

AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration Between

**FRATERNAL ORDER OF POLICE,
LODGE #5**

OPINION & AWARD

**Case No. 01-21-0016-5065
(P/O Gongara 30-Day Suspension)**

-- and --

CITY OF PHILADELPHIA

ARBITRATOR: James M. Darby, Esq.

APPEARANCES: For the FOP:
Thomas M. Gribben, Esq.
Willig Williams & Davidson

For the City:
Elliot I. Griffin, Esq.
Ballard Spahr

This case arose on or about June 10, 2021, when the City of Philadelphia Police Department (“the City” or “the Department”) imposed a 30-day suspension on Police Officer Candice Gongara (“the Grievant”) for excessive use of force (Joint Exhibit 4). On July 16, 2021, the Fraternal Order of Police, Lodge #5 (“the Union”) filed a grievance alleging that the discipline lacked just cause pursuant to the parties’ Collective Bargaining Agreement (“the Agreement”) (Joint Exhibits 1-2). The City denied the grievance at each step of the parties’ grievance process and the dispute was submitted to arbitration.

By letter dated October 27, 2021, from the American Arbitration Association (“AAA”), the undersigned was notified of his selection as Arbitrator of this dispute. A

hearing was held in Philadelphia, PA on April 26, 2023, where the parties were afforded a full opportunity to present testimony, exhibits and arguments in support of their positions. The hearing was transcribed. In lieu of submitting post-hearing briefs, the parties presented oral closings and the record was closed. After fully considering all of the evidence and arguments presented, the matter is now ready for final disposition.

QUESTIONS TO BE RESOLVED

At the hearing, the parties stipulated to the following issue to be resolved by the Arbitrator:

Whether the Department had just cause to suspend the Grievant, Candice Gongara, for thirty days? If not, what shall the remedy be?

(Transcript p. 6.)

REMEDY REQUESTED

The Union requests that the grievance be sustained and that the Grievant be made whole in all respects, including being reimbursed for missed overtime opportunities, and that all references to the discipline be removed from the Grievant's record. It also asks for a recommendation that the Grievant's name be removed from any list that prevents her from testifying in criminal proceedings. (Transcript p. 176-180.)

FACTS

The Grievant commenced her employment with the Department as a patrol officer on December 19, 2016. Prior to the instant case she had never before been

disciplined by the Department. At all material times she was assigned to the Department's 18th District.

On [REDACTED], two police officers fatally shot a black male in the 18th District. This action led to protests, riots and looting taking place throughout the city. The civil unrest became particularly volatile around 52nd and Chestnut Street, with rocks and other projectiles being thrown at police. A large police presence was established in that area into the early morning hours of [REDACTED]. As the police were attempting to disburse the crowd, an SUV approached the line of officers. According to the Internal Affairs Division ("IAD") Report (City Exhibit 1), the SUV reversed direction at which time numerous officers surrounded the vehicle and began banging on the windows. An officer broke out the windows of the SUV and the driver and two rear passengers were removed from the vehicle. At some point during this process, officers utilized pepper spray.

One of the rear passengers, 16-year-old [REDACTED] [REDACTED], was placed in handcuffs and taken into custody by officers. At that time, the Grievant walked [REDACTED] over to the curb. He was upset and disoriented, complaining that he had pepper spray in his eyes. The scene around the Grievant and [REDACTED] was chaotic and unstable. The Grievant asked [REDACTED] to sit down several times but he failed to do so. The Grievant then forced [REDACTED] to the ground using a leg sweep. Police eventually transported him to Jefferson Hospital. According to the IAD Report, [REDACTED] was diagnosed with a broken left finger. After he was treated, the police released him without charges.

