

AMERICAN ARBITRATION ASSOCIATION

In the Matter of Arbitration Between:

**FRATERNAL ORDER OF POLICE
LODGE #5**

and

CITY OF PHILADELPHIA

**AAA Case #01-21-0016-1595
(Gr: Sgt. David Chisholm Discharge)**

Walt De Treux, Arbitrator

*Hearing Date: 2/22/23
Decision Date: 4/17/23*

Appearances: For the FOP – Thomas M. Gribbin, Esq., *WILLIG WILLIAMS & DAVIDSON*
For the City – Elliot I. Griffin, Esq., *BALLARD SPAHR*

Introduction and Statement of Relevant Facts

On October 26, 2020, two City of Philadelphia police officers fatally shot [REDACTED], a black male. The shooting sparked protests, riots, and civil unrest, particularly in the 18th Police District located in West Philadelphia. In the early morning hours of October 27, [REDACTED] [REDACTED] drove a van into the area around [REDACTED] & [REDACTED], where protestors, rioters, and police had converged. A young male and a toddler were in the rear seat of the van. Officers surrounded the van, broke out its windows, and removed the operator and passengers. Young and the male passenger were handcuffed. The toddler was removed from the scene and subsequently transported to DHS before being released to his grandmother.

The Department initiated an investigation into the incident. During the course of the extensive investigation, [REDACTED] [REDACTED] [REDACTED] Commanding Officer of the 18th District, requested an internal investigation of [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] alleged that Officer

█████ had thrown rocks at the civilian crowd and used inappropriate, threatening, and vulgar language toward a neighborhood resident. █████ █████ █████ an Internal Affairs investigator, was tasked with reviewing body worn camera footage to determine if officers engaged in any misconduct. He specifically followed up on █████ █████ complaint, attempting to find footage of █████ █████ actions. █████ █████ complaints proved to be wholly unfounded as to █████ █████ who was not at the scene of the protests and riots at any time.

During the course of his video review, █████ █████ found footage of Sgt. David Chisholm, who had been deployed from the 26th District with a group of officers to assist in the police activity around █████ & █████ █████ █████ observed Sgt. Chisholm using inappropriate language and homophobic slurs and encouraging officers to throw rocks back at the rioting crowd that was throwing rocks at the officers. Specifically, Sgt. Chisholm is heard on the body worn camera footage saying to his officers, “Fuck it, start moving forward. Throw fucking rocks back, fuck them. I don’t give a shit, move these fucking faggots,” and to unidentified civilians, “Fuck you too, you little bitch. I’m going to fuck you up faggot, I don’t give a shit. I’ll trade you for cigarettes in prison bitch, you piece of shit.”

█████ █████ reported his findings to the lead investigator, █████ █████ █████ In the investigation report, █████ █████ erroneously stated that █████ █████ unfounded allegations were committed by Sgt. Chisholm rather than █████ █████ Sgt. Chisholm did not engage in rock throwing or make any of the comments █████ █████ attributed to █████ █████

Notwithstanding the lieutenant’s mischaracterization of the basis for concern with Sgt. Chisholm’s actions, the Department determined that the sergeant’s conduct warranted further

investigation. [REDACTED] interviewed Sgt. Chisholm and asked if he made the statements that had been reported by [REDACTED]. Sgt. Chisholm consistently answered, "I don't remember saying that" or "not that I recall." When shown the video at the end of his interview and asked if he was the officer in the video, Sgt. Chisholm responded, "I cannot say for sure that is me."

Following the investigation, the Department charged Sgt. Chisholm with conduct unbecoming related to his use of inappropriate language to the public (Section 1-§017-10 of the disciplinary code), inappropriate communication based on sexual orientation (Section 1-§023-10), and lying or attempting to deceive during a departmental investigation (Section 1-§009-10). The Commissioner took direct action and terminated Sgt. Chisholm's employment.

Sgt. Chisholm timely grieved his discharge. The parties were unable to resolve the grievance through the contractual steps and referred the matter to arbitration. On February 22, 2023, a hearing was held at the Philadelphia offices of Ballard Spahr, 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.

Issue

The parties stipulated to the following issue,

Did the City of Philadelphia have just cause to discharge Sgt. David Chisholm? If not, what shall be the remedy?

