

AMERICAN ARBITRATION ASSOCIATION

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| In the Matter of the Arbitration | : | AAA Case No. |
| | : | 01-17-0005-3380 |
| between | : | |
| | : | Opinion & Award |
| FRATERNAL ORDER OF POLICE, LODGE NO. 5, | : | |
| | : | Re: James Yeager - |
| “Union” | : | Discharge |
| | : | |
| - and - | : | Hearing: April 20, 2023 |
| | : | |
| CITY OF PHILADELPHIA, | : | |
| | : | |
| “City” | : | |
| -----X | : | |

APPEARANCES

For the Union

WILLIG, WILLIAMS & DAVIDSON
Thomas M. Gribbin, Jr., Esq.

For the City

Ahmad Zaffarese LLC
Katelyn L. Mays, Esq.

BEFORE: David J. Reilly, Esq., Arbitrator

BACKGROUND

The City discharged Police Officer James Yeager, effective August 31, 2017. It took this action upon finding that he had violated Section 1-§012-10 of the Police Department's Disciplinary Code, by using excessive force in arresting a suspect. (Joint Exhibits 1 & 3.)

The Union contends the City lacked just cause to discharge Yeager. It asks that he be reinstated to his former position with the Department and be made whole for all pay and benefits lost as a consequence of his discharge. It also requests that the City be directed to revise his personnel records to expunge all reference to his discharge to the extent consistent with governing law.

The basic facts of this case, including the areas of dispute, may be set forth succinctly.

Yeager's Employment History

At the time of his discharge, Yeager had been employed by the Department for four years. He testified that his annual evaluations had always been positive. Further, he confirmed having no prior discipline.

From 2015 – 2017, he was assigned to the 24th District. This District encompasses the Kensington neighborhood, an extremely high crime area of the City and a known center for illegal drug sales. In 2017, the City experienced a spike in fatal drug overdoses, which were predominantly opioid related, with a high percentage coming from Kensington. (Union Exhibit 1.)¹

In 2017, Yeager worked the “drop back” shift (i.e., 8:00 p.m. – 4:00 a.m.),

¹ In 2017, fatal drug overdoses in the City totaled 1,217, a 34% increase over 2016. (Union Exhibit 1.) A heat map of opioid-related overdose deaths in 2017, by location, showed Kensington at the epicenter. (Union Exhibit 2.)

assisting the officers assigned to last out (i.e., 12:00 a.m. – 8:00 a.m.) During that time, he was frequently assigned to bike patrol, and always partnered with [REDACTED]

Internal Affairs Division (“IAD”) Investigation

In testifying, [REDACTED] gieda, a member of the Department’s Internal Affairs Division (“IAD”), averred being assigned on July 10, 2017, to investigate a possible excessive use of force incident. The matter, he stated, stemmed from the actions of Yeager and three other officers in affecting the arrest of a suspect that night on drug charges. According to [REDACTED] the Department’s receipt of a video from a local television station depicting the officers’ conduct triggered the investigation. (City Exhibits 1 & 2.)²

[REDACTED] related beginning his work on this matter by visiting the location of the arrest, taking photographs and attempting to secure additional video recordings of the incident. In doing so, he reported obtaining a second cell phone video from a civilian witness. (City Exhibits 1 & 4.)

Next, he attempted to interview the suspect, who declined his request. Subsequent efforts to do so, he said, also proved unsuccessful.³

He recounted that his investigation continued with gathering additional materials (e.g., Yeager’ Use of Force Report) and conducting witness interviews, as well as interviewing twenty officers that had been at the location of the arrest. (City Exhibits 1

² A civilian witness to the incident recorded the video, using her cellphone. She subsequently uploaded the video to her social media account. The local television station apparently obtained the video from there and then transmitted it to the Department. (City Exhibit 1 at 7.)

³ The suspect ultimately consented to an interview by the District Attorney’s office in December 2017. (City Exhibit 1.)

& 3.)