On [REDACTED], after a review of the Body-Worn Camera ("body-cam") video, the Department removed the Grievant from service. On May 26, 2021, the IAD

Investigation sustained a finding that the Grievant engaged in “Physical Abuse-Kicked” and a violation of Department Directive 10.2, Use of Moderate/Limited Force (“UOF Directive”) (City Exhibit 2) by “perform[ing] a leg sweep causing Booker to fall and possibly break a finger,” and by “kick[ing] the feet from under a handcuffed prisoner to get him to sit down,” respectively (City Exhibit 1, pp. 71-72; City Exhibit 3). On May 28, 2021, the Department charged the Grievant with violating Code of Conduct, Article 1 “Conduct Unbecoming,” specifically 1-§012-10 “Unauthorized and/or Excessive Use of Force in Your Official Capacity” (Joint Exhibit 4).

The charges allege that after handcuffing ██████ the Grievant “then ordered Mr. ██████ to sit down twice, and you then kicked Mr. ██████ legs and he fell to the ground. Mr. ██████ sustained a broken finger during this incident.” (*Id.*) On June 10, 2021, the Department, by way of a Commissioner’s Direct Action, imposed a thirty-day suspension on the Grievant for violating 1-§012-10 (Joint Exhibit 3). In all, the Department disciplined 21 police officers for their actions during the incident relating to the SUV and its occupants.

IAD Chief Inspector Deborah Francis testified regarding the process that led to the IAD Report finding the Grievant had violated the Department’s Use of Force (“UOF”) Directive (City Exhibit 2). She explained how the Grievant’s use of a leg sweep on ██████ caused him to fall to the ground at a point where he was not resisting or attempting to flee the scene. Pursuant to the UOF Directive, Francis averred that in the absence of any resistance by ██████ the Grievant was not permitted to use any force to get him to comply with her directives. Francis also referred to the Use of Force Decision Chart showing that “No Force” is necessary where the offender is “obedient, compliant, non-aggressive (*Id.* at 10.2-4). She also testified that the Grievant did not

have to use a leg sweep to get ██████ to the ground. Francis also stated that it was possible that the Grievant's actions caused ██████ to fracture his finger.

On cross-examination, Francis testified that no formal use of force orders were provided to officers prior to engaging with the rioters. She also agreed that the Grievant had given ██████ two verbal commands to sit down and he failed to comply, and that the body cam videos show the Grievant holding onto ██████ as she executed the leg sweep. According to Francis, none of the police supervisors who were present during this skirmish ever raised a concern about the Grievant's actions. She explained that she learned of ██████ broken finger from his lawyer, but added it did not matter whether he sustained a broken finger because the leg sweep was enough to charge the Grievant with unauthorized use of force.

Deputy Commissioner ██████ testified that she reviews and signs off on all IAD Reports before they are passed on to the Commissioner. She stated that she made the decision to remove the Grievant from duty after reviewing the body cam videos. ██████ recounted how she saw the Grievant order ██████ to sit down, he refused and she used a leg sweep to bring him to the ground. She added that "he received two broken fingers as a result." Additionally, since ██████ was not resisting and he was in handcuffs, it was unwarranted for the Grievant to use any force against him. According to ██████ the Commissioner determined that given the chaotic circumstances surrounding the incident termination would have been too severe a punishment, so they agreed to impose a 30-day suspension given the egregious nature of the Grievant's actions.

On cross-examination, Deputy Commissioner ██████ testified that the charges against the Grievant were based exclusively on the body cam videos – not on

any eyewitness accounts. She also agreed that [REDACTED] was exhibiting passive resistance, which is defined as “defying an officer’s lawful order without the use of physical force” (City Exhibit 2, p. 10.2-2). [REDACTED] also stated that with handcuffs on [REDACTED] could still kick and flee on foot, and that in “certain situations” it is proper to have a suspect seated. She added that [REDACTED] lawyer made her aware that [REDACTED] had received two broken fingers due to the incident.¹ Later in her testimony, [REDACTED] stated that the charges against the Grievant would not have changed if [REDACTED] broke his finger while engaging with another officer. She added that there was no evidence the Grievant’s actions caused the broken finger.

