IN THE MATTER OF THE GRIEVANCE ARBITRATION BETWEEN

International Association of Firefighters Local 22	:	
Union	:	
and	:	
	:	AAA Case No. 01-22-0002-0848
City of Philadelphia	:	Grievance: 2022-08 - Cynthia Bell
Employer	:	Discharge
	:	
	:	DECISION AND AWARD

Before:	John T. Marchetto, Esq. – Arbitrator
Hearing Date:	March 20, 2023
Location:	Philadelphia, PA
Record Closed:	March 20, 2023
Date of Award:	May 18, 2023

APPEARANCES

For the Union:	Stephen J. Holroyd, Esq. Holroyd and Gelman, PC Philadelphia, PA
For the Employer:	Ellen Berkowitz, Esq., Senior Attorney Nicole S. Morris, Esq., Chief Deputy City Solicitor City of Philadelphia Law Dept. Philadelphia PA

Introduction:

This is a grievance arbitration between International Association of Firefighters Local 22 ("Union") and City of Philadelphia ("City" or "Employer"). The Parties are signatories to a Collective Bargaining Agreement, which provides that involuntary discharge of employees must be for just cause. The arbitration hearing was held on March 20, 2023, at the Philadelphia Office of the American Arbitration Association. The Parties agreed the matter was properly before the Arbitrator and there were no substantive or procedural jurisdictional issues.[1] Both Parties had full opportunity to submit evidence and examine witnesses. The Parties agreed to summation by oral argument and the record was closed on March 20, 2023, pending receipt of the official transcript of the proceedings, which was delivered on April 24, 2023.

Statement of the Issue:

Did the City have just cause to discharge the Grievant, Cynthia Bell, and if not, what shall the remedy be?

Relevant Disciplinary Policies and Regulations:

Fire Department Disciplinary Policy

Section 4.4.1 Conduct Unbecoming
Section 4.4.4 Neglect of Duty
Section 4.4.8 Unspecified
(Joint Ex. – 5)

City of Philadelphia Workplace Violence Policy
(Joint Ex. – 6)

Code of Ethics and EMT Oath
Joint Ex. – 7)

[1] Although a collective bargaining agreement was not submitted as an exhibit, both parties stipulated that the collective bargaining agreement does contain a "just cause" provision for discipline, as well as conferring arbitral jurisdiction.

Background:

The facts of this case are generally undisputed. The Grievant, Cynthia Bell, was employed by the City of Philadelphia Fire Department as a Fire Service Paramedic. In the late night of [redacted], the unit she was assigned to received a call from the University of Pennsylvania Police Department regarding an intoxicated individual, hereinafter "Patient". The Patient was then transported by the Grievant and her partner to the Hospital of the University of Pennsylvania ("HUP") for evaluation and/or treatment.

They arrived at HUP at approximately 00:11 hours on [redacted]. The Patient was seated in a wheelchair in the entrance area of the HUP emergency room. The Patient was being attended to by the HUP nursing staff after being handed off by the Grievant as is the normal process for additional treatment. Part of the hand-off process is to have the Patient sign an electronic form on a tablet. During this process the Patient called the Grievant a derogatory term in Spanish, which translates to "bitch" in English. The Patient then refused to sign the form and called the Grievant the same term a second time. The Grievant responded by striking the Patient in the left arm with the palm side of a closed hand.

Thereafter, the City Fire Department command staff was notified of this incident via incident reports filed by the Patient through the U of P Police Department, as well as HUP personnel. (City Ex. 1). Subsequently, the Fire Department opened an investigation, which included interviewing witnesses, including the Grievant. All the interviews were captured on audiotape. The investigation included review of videotape of the incident recorded by HUP. All audio and video recordings were submitted for the evidentiary record without objection. (City Ex. 2).

The Grievant admitted to striking the Patient at the outset of the investigatory process. After review of the investigatory materials by the 1st Deputy Commissioner, the Grievant was suspended for 30 days on April 5, 2022, with the Intent to Dismiss and thereafter discharged effective May 4, 2022. The Grievance challenging the discharge followed.

Summary of the Position of the Parties:

City of Philadelphia:

The City of Philadelphia Fire Department contends that it has a zero-tolerance policy for violence in the workplace. In addition to the City's general Workplace Violence Policy, the Fire Department has promulgated a Departmental Disciplinary Policy. The City asserts that striking a patient is a terminable offense in the first instance. The only possible mitigating factor, which is not present here, is if the employee is acting in self-defense. All employees of the Fire Department are made aware of these policies during their training at the fire academy and through dissemination of these policies in writing to each employee. Thus, the City maintains that it has satisfied its burden of just cause and the Grievance should be denied.