From his review of the first video received, ██████ confirmed that the scene depicted comported with his knowledge of the area. Recounting, in order of occurrence, the relevant portions of the video, he noted:

(1) Yeager, his partner ██████ and ██████ ██████ ██████ attempt to handcuff the suspect, ultimately, after a struggle, securing his hands in front of his body;

(2) Yeager places his right hand on the suspect's face, and then lifts him up by his arms, and, in turn twice forces him back toward the ground;⁴

(3) A crowd of citizens gathers near the officers, with persons yelling and throwing items at them, resulting in one officer being struck by a computer monitor; Yeager and other officers give chase, leaving the suspect with ██████ ██████, who had joined the scene;

(4) ██████ attempts to place suspect into rear of a patrol car, but he appears to push off the vehicle and then falls to the ground, after which he attempts to crawl under the vehicle;

(5) Yeager returns to the area, where he can be seen placing his baton underneath the suspect's midsection and then lifting and swinging the suspect to his right, resulting in the suspect striking the side of a pool that had been erected in the street; and

(6) ██████ places the suspect into the rear of the patrol car.

(City Exhibits 1 & 2.)⁵

██████ related that following the arrest, the suspect was taken to an area hospital, where he received treatment for facial abrasions, a cervical spine fracture, rib fractures, and a lacerated spleen. (City Exhibit 1.) As a result, he reported securing a

⁴ On cross-examination, ██████ acknowledged that it appeared the suspect had concealed narcotics in his mouth and Yeager was attempting to extract them. He also averred that the suspect grabbed Yeager's wrist, as he engaged in this effort, which was then followed by Yeager pulling away, raising his arms and thrusting down twice, before suspect released his grip.

⁵ The actions described occurred over the course of 1 minute, 29 seconds. (City Exhibits 1 & 2.) ██████ reported that when visiting the scene, the pool was still present and was dented consistent with what he had observed on the video. ██████ testified that the second video depicted the same actions by Yeager and the other officers. (City Exhibit 4.)

consultation report from the City's Chief Medical Examiner, [REDACTED], regarding the possible causes of those injuries. (City Exhibit 5.)

[REDACTED] opined: (1) the abrasions to the suspects face likely resulted from his scraping the pavement while struggling against the officers; (2) the cervical fracture resulted from the suspect's neck/back impacting with a solid object or surface and could have occurred from Yeager forcing him back to the ground twice, but not from striking the pool; (3) the rib fractures were healing and did not result from this incident; and (4) the lacerated spleen was consistent with "a blow where the force is concentrated in a small area, such as by a fist or other object, as opposed to contact with a surface such as the ground where the force is more spread out." (City Exhibit 5.)

Upon completing his investigation, [REDACTED] reported sustaining two violations of the Department's Use of Force Policy by Yeager. These consisted of: (1) his lifting and slamming the suspect two times to the ground; and (2) lifting the suspect off his feet and swinging him into the pool. In both instances, he determined the suspect was not resisting.

On cross-examination, however, he acknowledged that a failure to comply with a directive to enter the patrol car could possibly constitute resisting. The same characterization, he said, could be given to the suspect's efforts to stash drugs under the patrol car.⁶ The act of resisting, he said, generally involves evading a police officer's efforts to control a suspect during an arrest.

In connection with his investigation, he also reported providing a submission to the District Attorney's Office for its consideration in deciding whether to bring criminal

⁶ [REDACTED] confirmed that packets of heroin were subsequently recovered from under the patrol car.

charges against Yeager. The District Attorney initially charged Yeager with felony assault, but subsequently reduced the charges to a summary offense.⁷

Yeager's Testimony Regarding July 10, 2017

In testifying regarding the events of July 10, 2017, Yeager related being on bike patrol in the area of Hope Park, along with [REDACTED].

While there, he observed a hand-to-hand drug transaction by a male, Hispanic suspect. He recalled that upon approaching, the suspect placed narcotic packets in his mouth and then fled.

According to Yeager, he and his fellow officers pursued the suspect, with [REDACTED] and [REDACTED] being the first to reach him. The suspect, he said, resisted their efforts to restrain and arrest him, ultimately requiring them to handcuff him in front of his body. Doing so, he said, was not the best alternative because it left the suspect free to grab them or reach for a weapon.

At this point, he reported attempting to extract the illegal drugs from the suspect's mouth. When he placed his hand on the suspect's chin, he recalled the suspect grabbing his wrists. In effort to get free of the suspect's grasp, he described pulling his arms straight up and thrusting down, repeating this movement a second time before the suspect let go of his wrists and possibly made contact with the ground. He averred having no intent to harm the suspect by taking these actions.

