

AMERICAN ARBITRATION ASSOCIATION

In the Matter of Arbitration between

Fraternal Order of Police, Lodge # 5 : AAA Case Number: 01-20-0000-6900
and :
City of Philadelphia : Grievance: Sgt. Joseph Stevenson
Discharge

Opinion and Award

Hearing Date: January 23, 2023
Briefs Received: March 1 and March 22, 2023
Arbitrator: Thomas P. Leonard, Esquire

Appearances:

FOP Lodge #5

Thomas M. Gribbin, Jr., Esquire
Willig, Williams & Davidson

City of Philadelphia

Benjamin L. Sheckman, Esquire
Cozen O'Connor

Procedural History

Pursuant to the terms of a Collective Bargaining Agreement (CBA) between the Fraternal Order of Police Lodge 5 (FOP) and the City of Philadelphia (City) and the Labor Arbitration Rules of the American Arbitration Association, the parties appointed the undersigned arbitrator to hear and decide the dispute described below. Upon due notice, an arbitration hearing was held on October January 23, 2023 in the Philadelphia offices of the American Arbitration Association.

At the arbitration hearing, the parties presented testimony, cross-examined witnesses and introduced documentary evidence. The parties made closing arguments on the record. Additionally, on March 1, 2023, the City submitted a post-hearing brief on evidentiary issues. On March 22, 2023, the FOP filed a reply brief.

Issues

Did the City have just cause to discharge the Grievant, Sergeant Joseph Stevenson, and if not, what shall be the remedy?

Facts

Sergeant Joseph Stevenson (Grievant) was stationed in the City's 7th District prior to his discharge. On or about [REDACTED], the City learned that Grievant had been arrested by the Lower Southampton Township Police Department (LSTPD) after LSTPD responded to a domestic violence call by Grievant's wife from their home at around 3:46 A.M. that morning. Grievant was charged with the following criminal offenses: (1) Strangulation – Applying

Pressure to Throat or Neck (a felony); (2) Simple Assault (a misdemeanor); and (3) Harassment – Subject Other to Physical Contact (summary offense).

The Grievant’s supervisor in the 7th District was notified of the charges. He notified the Philadelphia Police Department Internal Affairs Division (IAD), which assigned Sergeant Dayton Bennett to investigate. At this arbitration hearing [REDACTED] testified about his investigation.

As part of his investigation, [REDACTED] obtained the report of responding LSTPD Officer [REDACTED], as well as a statement by Mrs. Stevenson made at 5:00 A.M. on [REDACTED]. In the statement, [REDACTED] reported that, after returning home from a night of drinking, Grievant made threats and “then put both hands around my neck and squeezed while throwing my head against the door 3 times before letting go.” In his report, Officer [REDACTED] reported that, upon his arrival, Mrs. Stevenson “was crying and upset. She had red marks on the front of her neck.” [REDACTED] reported that LSTPD “took digital pictures of [REDACTED]’s injuries with the Corporal [sic] camera. BWC used.” In addition to reviewing the statements of [REDACTED] and [REDACTED], [REDACTED] testified that he drove to LSTPD and reviewed the body worn camera (BWC) images described in [REDACTED]’s report. [REDACTED] testified that such images showed the red marks around [REDACTED]’s neck – consistent with the observations and statements of [REDACTED] and [REDACTED]. [REDACTED] further testified that he asked LSTPD for a copy of the BWC recording but that LSTPD did not provide it because of the open criminal case against Grievant. The LSTPD later told [REDACTED] the recording no longer existed.

On January 17, 2019, [REDACTED] interviewed the Grievant. He provided the Grievant his Gniotek warnings and rights. The Grievant declined to provide a statement on the advice of counsel. [REDACTED] informed the Grievant that he would be suspended for 30 days with an intent to dismiss.

[REDACTED] delivered his report to IAD [REDACTED] who concluded that the matter was appropriately handled as a Commissioner's Direct Action instead of as a Police Board of Inquiry (PBI).

On January 31, 2020, based on [REDACTED]'s report, the Department issued the Grievant an intent to dismiss for two violations of the Disciplinary Code.

