct Unbecoming 1-§021-10 30 Day or Dismissal

This section applies. It covers any conduct of an officer that demonstrates that the officer has little or no regard for the responsibilities of a Philadelphia police officer.

C. The City Proved by Clear and Convincing Evidence That Dismissal of Grievant Was Just

1. Just Cause Factors Applied

(a) Was there notice of possible disciplinary consequences?

Yes.

The bargained for Code of Conduct sets out the disciplinary infractions and corresponding penalties for any violation. Grievant fully appreciated, especially being in Internal Affairs, that he could lose his job because of the kind of misconduct that he was accused of committing.

(b) Was the work role reasonably related to the orderly, efficient and safe operation of employer's business and the performance properly expected of the employee?

Yes.

The Introduction to the Code of Conduct in the CBA states that the core values of honor, service and integrity are the bedrocks of public service and community trust.

(c) Did the employer conduct an investigation to determine if the conduct occurred?

Yes.

1. The Internal Affairs investigation was sufficiently complete when Detective [REDACTED] reviewed the hotel surveillance video and the Key West police investigation report which described the totality of Grievant's misconduct and was the arresting police officer's basis for probable cause for Grievant's arrest.

2. The Union contends that the Internal Affairs investigation was defective in a due process sense because Grievant's wife and the assault victim friend and his wife were not interviewed. The record, though, shows that the detective made reasonable efforts under the circumstances to obtain statements. She placed calls to Grievant's wife and male friend who, in addition to Grievant, gave statements to the Key West police. They did not call her back within a short period of time. The wife did not return the call at all. The friend did call back at some point but did not state that he was willing to make a statement. The detective did not call the friend back. The Union does not offer what, if anything, those interviews might have added to the investigation. Truthful testimony from each of them would have had to be consistent with the video evidence.

(d) Was the investigation fair and objective?

Yes.

1. The Union contends that Detective [REDACTED] should have conducted in-person interviews of key witnesses. That contention is vacuous. For example, the 911 caller's testimony would not have been helpful to Grievant. Nor, would the friend's wife's statement have been helpful to Grievant because she witnessed the forceful blow to his wife's head. The Union also complains that, prior to the discharge decision being made, personal interviews of the Key West police officers were not conducted or attempted. The Key West officers were not eyewitnesses to the assaults. They relied upon the surveillance camera

evidence for probable cause. Likewise, Detective [REDACTED] and subsequent Internal Affairs reviewers of the video relied upon their own eyes.

2. The Union contends that there was a basic due process deprivation because the Commissioner was not called to testify personally about her thought processes in reaching the dismissal decision and that the testimony of Deputy Commissioner [REDACTED] testimony that she was authorized by the Commissioner to speak for her should be rejected as incredible.
3. The Commissioner's signature appears on the CDA form and is dated November 24, 2021. That signature signifies that the Commissioner, herself, considered the accused misconduct to be serious and warranting dismissal without undue delay. No plausible reason exists to discredit Deputy [REDACTED] testimony that she was authorized by the Commissioner to make recommendations as to discipline and to testify in the arbitration hearing about the official position of the Commissioner.
4. Deputy [REDACTED] testified that she reviewed the video and concluded that dismissal was required, that she accurately, and face-to-face, relayed to the Commissioner what was on the video, that is, Grievant's assaults, and, in reliance on the description of the assaults, the Commissioner made the final decision to suspend Grievant with intent to dismiss. Nothing in the CBA requires that the Commissioner testify personally. Nothing in the CBA precludes the Commissioner from delegating certain of her responsibilities to her deputy.

5. Arbitrator accepts as credible Deputy [REDACTED] testimony about the delegation of authority from the Commissioner to her to testify on her behalf in the hearing and to state reasons for Grievant's dismissal consistent with the Commissioner's decision.
6. The mitigation factors raised by the Union in the arbitration hearing were, by the Deputy Commissioner's testimony, irrelevant to the dismissal decision because the misconduct was clear and serious and the penalty was consistent with the reasons on which the Commissioner has stood firm in other unjustified officer assault cases.
7. This testimony as to consistency is corroborated by the testimony of [REDACTED] [REDACTED] Union Representative and Union Vice President. He testified that the Commissioner and her predecessor have been consistent in dismissals for assaults by officers and that in some cases arbitrators have reversed dismissal discipline and in some cases arbitrators have not.
8. The delegation of authority by the Commissioner to her Deputy Commissioner to testify did not deprive Grievant of any due process right or hearing fairness.