Following this interaction, he recalled, a crowd had begun to gather around the officers, with persons yelling and throwing items at the officers. When a computer monitor struck [REDACTED] he reported chasing the person who threw it, but was unable to

⁷ Yeager testified to pleading guilty to the reduced charge, which was neither a felony nor a misdemeanor. The plea to this charge, he said, in no way restricts or impedes his ability to work as a police officer in the City of Philadelphia or the Commonwealth of Pennsylvania.

apprehend him.

Upon returning to the location where the suspect had been stopped, he observed [REDACTED] [REDACTED] attempting to place him into a patrol car that had arrived. As [REDACTED] did so, he saw the suspect push off the vehicle, go to his knees and then attempt to crawl under the vehicle in an apparent attempt to stash the illegal drugs.⁸

Considering these actions to be resisting, he intervened by placing his asp under the suspect's arms and lifted him off the ground. In order to not place the suspect in a position where he could possibly grab [REDACTED] he chose not to lift him straight up, but swung him to his right. This movement resulted in the suspect hitting the pool located behind them, which was not his intention.⁹

According to Yeager, he then returned the suspect to a standing position and he and [REDACTED] attempted to place him into the rear of the patrol car. Once they had done so, he recalled, the suspect attempted to escape through the opposite door.

Termination of Yeager's Employment

On August 21, 2017, the Department issued Yeager a Notice of Intention to Dismiss, charging him with violating Department Disciplinary Code Section 1-§012-10, Conduct Unbecoming (Unauthorized and/or excessive use of force in your official capacity) based upon his actions on July 10, 2017. (Joint Exhibit 2.) In particular, the Notice cited Yeager's actions in: (1) slamming the suspect's upper body to the ground while handcuffed; and (2) using his asp to lift the suspect off his feet and then swinging him, which caused the suspect to strike the side of a pool. (Joint Exhibit 2.) These actions, the Notice stated, violated departmental policy in that they involved using more

⁸ Subsequently, 24 packets of heroin mixed with fentanyl were retrieved from under the patrol car.

⁹ On cross-examination, Yeager acknowledged that using his asp in this manner represented a control hold, which constitutes a use of force.

force than was necessary to overcome the suspect's resistance to being arrested. (Joint Exhibit 2.)

Subsequently, by a Commissioner's Direct Action approved by then [REDACTED] [REDACTED] [REDACTED] the Department discharged Yeager, effective August 31, 2017. (Joint Exhibit 3.)

In testifying regarding this action, [REDACTED], who has responsibility for the Department's Office of Responsibility, including IAD, related that under Department policy, in effecting an arrest, officers are permitted to use only such level of force as is necessary to overcome the resistance being exerted by the subject.¹⁰ The force used by Yeager on July 10, 2017, she said, was clearly excessive. In reaching this conclusion, she explained that while the suspect was not fully compliant, Yeager employed substantially more force than was warranted, taking into consideration that the suspect was handcuffed at the time.

From her review of the video, she labeled Yeager's actions as "egregious." This description, she said, reflected that the suspect was not resisting and unable to protect himself from injury in response to Yeager's actions. She noted that with the other officers present, Yeager had safer alternatives to the use of such force.

Procedural History

In response to Yeager's discharge, the Union filed the instant grievance contesting that action. (Joint Exhibit 4.) When the parties were unable to resolve the matter at the lower stages of the grievance procedure, the Union demanded arbitration. (Joint Exhibit 4.) Pursuant to their contractual procedures, the parties selected me to hear and decide

¹⁰ The Department, she confirmed, trains all police officers on the permissible use of force upon hire while attending the Academy and provides periodic refresher training.

the case. (Joint Exhibit 1.)

I held a hearing on April 20, 2023, at the offices of American Arbitration Association in Philadelphia. At the hearing, the parties each had full opportunity to present evidence and argument in support of their respective positions. They did so. Upon the conclusion of the hearing, I declared the record closed as of that date.

DISCUSSION AND FINDINGS

The Issue:

The parties have stipulated that the issues to be decided are as follows:

1. Did the City have just cause to discharge the grievant, Police Officer James Yeager, effective August 31, 2017?
2. If not, what shall be the remedy?