The first violation stated:

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. ns) The charge stated:

On Sunday, [REDACTED], approximately 3: 46 AM, Lower. Southampton Township Police responded to [REDACTED] in reference to a report of a domestic incident. Upon arrival, [REDACTED] observed redness around the neck of [REDACTED] your wife, who further reported a complaint of pain to the back of her head due to repeatedly being thrust against a wall while choked by you. [REDACTED] was transported to [REDACTED] where she was treated for her injuries and released.

The second violation stated:

CONDUCT UNBECOMING, SECTION 1-§ 001-10 (Unspecified).

Quoted the same facts as above with the addition of:

You were subsequently arrested by the Southampton Township Police Department for your actions during this domestic incident. The course of conduct you engaged in indicates that you have little or no regard for your Responsibility as a member of the

Philadelphia Police Department. Therefore, you will be dismissed after being placed on a 30-day suspension.

On January 21, 2020, the FOP filed the present grievance on behalf of Sgt. Stevenson alleging that the Department discharged him without just cause.

The criminal charges against the Grievant later proceeded to court. The official court docket shows that on December 7, 2021, the Bucks County Court of Common Pleas accepted the Grievant's plea of nolo contendere to two summary charges of disorderly conduct-unreasonable noise 18 § 5503 §§ A2. All fines were waived by the Court. (Union Exhibit 1). The LSTPD withdrew the other two more serious charges.

Discussion

The burden of proof in a discipline case is on the employer to show that it had just cause for the discipline. The FOP contends that the City has not met its burden of proving just cause to discharge the Grievant. In particular, the FOP contends that the City has not proven, by sufficient evidence, that the Grievant engaged in the conduct that was the basis for finding that he violated the Disciplinary Code.

The FOP's Position

The FOP argues that the evidence is insufficient because the City's case is based solely on hearsay evidence. Although the FOP acknowledges that strict evidentiary rules are not legally binding in labor arbitration hearings, relying exclusively on hearsay "is wholly unsupported in the arbitration literature." Bamberger's, 59 LA 879, 882 (Glushein 1972). Moreover, written

statements are also hearsay which arbitrators have consistently concluded are entitled to little, if any, weight.

Pennsylvania caselaw has defined hearsay as an “out-of-court statement offered to prove the truth of the matter asserted.” *Heddings v. Steele*, 514 Pa. 569, 526 A.2d 349 (1987).

Under Pennsylvania Rule of Evidence 801, hearsay means “a statement that the declarant does not make while testifying at the current trial or hearing; and a party offers in evidence to prove the truth of the matter asserted in the statement.” A “statement” means “a person’s oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.” Pa.R.E. 801(a), (c).

The FOP points out three flaws in the sufficiency of the City’s evidence. The City did not produce the in-person testimony of [REDACTED] nor did it compel her appearance by subpoena. The City did not produce the in-person testimony of any police officer from the Lower Southampton Township Police Department nor compel their appearance by subpoena. The City did not produce the body worn camera (BWC) video of the responding LSTPD officers from [REDACTED] representing that the video no longer existed.

Instead, the City produced and relied on a written statement made by [REDACTED] a written statement of LSTPD [REDACTED] and the testimony of Investigator [REDACTED] [REDACTED] regarding what he observed when he viewed the BWC video purporting to be from responding LSTPD officers from [REDACTED].

Arbitrators have consistently held that hearsay evidence alone is not enough to sustain an employer’s heavy burden of proving misconduct as part of the just cause calculus. *Kellogg Co.*, 138 LA 1595, 1600 (Douglas Bonney 2018). In large part this is so because hearsay evidence,

including unsworn written statements, cannot be subjected to the rigorous truth-finding tests of cross-examination.

██████████'s testimony and the related documentary evidence submitted by the City is plain hearsay.

The FOP addresses the City's arguments that hearsay exceptions under the Pennsylvania Rules of Evidence and the related case law allow the arbitrator to rely on its evidence. These exceptions bear solely on the admissibility at trial of evidence that would otherwise be properly excluded as hearsay. Also, the FOP points out that the heart of the issue here is not whether the hearsay should be admitted, but rather the weight that the arbitrator can properly accord to it. So, even though hearsay is generally admissible in labor arbitration, it cannot, standing alone, be received for the truth of the matter asserted, especially where it bears on the ultimate issue in the case, namely, here, whether the grievant physically assaulted his wife.