(e) Was there substantial evidence or proof supporting the finding of misconduct?

Yes.

The evidence and conclusions have been discussed above.

(f) Was the discipline proportionate to the offense and the employee's record?

Yes.

1. Domestic battery is a serious offense. The Union does not argue otherwise.

An arbitrator does not have the authority to direct the City to treat it less seriously.

The Union concedes in its post-trial brief that Grievant struck his wife. It does not concede, though, the power of the punch. There was more than a mere touching.

There was injury inflicted with no legal justification.

2. Review of arbitration awards cited by the Union in its post-hearing brief shows that termination decisions for assaults have been reversed and reinstatement directed where the Commissioner has been found to have been materially in error, either as to a fact of the accused offense or as to due process. Here, the Union has not advanced for consideration any arbitrator award where dismissal discipline was reversed and there was clear and convincing evidence of a serious offense and no due process denial.

3. The Union argues that one domestic violence case is comparable where there was only a suspension. P/O [REDACTED] [REDACTED] was given a fifteen (15) day suspension where her husband accused her of domestic assault. He had claimed that she struck him in his face and other parts of his body. Officer [REDACTED] admitted only to kicking him in the knees and legs. The disputed facts of the [REDACTED] matter distinguish it from this case and Arbitrator finds that it is not a proper comparator.

4. According to Union Exhibit 9, which does not show which section of the disciplinary code was invoked, Officer [REDACTED] had been engaged while in her home in a verbal confrontation with her brother about personal matters related to their mother. Her husband, disturbed by what he heard, “inserted” himself between the disputants. The exhibit does not state how the husband inserted himself into the

mix. At some point, husband and wife became “physical.” It is possible that Officer [REDACTED] could have reasonably believed that physical action by her was needed in lawful defensive against her husband’s conduct. The husband stated, “... she kicked him in the leg and knee several times until he let her go”. By the husband’s statement, he was holding Officer [REDACTED] and continued to hold her despite her efforts to be released from his grasp by using her hands and feet. The husband’s conduct, verbally or physically, could have been reasonably perceived by her as being immediately threatening to her personal safety. She called 911 because the husband “refused to leave the house”, which suggests that she perceived him to be a continuing physical threat. In Grievant’s case, there is no defense of self-protection or of protecting another and there is no doubt that he committed the acts charged by the Commissioner.

(g) Was the discipline proportionate to the offense and the employee’s record?

Yes.

1. Deputy Commissioner [REDACTED] testified that when she saw Grievant’s criminal misconduct on the hotel surveillance video, she concluded, as had everyone else on the investigation reviewing team, that the recommendation for suspension for 30 days and then dismissal was the only appropriate discipline. The only reasonable inference to be drawn from her testimony is that Grievant’s voluntary intoxication, claimed resulting loss of memory, his past commendations and his past performance evaluations, did not excuse his misconduct and that the misconduct she viewed could never be squared with the duties and obligations of a Philadelphia police officer. Likewise, when she testified there was nothing that Grievant could

offer at the arbitration hearing that would cause the Commissioner to impose discipline less than dismissal, the only reasonable inference is that the Commissioner had determined that the misconduct was so egregious that, irrespective of position or length of service, any officer found to have done what Grievant did would also be dismissed from the force.

2. The Commissioner, according to Deputy [REDACTED] has taken the position that the PPD cannot employ someone who engages in behaviors that the police are sworn to protect the public against and that such reemployment would have damaging effects upon the PPD and the community. No record evidence challenges these conclusions of negative impact.
3. The Internal Affairs investigator and its review team, and, through them, the Commissioner, knew of Grievant's work history, his performance evaluations and commendations. Grievant worked in Internal Affairs and had been selected to work by Inspector [REDACTED] as his aide because of his exceptional service record. Grievant reported his Key West arrest to Inspector [REDACTED]. He was served with the Gniotek hearing notice by Inspector [REDACTED] and Inspector [REDACTED] was present at the Gniotek hearing as one of the Commissioner's representatives.
4. The Union argues that Grievant should be reinstated because the offense of domestic battery was not accorded progressive discipline. By implication, it asserts that progressive discipline is required, irrespective of the offense. Yet, the Union concedes, on page 10 of its brief, that "Some offenses are so egregious as to justify summary termination without progressive discipline", citing DISCIPLINE AND DISCHARGE IN ARBITRATION, pp.57-58 (Brand & Brief eds., 3d ed. 2015). It

also cites an arbitration case that states the obvious, that domestic battery is a serious offense. In City of Philadelphia v. FOP Lodge 5 (Shaheed Discharge), Arbitrator [REDACTED] wrote that domestic violence is a serious offense and the officer's action in punching his wife in the face with a closed fist could not be justified in any way. (Grievance sustained and officer restored to duty, in substantial part, because the City waited fourteen (14) months before imposing discipline). Here, it cannot seriously be contended that Grievant's closed fist batteries upon Grievant's wife and his friend were not serious offenses.