Positions of the Parties

At the conclusion of the April 20, 2023 hearing, both parties made closing arguments. Their respective positions are summarized below.

The City's Position

The City contends that its discharge of Yeager was for just cause. It maintains that the evidence conclusively demonstrates his guilt on the Section 1-§012-10 charge of excessive use of force.

The video evidence, it submits, speaks for itself. The conducted depicted there, it maintains, shows Yeager using excessive force in arresting and attempting to restrain the suspect on July 10, 2017. In particular, it highlights, Yeager can be seen on the video twice slamming the suspect against the ground. A minute later, the video depicts him lifting the suspect off his feet and striking him against the pool.

These actions by Yeager, it argues, fell well below the Department's reasonable expectations for its officers. In fact, it points out, they led the District Attorney to bring criminal charges against him.

In sum, it concludes, Yeager's conduct undercut the public's trust in the Department and his fellow officers, and thereby, demonstrated that his continued employment by the Department poses an undue risk. As such, the City had just cause to discharge him.

Accordingly, for all these reasons, it asks that the discharge be sustained and the grievance be denied.

The Union's Position

The Union, on the other hand, maintains that the City lacked just cause to discharge Yeager based on the events of July 10, 2017. It submits that the City has failed to meet its burden of demonstrating that Yeager committed the charged offense; namely the unauthorized and/or excessive use of force against the suspect.¹¹

In establishing just cause, it states, the City's required showing is two-fold. Namely, the evidence presented must substantiate: (1) Yeager committed the offending conduct; and (2) the level of discipline imposed must be justified, giving consideration to the relevant circumstances.

As to the former, it states, the City must prove Yeager acted contrary to the governing policy. However, it stresses, the record does not include the Department's use of force policy. In any event, it maintains, the evidence does not show a violation of that

¹¹ It submits that in view of the nature and gravity of the alleged misconduct here, the City should be held to the clear and convincing evidence standard of proof. *Champion Spark Plug Co.*, 93 L.A. 1277 (Dobry 1989).

policy, per the standards articulated by witness testimony.

The City's case, it points out, consists of hearsay and circumstantial evidence. The record does not include testimony from any City witnesses with first-hand knowledge of the relevant events. Instead, the City relies solely on the IAD report and cell phone videos.

The only first-hand witness testimony, it notes, came from Yeager and was exculpatory. As to the first instance of excessive force, he confirmed that his thrusting the suspect to the ground represented an effort to free himself from the suspect's grasp with no intention of causing physical harm. In reference to the second, he averred lifting the suspect off the ground to prevent his stashing drugs and then swinging him away from the patrol car to safeguard [REDACTED], who was looking away.

Turning to the issue of penalty, it avers that here, too, the City failed to meet its burden. It reasons that even if the City had established a use of excessive force by Yeager, discharge was a disproportionate response. In support, it cites: (1) Yeager's absence of any prior discipline; and (2) the established penalty range for a first offense of an excessive use of force is reprimand to dismissal.

Accordingly, for these reasons, the Union submits that its grievance should be granted, and the requested relief be awarded.

Opinion

There can be no question that the City's Police Department has a right and a duty to ensure that its officers adhere to certain standards of conduct when acting in their official capacity. The appropriate use of force is undoubtedly one area in which the enforcement of such standards is of paramount importance. The Department's obligation

to safeguard the public, while also shielding itself from civil claims, demands as much. To this end, the Department has the indisputable right to discipline an officer who engages in the use of unauthorized and/or excessive force.

The City, of course, carries the burden of proof here. It must demonstrate by a preponderance of the credible evidence that Yeager committed the charged offense. It must also establish that the level of discipline imposed is appropriate.

The Union, on the other hand, has no corresponding burden. It need not disprove the charges against Yeager. Indeed, he is entitled to the presumption of innocence.

After a careful review of the record and thorough consideration of the parties' respective arguments, I am convinced that the City has not met its burden.¹² My reasons for this conclusion follow.

The City's proof of Yeager's misconduct rests heavily, if not entirely, on the two videos presented. City witnesses, [REDACTED] and [REDACTED], did not possess any first-hand knowledge of the events of July 10, 2017. Instead, their stated conclusions regarding Yeager's purported use of excessive force come from their review of the two videos.