IAFF Local 22:

The Union frames this matter as a "mercy" case. That is, it offers no justification for the conduct of the Grievant, but it asserts that termination of employment is too severe a punishment when viewed in the totality of circumstances. It cites the actual language of the Workplace Violence Policy and Disciplinary Policy that allows for lesser discipline depending on the severity of the conduct. The Union posits that the closed hand strike by the Grievant as it appears on videotape shows that it was not a punch, but rather a light blow to the arm of the patient. Further, the Union cites other cases where an employee of the Fire Department struck another person and

was not terminated. Therefore, the Grievance should be sustained by finding that just cause does not exist for discharge, but acknowledges that a lesser discipline may be appropriate.

Discussion and Analysis:

The Seven Factors in Just Cause as annunciated by Arbitrator Carroll Daugherty has been adopted in Pennsylvania in discipline/discharge cases. In *American Fed'n of State, County & Municipal Employees, District Council 88 v. City of Reading*, 130 Pa.Cmwlth. 575, 568 A.2d 1352 (1990), the Court set forth these seven-factors to be considered in determining the existence of "just cause" for discipline[2]: Where any one of the above factors is not satisfied, just cause for discipline does not exist. Id." citing *International Broth. of Fireman and Oilers*, 688 A.2d 269, 271 (Pa.Cmwlth. 1997).

However, there has been academic push back by many arbitrators in utilizing such a bright line yes/no test.[3] Determining whether a given factor is satisfied requires an analysis of the importance for each factor in light of the totality of the circumstances. Therefore, some factors may be given more weight than others in the analysis and final determination.

It is without question that the City's disciplinary and workplace violence policies are reasonable and promulgated for safe and efficient operation of the Fire Department. There is

[2] (1) Did the employer give the employee forewarning of the possible disciplinary consequences of his or her conduct?; (2) Was the employer's rule or order reasonably related to the orderly, efficient and safe operation of its business and the performance that the employer might properly expect of the employee?; (3) Did the employer make an effort to determine whether the employee in fact violated its rule or order?; (4) Was the employer's investigation conducted fairly and objectively?; (5) Did the employer obtain substantial evidence of the employee's violation?; (6) Has the employer applied its rules and penalties even-handedly to all employees?; and (7) Was the degree of imposed discipline reasonably related to the seriousness of the offense and the employee's work record?

[3] See Dunsford, Arbitral Discretion: The tests of just cause, NAA 1989. https://naarb.org/naarb_proceedings/arbitral-discretion-the-tests-of-just-cause/

also no question that the unauthorized physical striking of a patient by a Fire Department employee violates the general code of conduct.

After this incident was brought to the attention of the Fire Department it conducted an investigation.[4] Upon review of the videotape, the Department was tasked with determining if there was anything to mitigate the Grievant's conduct. It determined that being called a derogatory name does not in any way sanction a physical response. Likewise, the Grievant admitted the same.

The Department charges that Grievant Cynthia Bell violated three provisions of its disciplinary policy; Section 4.4.1 Conduct Unbecoming (1:00); Section 4.4.4. Neglect of Duty (4:01); Section 4.4.8. Unspecified (8:00). The Department is bound to follow its written policies.

The Department's Disciplinary Policy is a comprehensive document providing for various punishments associated with specific charges as set forth therein. The Policy recognizes the concept of progressive discipline as it outlines potential increases in punishment based on the both the level of offense and whether the offense was a first, second or third infraction.

As related to the instant matter, Section 4.4.1 CONDUCT UNBECOMING (1:00) appears to be a catch-all as it states:

Section	Charge	1st Offense	2nd Offense	3rd Offense	Reckoning Period
1:00	Not conducting oneself in the rules of good behavior observed by law-abiding and self-respecting citizens in or out of uniform.	*Member will be held accountable for other specified charges			2 years

Similarly, Section 4.4.4. NEGLECT OF DUTY (4:01) subscribes to the same scheme.

[4] There is no information in the record that the Department interviewed the Patient who filed the complaint. The information contained in the Incident Reports relating to matters that occurred outside of what was recorded on videotape is uncorroborated double hearsay. The discipline was leveled only for the physical strike that was captured on videotape.