Thus, ██████████'s statements should not be accepted as proof that the grievant engaged in conduct deemed unbecoming under the Police Department's Disciplinary Code. Further, ██████████'s testimony regarding what he viewed in the BWC video is also insufficient to substantiate the grievant's guilt of the charged misconduct, because it is ██████████'s statement which provides context and meaning to that circumstantial evidence. Such evidence remains subject to alternative interpretations, only one of which supports the City's case.

In sum, the arbitrator must afford the City's offered evidence no weight. Such a finding is wholly supported by and consistent with the decisions in two recent arbitration decisions between the parties and submitted as persuasive authority by the FOP at the hearing: City of Philadelphia and FOP Lodge No. 5; AAA Case No. 01-17-0005-3521 (Discharge of Anthony

Abrams) (Reilly, 2018) and City of Philadelphia and FOP Lodge No. 5; AAA Case No. 01-20-0007-3522 (Discharge of Javier Montanez) (Reilly, 2021).

The City's Position

The City argues that ██████████'s testimony should be afforded significant weight in the determination of whether the City had just cause to discharge Grievant. The City cites a case where the arbitrator admitted testimony about a video. In Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia (Josey) (AAA No.01-16-0000-9296 (Peck 2016), then-Commissioner Ross testified that he made a decision not to promote the grievant based on his review of a cell phone video of an incident at the 2012 Puerto Rican Day Parade. The arbitrator found that "Ross reviewed the video . . . and recalled that it depicted Lt. Josey taking a swing in the direction of a woman," and that "Commissioner Ross noted that [the video] played a significant role in his determination to pass over Lt. Josey for promotion, noting '... my decision was made exclusively off of what I saw in the video and what I remember.'"

The Arbitrator should admit and give significant weight to ██████████'s testimony as to the red marks on ██████████'s neck. Despite cross-examining ██████████, the Union did not dispute the fact or substance of his observations, which align with ██████████'s and ██████████'s statements discussed below. For these reasons, ██████████'s unchallenged testimony is admissible, consistent with the other operative evidence offered by the City, and supports a finding that Grievant engaged in the misconduct for which the City discharged him.

Second, the City argues that ██████████'s Statements and ██████████'s statements in his report fit within exceptions to the rule against hearsay evidence. ██████████'s statements were "excited utterances," defined as a "statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused."

PA.R.E. 803(2). Excited utterances are admissible even when the declarant does not testify provided that, “at the time the statement is made, the nervous excitement continues to dominate while the reflective processes remain in abeyance. It is the spontaneity of . . . an excited utterance [that] is the source of reliability and the touchstone of admissibility.” *Commonwealth v. Gray*, 867 A.2d 560, 570-71 (Pa. Super. 2005). There is no temporal component, and a police officer’s testimony that the declarant was “upset” suffices to establish the requisite emotional state. See *Commonwealth v. Coker*, No. 665 EDA 2017 (Pa. Super. Mar. 22, 2018). Here, Mrs. Stevenson was “crying and upset” during her report that Grievant had strangled and assaulted her; additionally, there is no evidence that her emotional state changed before her 5:00 A.M. written statement. Thus, Mrs. Stevenson’s statements were excited utterances and admissible under this exception to the hearsay rule. PA.R.E. 803(2).

Third, these statements were also admissible “present sense impressions,” or “statement[s] describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.” Pa. R.E. 803(1). The Comment to Rule 803(1) explains, in pertinent part:

For [the present sense impression] exception to apply, declarant need not be excited or otherwise emotionally affected by the event or condition perceived. The trustworthiness of the statement arises from its timing. The requirement of contemporaneousness, or near contemporaneousness, reduces the chance of premeditated prevarication or loss of memory. Pa.R.E. 803(1).