The Grievant testified generally about the timeframe surrounding the incident with [REDACTED]. She had worked 19 straight days with shifts in excess of 12 hours. In the early morning of [REDACTED] [REDACTED] [REDACTED], she was part of a line formation of approximately 40 officers who were being pelted with rocks, cinder blocks, and 2 by 4s by a number of protesters who were “too many to count.” The Grievant recounted how she requested orders from supervisors as to how to confront the mob but received no response and no plan was in place. Prior to this encounter a sergeant had been run over by a pickup truck. So when the SUV approached the line of officers they feared something like that might occur again.

The Grievant averred she was not involved in stopping the SUV, breaking its windows or removing the occupants. Her first involvement was when she saw two

¹ The record shows that sometime after [REDACTED] was removed from the vehicle he told P/O [REDACTED] that “he thought his finger was broken” (City Exhibit 1, p. 307). A Department Incident report prepared the night of the incident indicates that [REDACTED] was taken to the hospital “for possible broken/dislocated left index finger” (City Exhibit 6).

officers on top of [REDACTED] and she intervened to get him “away from the chaos” to a safer location. She did not use pepper spray at any time during this encounter with [REDACTED]. According to the Grievant, ordering a suspect -- who is bigger, faster and stronger than the officer -- to sit down is “what you do.” At that time she did not consider [REDACTED] under arrest since he was not yet in a police vehicle. The Grievant described how she requested [REDACTED] two times to sit down and he refused to do so. She then “took [her] foot and grabbed his shirt and guided him to the ground with a leg sweep.” The Grievant stressed she did not intend to injure [REDACTED] but was just trying to get him to comply with her order to sit down and she used the least amount of force necessary to do so.

The Grievant added that [REDACTED] was complaining about his eyes being in pain due to the pepper spray, but mentioned nothing about his finger[s]. She also averred that she was never interviewed as part of the IAD investigation or otherwise. On cross-examination, the Grievant testified that [REDACTED] heard her orders to sit down, which were “loud and clear.”

DISCUSSION

The parties’ positions can be briefly summarized.

The City maintains it had just cause to discipline the Grievant for her actions involving Mr. [REDACTED]. It notes that at the time the Grievant kicked [REDACTED] leg out from under him, she showed “no care” for the fact he was clearly in distress, confused and unable to focus on the orders he was being given. The videos also show that [REDACTED] was not being resistant but was screaming and crying from being pepper sprayed.

Additionally, the City maintains that regardless of whether [REDACTED] broke his finger during his brief encounter with the Grievant, her actions were inexcusable. She was expected to at most only match the level of resistance given the totality of the circumstances, including any potential threat to the officer. In this case, consideration of those factors show that the Grievant had no basis for acting as precipitously as she did. Although there may be circumstances where an officer can utilize light force to confront a suspect who is failing to comply with a verbal order, this was not one of those situations. Based on the testimony, the IAD Report and the video evidence the 30-day suspension should be upheld.

The Union asserts the City has failed to meet its heavy burden of showing it had just cause to discipline the Grievant. Neither of the City's witnesses were eyewitnesses to the incident involving [REDACTED] and the Grievant, nor did either of them play a meaningful role in the investigation. The Union also insists there is no medical evidence supporting the conclusion that [REDACTED] finger was broken that evening, much less that it was caused by the Grievant. Deputy Commissioner [REDACTED] who spoke to the Commissioner about the appropriate discipline to impose here, testified that she believed [REDACTED] broke two fingers. Notwithstanding, the charges against the Grievant state that "Mr. [REDACTED] sustained a broken finger during this incident."

The Union also argues that the video produced by the City, which is the only evidence it relied on to discipline the Grievant, "shows something much less than what any reasonable person would call was a leg sweep." The Grievant, who was the only eyewitness to the event who testified, credibly described the chaotic and riotous scene she was immersed in when she encountered [REDACTED]. She moved him to the sidewalk and, although [REDACTED] was already in handcuffs, the arrest was not completed. The

Union emphasizes that the UOF Directive permits the use of force if there is active resistance or a risk of flight – a reasonable belief on the Grievant’s part at that time. The Grievant used the least amount of force by issuing two verbal commands for ██████ to sit down, which ██████ countered with passive resistance; namely, defying the order without the use of force. The Union insists the Grievant responded appropriately, after taking into account all of the circumstances present, when she used moderate or limited force to guide ██████ to the ground after he refused to sit down.