Analysis and Decision

██████████ ██████████ ██████████ ██████████ with whom the Commissioner consults on disciplinary matters, criticized Grievant for failing to “contain and de-escalate and protect” during a crisis situation. She described Grievant as “totally out of control” and “escalating the situation even more.” The Deputy Commissioner explained that Grievant’s conduct “does not fall in line with what we believe and what we want our department to be seen as.”

The FOP does not necessarily contest ██████████ ██████████ ██████████ harsh criticism of Grievant’s conduct and supervisory failures. It notes, however, that the disciplinary matrix, negotiated by the parties and codified in the collective bargaining agreement, carries a mandated penalty of reprimand to 5 days for a first time violation of conduct unbecoming related to the use of inappropriate language to the public (Section 1-§017-10) and reprimand to 15 days for inappropriate communication based on sexual orientation (Section 1-§023-10). The FOP argues that the Department should have disciplined Grievant at the low end of the range for those offenses.

Grievant was working in an unprecedented situation, certainly not one for which he was prepared and for which he received no instruction from his superiors. As Grievant described it, he had finished his tour of duty in the 26th District and was driving home when his lieutenant

directed him to return to the district. He and other officers were deployed to the 18th District without any instructions (although they were receiving reports of the civil unrest and “a lot of injured officers.”) In route to West Philadelphia, some civilians threw two-by-fours and other “stuff” at the officers’ vehicle. When he arrived on scene around 52nd & Market, Grievant observed “so many cop cars,” some destroyed and others on fire, and officers “limping because they were hit with God knows what.” Grievant and the officers proceeded to [REDACTED] & [REDACTED] [REDACTED] where some of the crowd began throwing Belgian blocks at them. Grievant did not see any staging area and he was unaware of who was commanding the scene. He did not receive any instructions from “all these bosses, 30, 40 yards behind us like huddled up.” When he saw other officers “literally getting beat up,” he moved his officers closer to assist. [REDACTED] [REDACTED]

[REDACTED] Commanding Officer of the Southwest Division described the scene to IAD,

“This was a riot. We hadn’t had a riot in the city since 1964. This was the second one in 6 months. This was a violent and chaotic night where a sergeant was almost killed. Residents, supervisors and officers were all afraid. I could see it in their eyes. Many of them have never experienced anything like this and probably never will. We had to barricade our own police facility at the 18th district because people were threatening to take over and overrun the district. This was a traumatic event that will take decades for the community as well as officers to heal from.”

It was during this unprecedented event that Grievant, admittedly scared and lacking any instruction from command staff, failed to act professionally when he used inappropriate language and encouraged his officers to throw bricks back at the crowd throwing bricks at them. (There is no evidence that any officer followed that suggestion.) In so doing, he engaged in conduct unbecoming as charged by the Department. The Commissioner certainly could have taken into consideration the extreme circumstances under which Grievant’s misconduct occurred, but [REDACTED] [REDACTED] [REDACTED] correctly noted that Grievant’s failure to de-

escalate contributed to an already horrific situation. Discipline on the high end of the penalty range for the charged offenses is consistent with just cause.

The Department terminated Grievant's employment based on his alleged violation of Section 1-§009-10 (lying or attempting to deceive during a departmental investigation). The charge is based on a series of questions in which the IAD investigator asked Grievant if he made the offensive statements and Grievant responded, "I don't remember saying that" or "Not that I recall." It is also based on Grievant responding, "I cannot say for sure that is me" when he was asked to identify himself on the video.

██████████ ██████████ ██████████ effectively concedes that Grievant was not lying or attempting to deceive when he did not remember or could not recall making statements that night. She testified, "...he doesn't recall anything from that night, and that's possible." Grievant's interview occurred approximately four months after that chaotic night. Without seeing the video, he could not be expected to remember or recall what he said in the middle of a riot as he and his officers were under attack. The parties introduced into evidence transcripts of all the interviews conducted as part of the ██████████ ██████████ investigation. At least 14 officers and several command staff were interviewed. Even a cursory review of those interviews reveals that almost every officer, including those holding positions as high in command as Inspector, numerous times over responded with "I don't know," "I can't recall," or "I can't remember." Those responses were not characterized as lying or attempting to deceive because the Department recognized that the officers and commanders truly did not remember or recall specific details occurring on a chaotic night. Likewise, Grievant did not lie or attempt to deceive when he did not remember or recall the words he said that night.