5. Nothing in the CBA states that progressive discipline must be applied to all employee misconduct, regardless of the degree of seriousness.
6. Deciding what is an egregious offense is reserved to the exercise sound discretion of the employer. Section IV, Management Rights, p. 4 of the CBA states:

“The City, consistent with sound discretion, possesses the right, in accordance with applicable laws, to manage all operations, including but not limited to the direction of the work force and the right to plan, direct and control the operation of all equipment and other property of the City, except as modified by this Award and those provisions of the agreement which are not inconsistent with or contrary to the exercise of such discretions.

Matters of inherent managerial policy are reserved exclusively to the City. Except as specifically addressed in this Award and the collective bargaining agreement,...

7. Section 1-§ 021-10 of the Code of Conduct (conduct unbecoming a police officer) does not provide for progressive discipline. Either the Commissioner judges the conduct to be serious, one that equates to dismissal, or to be less than serious, one which equates to a thirty (30) days suspension. Arbitrator does not have power to

rewrite the parties' CBA and change the language of "30 days or dismissal" into "30 days to dismissal."

8. The Union's brief concedes that there was just cause for discipline as to the battery of Grievant's wife because in the hearing he admitted that he struck her. However, Grievant has not in similar fashion admitted that he battered his friend. That misconduct must also be considered in the evaluation of "serious."
9. Battery of the friend with a closed fist cannot be ignored. While it is not known what degree of physical injury the friend experienced from the blow to the head, it was seen as being more than a mere touching and would have caused some injury, however fleeting.
10. The Commissioner considered the totality of Grievant's misconduct in deciding seriousness. The Union's post-hearing brief does not.

OTHER MITIGATION FACTORS CONSIDERED

A. Intoxication and Loss of Memory

The Union contends that the Commissioner should have considered Grievant's claims of intoxication resulting in loss of memory, arguing that such a condition reduced his intent and culpability for the offenses charged.

1. The Key West police investigation report states that Grievant claimed at the scene that he had no memory of how his wife was injured and that he had been "drinking all day". There is no evidence as to what he had been drinking, the alcoholic content, frequency of imbibing, or food ingestion, all factors which might inform a reviewer of evidence of the degree of intoxication. There was nothing in the police report about observable signs of drunkenness. Nevertheless, from any reading the

investigation report, the Internal Affairs Division knew Grievant's claimed excuses for his misconduct before the dismissal decision was made because they are in his statement in the report. By reasonable inference, Arbitrator finds that voluntary intoxication and memory loss as proffered mitigation factors were necessarily considered and rejected by Internal Affairs and the Commissioner.

2. In the Gniotek notice and hearing, no credibility determination was made regarding Grievant's claims of intoxication and memory loss. The reasonable inference drawn is that such claims were considered to be irrelevant to the charges.
3. The charged violations of the Code of Conducts make officer misconduct subject to discipline. The CBA makes each officer responsible for his or her actions at all times, whether on duty or off duty.
4. It is common knowledge that voluntary intoxication is not a defense to criminal conduct. Florida and Pennsylvania have criminal statutes to that effect. It's reasonable and expectable that the Commissioner would apply and enforce rules of conduct applicable to police officers in accordance with the law.
5. As a matter of common sense, memory loss claimed to have been caused by voluntary intoxication can be real or feigned. Only the person in question knows if he/she remembers.
6. Arbitrator finds that it was reasonable for the Commissioner to have rejected voluntary intoxication as a mitigation factor even if it did cause memory loss and to do so without determining the credibility of Grievant's excuses proffered in arbitration for his misconduct on the evening of November 3, 2021.

B. Credibility and Loss of Memory.

The Union urges the Arbitrator to conclude that Grievant is truthful with respect to the claims of loss of memory caused by alcohol ingestion and to consider that truthfulness in fashioning a just penalty that returns Grievant to the police force.