When viewed at normal speed and without any other context, the videos do appear to depict two instances in which Yeager used more force than was necessary in response to the resistance of a suspect who had been handcuffed.¹³ The record, however, does contain more. Namely, there is Yeager's testimony explaining his actions.

¹² As detailed above, the Union argues for the application of heightened standard of proof here; namely, the clear and convincing evidence standard. I find that it is unnecessary to resolve this issue, as I conclude that on the record established, the City has failed to demonstrate Yeager's guilt by the lesser preponderance of the relevant evidence standard.

¹³ The quality of the second video is far inferior to the first in depicting the second instance in which Yeager is alleged to have used excessive force. The angle and distance from which this portion of the video was recorded renders it difficult to discern the exact actions in question.

In watching the videos frame-by-frame, while giving consideration to Yeager's account, I find that the conclusions drawn by the Department cannot be sustained. Simply put, the videos do not depict that Yeager's actions violated Department standards.

The two acts of excessive use force with which Yeager stands accused represent part of a continuum of events by which he, together with his fellow officers, sought to effect the suspect's arrest, prevent his concealment of evidence and ultimately place him into a patrol car for transport. However, for purposes of determining whether he breached Department standards, each instance must be analyzed separately, applying the standard of whether he exceeded the force reasonably necessary to overcome the suspect's resistance or an immediate threat of harm.

Turning first to Yeager's actions in twice thrusting the suspect to the ground, I take note of his testimony, stating that these movements represented his reaction to the suspect grabbing his wrists, as he attempted to extract the drugs the suspect had secreted in his mouth. In weighing his account in this regard, I do not accept it at face value. Instead, as must be done, I have tested its veracity.

In doing so, I take note that his testimony, in this respect, was clear and consistent. He did not waiver. Moreover, the videos corroborate his account. When reviewed in slow motion, the suspect can be seen on both videos clutching Yeager's wrists immediately before Yeager pulls his arms up and then twice thrusts down. As such, I am satisfied that Yeager's account of these actions should be credited.

On this basis, I am persuaded that Yeager's movements in this regard, while, no doubt, a use of force, did not represent an intentional act to cause harm to the suspect. Rather, I find that he acted to free himself from the suspect's grip. More importantly,

when judged in view of the totality of the circumstances, I am compelled to conclude that his split-second response in this instance constituted an objectively reasonable effort to overcome the suspect's resistance and, as such, did not represent an excessive use of force.

Moving on to the second alleged act of excessive force, I again find that the videos corroborate Yeager's explanation of his conduct. Further, here too, he was unequivocal in recounting his actions. His testimony, in this regard, withstood vigorous cross-examination without alteration. In sum, it had the ring of truth.

As such, I am convinced: (1) the suspect was not compliant, as shown by his efforts to crawl under the patrol car in apparent effort to stash the illegal drugs in his possession;¹⁴ (2) Yeager, by using his asp to lift the suspect, acted to overcome this resistance;¹⁵ and (3) in moving the suspect to his right and away from the patrol car, as opposed to raising him straight up, Yeager endeavored to safeguard [REDACTED], who, at that moment, had his back to the suspect and was at risk of being grabbed.

If Yeager's actions had stopped here, I suspect there would not have been a second allegation of his using excessive force against the suspect. However, such was not the case. Instead, as the first video shows, in swinging the suspect away from [REDACTED] and the patrol car, Yeager caused the suspect's body to strike the pool, which was situated behind them.¹⁶

The question then is whether the culmination of Yeager's actions, which involved

¹⁴ It stands undisputed that packets of heroin were recovered from underneath the patrol car. (City Exhibit 1.)

¹⁵ On cross-examination, [REDACTED] acknowledged that the suspect's non-compliance in attempting to stash drugs under the patrol car could be deemed resistance warranting the use of force to prevent him from doing so.

¹⁶ See note 13, *supra*.

the suspect hitting the pool, causes his conduct to rise to an excessive use of force. I conclude that it does not.

In making this determination, I have weighed Yeager's testimony, while carefully examining both videos frame-by-frame. From this analysis, two things stand out. First, as Yeager lifts and begins to rotate the suspect away from the patrol car, the pool is behind him; it is not in his line of sight. Second, I see nothing in the video that contradicts or conflicts with Yeager's claim that in swinging the suspect away from the patrol car, he acted solely to safeguard Foley; he did not intend for the suspect to strike the pool or any other object.