The undersigned must decide whether the City had just cause to suspend the Grievant for 30 days without pay for her actions vis-à-vis ██████ on ██████. For the reasons set forth below, I conclude it did not.

First, the record shows that the City relied entirely on body cam videos to conclude the Grievant used unauthorized/excessive force against ██████. After reviewing the videos multiple times, I find that they fail to show sufficient detail with respect to the Grievant’s handling of ██████ primarily because it was dark and the officers were moving very quickly. The most that can be said about the videos is that they clearly convey the loud, frightening, and chaotic scene the officers faced dealing with the protesters. As a result, all that remains to support a just cause finding here are the Department’s second-hand observations in the IAD Report based on its review of those same videos.

Additionally, the record shows that the Grievant and the other officers were completely outnumbered and under siege by the rioters. The Grievant, whose

testimony I found to be clear, consistent and compelling, averred that officers were not provided any specific instructions or orders regarding restoring order, including the level of force they were expected to use. The Grievant described how she was forced to rely on her training and law enforcement instincts in the aftermath of the SUV being pulled over by her fellow officers. When she observed two officers on top of the teenage ■■■■■ who was screaming from the pepper spray used to subdue the occupants of the vehicle, the Grievant immediately intervened and removed him from the frantic scene. She guided him to the curb and conversed with him to find out why he was screaming. These tactics do not reflect the actions of an officer who was prone to use more force than was necessary to subdue Mr. ■■■■■

Next, with respect to the “leg sweep” used by the Grievant on ■■■■■ no one from the Department took issue with the Grievant’s decision that it was important for her to get ■■■■■ seated. ■■■■■ who was in pain, handcuffed and disoriented, could have easily fled the scene and created an additional distraction to an already frenzied situation. It is also undisputed that the Grievant twice directed ■■■■■ to sit down and he failed to comply. This non-compliant act on the part of ■■■■■ – defined as “passive resistance” under the UOF Directive – permits an officer to respond with “moderate/limited force” pursuant to the Department’s UOF Decision Chart. The Grievant’s action of sweeping ■■■■■ leg out from under him, while holding on to him and guiding him down, cannot be viewed as unauthorized or excessive under these circumstances.

Finally, the charge against the Grievant that “Mr. ■■■■■ sustained a broken finger during this incident” is not supported by the record evidence. Without question, had the evidence shown that ■■■■■ sustained a broken finger while being leg swept

by the Grievant, this might tend to show that she was being too aggressive while executing that procedure. However, there is no reliable evidence to support a finding that the Grievant's finger was actually broken and, even if there was, that it was a result of any act of the Grievant. The City's post-charge attempt to minimize the import of [REDACTED] broken finger in its determination to issue the 30-day suspension, is belied by the Department's including this finding in the "Specifications" against the Grievant.


Based on the foregoing, I conclude that the evidence fails to demonstrate that the Grievant used unauthorized or excessive force during her encounter with Mr. [REDACTED]. Accordingly, the grievance is sustained. The Department did not have just cause to suspend the Grievant for 30 days. The City is directed to expunge any reference to this discipline from the Grievant's personnel records and make her whole for her loss of pay and benefits, including any missed overtime opportunities.

Consistent with the foregoing discussion and findings, the Arbitrator renders the following

AWARD

The grievance is sustained.

The Department did not have just cause to suspend the Grievant, Candice Gongara, for thirty days. The City is directed to expunge any reference to this discipline from the Grievant's personnel records and make her whole for her loss of pay and benefits, including any missed overtime opportunities.

A handwritten signature in black ink, appearing to read "James M. Darby", written over a horizontal line.

JAMES M. DARBY
Arbitrator
Lancaster, Pennsylvania
August 2, 2023