The Department took greater issue with Grievant's reluctance to positively identify himself from the video. As [REDACTED] [REDACTED] [REDACTED] explained, "...it's very difficult not to identify yourself." But she equivocated on whether Grievant was lying or attempting to deceive. She testified, "So he lied, *or however you want to frame it*, or he tried to deceive, but he didn't own it." (*emphasis added*) From her testimony, it is clear that Grievant's lack of accountability, i.e., his failure to "own it" or take responsibility, was the main factor leading to his discharge. [REDACTED] [REDACTED] [REDACTED] characterized Grievant as follows,

"[c]learly not in control, not in control at all, and then not taking responsibility. Even if it was a situation where he may have lost his cool, he came in and he just would not cooperate with the investigation and not identify his own self on the video, and the discipline for that is up to dismissal."

Failing to cooperate in the investigation and failing to take accountability for one's actions are not the same as lying or attempting to deceive. In his second to last question of the interview, [REDACTED] [REDACTED] asked Grievant if it was him on the body worn camera footage. Grievant responded, "I cannot say for sure that is me." [REDACTED] [REDACTED] did not ask any follow-up questions or press Grievant as to why he could not recognize himself. [REDACTED] [REDACTED] watched the same video and continued to insist that it was [REDACTED] [REDACTED]. On the other hand, [REDACTED] [REDACTED] learned Grievant was the officer in the video by showing it to other officers and supervisors who readily recognized Grievant. At hearing, Grievant offered that he viewed the video on a small screen and maintained that he was not positive it was him. Seeing the video on a big screen at hearing, he promptly identified himself.

Grievant likely had less uncertainty about his identity than he was willing to admit in his first and only response to [REDACTED] [REDACTED] question. But the answer speaks more to his unwillingness to accept responsibility for his actions than it does to any attempt to lie or deceive. As the FOP

points out, Grievant had no incentive to lie as a charge of lying can lead to discharge while a charge of conduct unbecoming for inappropriate language carries a much lesser penalty.

Even if the evidence supported the City's characterization of Grievant's response as lying or attempting to deceive, the mandated penalty in the disciplinary matrix ranges from 10 days to dismissal. Grievant's hedging ("I cannot say for sure that is me") is less than a full denial. It came in response to one question in the interview without any pressing follow-up to what the investigator and Department thought was an implausible denial. Grievant is a 19-year veteran of the force with no prior disciplinary record. If the City sustained its burden of proof on the lying/attempting to deceive charge, given the context of the alleged attempt to deceive and Grievant's many years of good service, only a penalty less than discharge would comport with just cause.

The Department elevated Grievant's discipline to termination because his conduct was unacceptable and unprofessional and he failed to take responsibility for it. The Department did not prove, however, that Grievant lied or attempted to deceive during the IAD interview. Only the lying/attempting to deceive charge carries a possible penalty of dismissal. Grievant's failure to take accountability for his actions should certainly be considered when determining the severity of the disciplinary penalty for the conduct unbecoming charges related to inappropriate language and communications. That is, Grievant's failure to accept responsibility and his uncooperativeness during the investigation lends support for discipline on the high range of the penalties mandated in the disciplinary matrix for the conduct unbecoming offenses.

For these reasons, I find that the City had just cause to discipline, but not to discharge, Sgt. David Chisholm.

Award and Remedy

The grievance is sustained in part and denied in part. The City has just cause to discipline, but not discharge, Sgt. David Chisholm. To remedy the just cause violation, the Department is ordered to reduce Grievant's discharge to a 20-day suspension (5 days for the 1-§017-10 violation and 15 days for the 1-§023-10 violation) and to remove the 1-§009-10 charge from Grievant's disciplinary record. The City is further directed to reinstate Grievant to his former position without loss of seniority as soon as practicable after issuance of this Award and to make him whole for any losses incurred as a result of his discharge from the date of his discharge to the date of his reinstatement, less the 20-day suspension and any interim earnings.

The Arbitrator shall retain jurisdiction of this case for the sole purpose of resolving any dispute regarding implementation of the remedy.

Walt De Treux

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