Therefore, judging Yeager's actions, with consideration to the totality of the circumstances, I cannot find that the City has met its burden. Simply put, on the record here, I cannot conclude that Yeager's conduct violated Department standards, as opposed to representing an objectively reasonable effort to overcome the suspect's resistance in seeking to crawl under the patrol car to stash illegal drugs, while safeguarding his fellow officer.

In sum, as to both charged acts, the City has failed to substantiate that on July 10, 2017, Yeager engaged in an excessive use of force in interacting with the suspect.¹⁷

Therefore, it follows that it lacked just cause to discharge him.

Accordingly, for all these reasons, the Union's grievance is granted. In regard to

¹⁷ In reaching this result, two final comments are in order. First, the injuries that the suspect sustained during his arrest on July 10, 2017, are indeed regrettable. (City Exhibit 5.) However, even assuming the injuries to his spine and spleen stemmed from Yeager's actions, it does not cause me to reach a different conclusion as to the charged misconduct. Stated otherwise, based on my review of the totality of the circumstances, my conclusion remains that the City has not substantiated his actions constituted an excessive use of force. Second, I am mindful of the challenges the City faced here in presenting its case, including the apparent unavailability or unwillingness of the suspect and other witnesses with first-hand knowledge to testify to the events of July 10, 2017. However, neither those circumstances nor the gravity of the charges brought against Yeager can substitute for the required evidence of his guilt or justify a lowering of the required standard of proof.

remedy, I direct the City to promptly reinstate Yeager to his former position within the Department without loss of seniority. In addition, I instruct the Department to revise his personnel record to delete all references to his discharge to the maximum extent permitted under the governing law.

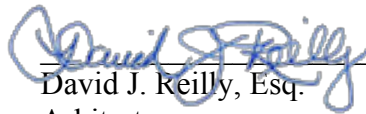
As to the matter of make whole relief, the City is directed to make payment to Yeager for all wages and benefits lost, including overtime, as a consequence of his discharge, through the date of his reinstatement, but excluding the period during which the felony charges filed in connection with his conduct on July 10, 2017 were pending and any subsequent period when he was not available for duty relative to the disposition of those charges.¹⁸ In declining to award Yeager back pay for this period, I am persuaded by the City's assertion that while subject to felony charges, Yeager could not function as a police officer.

¹⁸ The record does not include evidence of Yeager's actual damages. As such, the parties will need to meet and confer to determine the amount due him or return to me for a ruling in the event they are unable to do so. In addressing the matter of lost overtime, I note that the make whole award requires proof that is more than speculative. Instead, it necessitates showing to a reasonable degree of certainty that but for Yeager's discharge, overtime would have been offered to him and he would have worked such overtime.

AWARD

1. The grievance is granted.
2. The City did not have just cause to discharge James Yeager, effective August 31, 2017.
3. The City will promptly reinstate James Yeager to his former position with the Department without loss of seniority, and revise his personnel records, to the maximum extent permitted under governing law, to expunge all references to his August 31, 2017 discharge. In addition, the City will make him whole for all wages and benefits lost as a consequence of his discharge, including overtime, through the date of his reinstatement, but excluding the period during which the felony charges filed in connection with his conduct on July 10, 2017 were pending and any subsequent period when he was not available for duty due to the disposition of those charges. Such make whole relief will also be reduced by all outside wages and other earnings received by him as to the back pay period. I will retain jurisdiction of this matter to resolve any dispute as to the monies to be paid to James Yeager based on this award, including the issue of whether he satisfied his obligation to mitigate his damages.

May 22, 2023

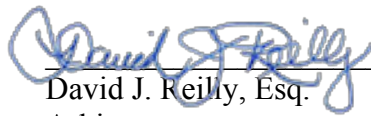


 David J. Reilly, Esq.
 Arbitrator

STATE OF NEW YORK)
)
 COUNTY OF NEW YORK) ss.:

I, DAVID J. REILLY, ESQ., do hereby affirm upon my oath as Arbitrator that I am the individual described herein and who executed this instrument, which is my Award.

May 22, 2023



 David J. Reilly, Esq.
 Arbitrator