Section	Charge	1st Offense	2nd Offense	3rd Offense	Reckoning Period
4:01	Failure to uphold the Office, Fire Department	*Associated with other specified charges			Duration of Employment

And, lastly Section 4.4.8. UNSPECIFIED (8:00) (thereafter specified as) "Assaulting a patient"

Section	Charge	1st Offense	2nd Offense	3rd Offense	Reckoning Period
8:00	Unspecified	Reprimand to Dismissal	Reprimand to Dismissal	Reprimand to Dismissal	Reprimand to Dismissal

There are a multitude of infractions listed within the disciplinary matrix, including assaulting, or attempting to assault another member of the Fire Department, but there is no specific infraction listed regarding assaulting a member of the public.[5] The Department points to the City's overall Workplace Violence Policy as the catch-all for the other "specified" and "unspecified" charges contained in the Disciplinary Policy encompassing the prohibitive conduct referenced above. This is likely because there is nothing specified within the Department's own policy.

The City's Workplace Violence Policy states in relevant part:

II. Policy

A. Statement of Commitment

"…The City will not tolerate violent behavior or threats in the workplace. Any violent behavior related to the employees work or work relationships, on or off city property or city workplaces, is prohibited. Violations of this policy will be investigated, and if substantiated, the city will take this primary action in accordance with established procedures."

B. Violent Behavior

Employees should not be subject to physical, written, or verbal conduct that is violent in nature related to the employees work or work relationships. In addition, no employees

[5] Section 4.4.1. (1:12) does list an infraction for conduct that is offensive or threatening to the public while in uniform, but this was not raised in the charging documents.

> permitted to engage in violence or threatened violence to another employee, supervisor, manager, union representative, customer, resident, or any other person.
>
> Violent behavior includes physical violence and/or threats of physical violence that would lead to a reasonable person to fear for his/her safety. Violence may be either verbal, written, or physical…"
>
> Physical Violence is defined as "unwelcome contact between two parties…"

It is without doubt that the Grievant's conduct violated Section 4.4.1. (1:00) as conduct unbecoming a member of the Philadelphia Fire Department. The public must be treated with courtesy and respect by members of the Department tasked with providing public services, even during difficult times.

Similarly, the Grievant violated Section 4.4.4 (4:01) Neglect of Duty by failing to uphold her oath of office as sworn to under the Code of Ethics and EMT Oath to do no harm. (City Ex. 7).

Lastly, Section 4.4.8 (8:00) "Unspecified" provides a catch-all for charges that are not defined elsewhere in the Disciplinary Code. I find that the Grievant violated both the written workplace violence policy and the unwritten rule of assaulting the patient.

Notwithstanding, the analysis of whether there is just cause also encompasses whether the punishment is commensurate with the severity of the improper conduct. The Workplace Violence Policy is a City-wide policy spelling out the prohibition of violence in the workplace.

However, the Policy does not contain penalties for substantiated violations. Rather, it defers penalties to be in accordance with "established procedures". As it pertains to the Fire Department, the "established procedures" must therefore be in accordance with the Department's Disciplinary Policy. (Ex. J-5)

Here, the Department promulgated and disseminated a wide-ranging disciplinary policy that provides a range of penalties every infraction imaginable, except for a physical altercation

with non-employees. The only provision listed in the charging documents that contains a penalty is in Section 4.4.8 (8:00), which specifies a range of penalties from reprimand to dismissal. At the hearing [redacted] testified and relied on the fact that the Department has adopted a zero-tolerance policy regarding workplace violence, that this case fits the criteria, and therefore termination is required.

However, there is no written provision regarding "zero-tolerance" in any of the proffered policies. Likewise, the term "zero-tolerance" was never brought forth in any of the recorded interviews, either during the investigative stage or final meeting when the Grievant was discharged. Tellingly absent is any mention of zero-tolerance during the discharge meeting on April 5, 2022, when Local 22 [redacted] asked for lesser discipline on behalf of the Grievant. If there was a long standing zero-tolerance policy that mandated termination logic would dictate that it would have been raised by the Deputy Chief at that time.

There also appears to be a conflation of the term "zero-tolerance" with "mandatory termination". These terms are not mutually exclusive. There can be zero tolerance of improper conduct by imposing discipline less than termination depending on the severity of the conduct for the infraction. For example, when the assault is between members of the Department while on duty the Policy provides a penalty for a 1st offense ranging from 48-hour suspension to dismissal. This clearly recognizes that there are distinctions to the severity of the physical altercation.