Although courts have not precisely defined the term “immediately thereafter,” in *Estate of Dinnien v. Dinli Metal Indus. Co.*, 2006 Phila. Ct. Com. Pl. LEXIS 485 (2006), the court found that a declarant’s statements were present sense impressions despite the passage of an unspecified amount of time between the declarant’s observations and his statements at issue. In that products liability case involving a deceased motorist, the wife of the deceased declarant

testified at trial “that she went to the hospital right away once she was told . . . about the accident” and the declarant told her “that the grip came off the bike while he was riding it.” Id. at *29-30. The court did not describe the distance between the location of the declarant’s wife and the hospital at the time she was told about the accident; by the same token, the court did not specify the amount of time that passed in the interim. Nonetheless, the court found that “John’s statement to his wife immediately following the accident was properly considered a present sense impression and there was no error in allowing this testimony.” Id. at *32.

Similar to Dinnien, only a short amount of time passed between the 3:46 A.M. police call and the statements at issue in this case. [REDACTED] signed her statement at 5:00 A.M., and, according to [REDACTED]’s report, she had already made verbal statements to LSTPD upon their arrival to the Stevenson home. [REDACTED] made his report at 5:43 A.M. Both fall within the present sense impression exception. Importantly, [REDACTED]’s observations of the BWC images corroborate these statements and establish that [REDACTED] had red marks on her neck. This further supports the trustworthiness of these statements, which is the purpose for the present sense impression exception. See Comment to P.A.R.E. 803(1).

In sum, the arbitrator should admit and give weight to both Sgt. [REDACTED]’s testimony regarding the BWC recording and the statements of [REDACTED] and [REDACTED].

Analysis and Conclusion

Having considered the competing arguments of the parties, I must conclude that the City’s case for finding that the Grievant’s conduct violated the Disciplinary Code is not supported by competent evidence.

First, as the FOP has pointed out, the case is built on hearsay evidence. [REDACTED]'s testimony about the Grievant's conduct rests on the "out of court" statements in [REDACTED] [REDACTED]'s report and a body worn camera video, both of which were not subject to cross examination.

Second, the FOP has squarely addressed the City's argument that exceptions to the hearsay rules apply in this case. The exceptions are the "excited utterances" exception of Ms. [REDACTED] and "the present sense impressions" of [REDACTED]. These arguments are not persuasive since the statements that the City wants the exceptions to cover are themselves part of a hearsay document, [REDACTED]'s report. [REDACTED] was not present at this arbitration to testify to what he observed and to be cross-examined.

Third, the FOP has also squarely addressed the offer of the evidence of the marks on [REDACTED] [REDACTED]'s neck as seen in the BWC video as circumstantial evidence of the Grievant's misconduct. [REDACTED] testified that he viewed the BWC video and saw the marks on [REDACTED] [REDACTED]'s neck as part of the video. However, as the City has pointed out, the video from the BWC is itself hearsay. The BWC video was not offered in this arbitration hearing because the LSTPD no longer has it.

Without direct non-hearsay evidence of the facts of the night in question, the Grievant has been denied the opportunity to cross examine the witnesses who are the foundation of the City's charges, a fundamental right by which an accused is allowed to test the reliability of the offered evidence. Having only produced hearsay evidence, the City has not presented competent legally admissible evidence to prove that it decided that the Grievant engaged in misconduct that violated of the Disciplinary Code.

I must conclude that based on the competent evidence presented to this arbitrator, the City has not met its burden of proof that its decision to discharge the Grievant was for just cause. The City's proof rests entirely on hearsay statements. It is unfair to base a decision to discharge an employee on hearsay evidence. Accordingly, the City did not prove that it had just cause to discharge the Grievant for the misconduct alleged in the statement of charges.


Award

For the reasons stated above, the FOP's grievance is sustained. The City has not met its burden of establishing just cause for the discharge of Grievant, Sergeant Joseph Stevenson.

The City shall rescind its discharge of Grievant; expunge any and all records of the discharge from Grievant's personnel and discipline files; offer Grievant reinstatement to his former position in the 7th District and make Grievant whole for his lost wages, benefits and seniority resulting from his discharge.

The Arbitrator will retain jurisdiction over this matter to resolve any disputes over the implementation of the Award.

Harrisburg, Pennsylvania
April 24, 2023


Thomas P. Leonard, Esquire