The video/audio recording in the arrest/transporting police vehicle has been offered by the Union as proof of that condition. The City has offered the same exhibit as proof that Grievant was not suffering from loss of memory of his assault behavior. That recording does not clearly support the Union's position. On the other hand, there is much that supports the City's position as to lack of credibility. This exhibit was not part of the Gniotek specification of charges.

1. Arbitrator credits Grievant's testimony that he is committed to a life of sobriety, that he has lost 45 pounds of weight, that he feels better now that he is not drinking alcohol and his mind is clear, that again he has a happy marriage, that he and his wife recently vacationed as a couple and had a great time, and that he is ready, willing, and able to return to his job duties, even as a patrol officer. Arbitrator also credits his testimony that he would never do again what he is accused of doing criminally in Key West on November 3, 2021.
2. However, the relevant question is not what the arbitrator subjectively thinks of Grievant's credibility. Rather, it is whether the Grievant's credibility is so evident that employer rejection of his credibility would be unreasonable.
3. Arbitrator has reviewed the recording. In it, Grievant does not admit that he struck his wife but he made statements that suggest that he then recalled what had happened. Arguably, the same statements are consistent with his being rueful after finding himself under arrest. For example, he says "It's the worse day of my life."

That statement is as consistent with memory of the entire day as it is with his expressing woefulness about his current circumstances.

4. Grievant' statements do suggest awareness of time, place and recollections of vacation experiences, consistent with his past memory being intact at that time, despite so level of possible intoxication. Therefore, the statements are inconclusive of loss of memory that he punched his wife or that he did not know that he did it when he did it.
5. All of the above does not preclude the possibility that Grievant woke up in jail with no memory of all actions and statements related to his arrest and arraignment. However, Arbitrator cannot conclude, by clear and convincing evidence, that the City is unreasonable to doubt his credibility with respect to his claim that he did not remember striking his wife.

C. No Acceptance of Responsibility

In the arbitration hearing, Grievant's testimony was consistent that he should not have to admit to conduct that he does not remember when presented with the hotel video evidence on cross-examination by the City. He did admit that the conduct that he saw on the screen was conduct unbecoming a Philadelphia police officer. While Grievant was reluctant to admit that which he could not remember, and while that reluctance may be understandable, it does not equate to full-throated acceptance of responsibility.

D. Remorse

The Grievant did not express to the Commissioner during the grievance process that he was sorry for the accused assaults. He chose not to make a statement at the Gniotek hearing, following the advice of counsel. His silence during that hearing was understandable since the Key

West criminal charge was still open. But, once the criminal charge was dismissed on May 6, 2022, there was no legal impediment to his admitting to the Commissioner that he struck his wife and friend and was truly sorry for his misconduct. He did not do that. In the arbitration hearing, there was no “Perry Mason moment” where he broke down on the witness stand and confessed wrongdoing. Grievant had difficulty accepting that he committed serious offenses against his wife and against all that his badge represents.

INDUSTRIAL JUSTICE REQUESTED

Alternatively, the Union asks Arbitrator to fashion a just remedy that would return Grievant to the police force, even if it is not with full back pay and benefits. It urges that an arbitrator has the power to develop a return-to-work remedy that recognizes Grievant’s rehabilitation from his alcohol experiences, his dedication to sobriety, his successful completion of an anger management course and his strong marriage.

The Union surmises that the Commissioner could be directed to assign Grievant permanently to a desk job that would keep him from public contact. Deputy ██████ testified that Grievant’s position was patrolman and, if reinstated, he would be assigned to patrol duties, not desk duties, and would be expected to respond in the community to domestic assaults, general assaults and other criminal acts that cannot be fully anticipated. Further, she testified that a history of criminal conduct would negate his utility as a prosecution witness were he called upon to testify as an arresting officer. There is no record basis to find these concerns to be unreasonable or unrelated to valid policing objectives and standards.

Arbitrator disagrees with the Union that an arbitrator, applying “just cause” principles, can depart from CBA limitations and impose a return-to-work remedy where just cause has been established for dismissal. That would amount to substitution of arbitrator subjective judgment for

the employer's managerial judgment in contravention of the reservation of rights provisions in the CBA.

CONCLUSION

The City proved just cause for discipline as to Grievant's misconduct and for dismissal as the just penalty.

AWARD

The Union's Grievance on behalf of Peter A. Berndlmaier is denied.

Dated: May 10, 2023



James T. Giles
Arbitrator