Thus, the current established policies indicate the conduct must be viewed in the totality of the circumstances with an emphasis on the general elements of progressive discipline, which is to correct behavior and/or rehabilitate employees when possible.

As the testimony has shown, prior occurrences of physical contact may result in termination, or they may not. [redacted] testified that he was aware of other incidents where there was physical contact involving EMT's, but was not aware of the discipline imposed. He testified that he personally investigated two incidents of this nature. The two specific cases referenced in the testimony, were the Burkett case and the Haven case. Albeit the facts of these cases as presented during the hearing were not directly on point with what occurred in this instance. Nonetheless, they do indicate that there are times when a physical response may be tolerated, or the level of response may impact the discipline to something less than termination in accordance with established procedures.

Again, this is not to say the failure of a policy to contain a specific provision renders the conduct at issue here acceptable. However, written policies must supersede the unwritten. If the City/Department wants to promulgate a non-discretionary zero-tolerance policy for offenses of this nature that result in immediate discharge, which it has the right to do, then it must clearly and unambiguously inform its employees. This view is also not to be interpreted that a first offense of physical violence can never result in termination under the current policy. Surely, there may be an incident so severe that termination is warranted.

According to the facts as presented, to say that the Grievant's action was unprovoked is not accurate. She was verbally provoked by being called a "bitch" twice by an intoxicated person. It would be more accurate to say that her response to the provocation was excessive.

The video of the incident is important. It shows that the Grievant struck the Patient, a physically large male, in the upper left arm with the closed palm of her right hand while he was in a seated position. The Patient barely reacted to the contact, which indicates that it was more

of a jolt than a punch. While the response to the provocation was excessive, the physical contact as shown on the videotape was relatively minor.

Grievant is clearly and truly remorseful for her conduct. She testified that she has been struck by patients on two prior occasions and did not strike back. Listening to her two recorded interviews she showed genuine remorse. (Ex. City-2) She understood that she brought disrepute to the Fire Department and that she let the Fire Commissioner down after previously receiving a written commendation for her performance. I find this to be more indicative of her character than what occurred on [redacted]. Correspondingly, she begged for her job back while understanding that she should be punished for what she did. She offered no excuses.

While a zero-tolerance policy may be a reasonable policy, it must be clearly communicated to the employee along with any mitigating factors where the zero-tolerance may be waived. While the Grievant understands that she, in her own words, broke the "golden rule" and her conduct was severely wrong, she never acknowledged that she understood or was informed it was mandatory terminable offense. This is corroborated by [redacted]'s testimony that he believed the Grievant understood that termination was a "possibility". The Policy as written is clearly a progressive disciplinary policy showing gradations of penalties for first, second and third offenses. Also, the Policy provides for disciplinary actions to be removed or reset after a certain period of time. The structure of the Policy indicates that the parties acknowledge the purpose of progressive discipline is to rehabilitate improper conduct when possible.

In weighing the competing factors, I find that there is not just cause for termination. First, the Grievant was never informed of the unwritten zero-tolerance policy. Secondly, the strike as depicted on the video was not a violent contact with the intent to cause physical harm to

the Patient. Thirdly, the Grievant's demeanor during the interview process shows an employee that is genuinely remorseful, truthful and one that can be rehabilitated through a lesser discipline.

Nonetheless, the Grievant clearly violated the Disciplinary Policy and made unwarranted physical contact with a member of the public. The Grievant was on-duty, in uniform, and her actions were in the presence of hospital personnel. This is clearly conduct unbecoming of an FSP and negatively reflects on the reputation of the Fire Department and warrants discipline. Although, reducing the discipline to a suspension that would compensate the Grievant for any lost time upon reinstatement could be viewed as sanctioning her conduct in some respect.

Therefore, the Award is as follows:

The Grievance is sustained in so far as discharge is too severe a penalty under the totality of the circumstances. The Grievant, Cynthia Bell, shall be reinstated without any back pay or seniority and the infraction shall remain on the Grievant's record in accordance with Disciplinary Code Sections 4.4.4 (4:01), which is for the duration of employment. Jurisdiction is retained for 21-days from the date of this Decision and Award for the sole purpose of implementing the remedy should either party require it.

Respectfully submitted,

_____ Date: May 18, 2023

John T. Marchetto, Esq.
Arbitrator