

IN THE MATTER OF ARBITRATION BETWEEN

IAFF Local 22

Union

AND

City of Philadelphia

Employer

* AAA Case No.
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* 01-21-0016-8237
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* Thomas Patsch
* 24-Hour Suspension
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For the Union: Marc Gelman, Esq.

For the Employer: Michael J. Sheehan, Esq.
Nicole S. Morris, Esq.

OPINION AND AWARD

Dates of Hearing: December 20, 2022 and April 14, 2023

Date of Award: June 2, 2023

Arbitrator: Samantha E. Tower, Esq.

BACKGROUND

The City of Philadelphia (City) and the IAFF Local 22 (Union) are parties to a Collective Bargaining Agreement (CBA). The Union filed this grievance on September 11, 2020 protesting the 24-Hour suspension of Lt. Thomas Patsch (Grievant). (J3) The grievance states in relevant part:

Statement of Specifics of Grievances:

I was issued 24 Hour Suspension for an incident involving a disagreement between me and another member. Charge sheet indicates that I was the instigator. The other member was not issued any discipline. As the other party in the disagreement was given no discipline, for an incident without an aggressor, the discipline should be equal.

The parties had a full opportunity to present evidence and question witnesses at a two-day arbitration hearing on December 20, 2022 and April 13, 2023.

Grievant worked for the Fire Department for approximately twenty-nine (29) years before retiring in January 2023. He had no prior discipline before the discipline at issue here.

Most of the underlying facts related to the dispute between Grievant and Firefighter [REDACTED] are not

in dispute. Grievant and [REDACTED] engaged in some level of conflict on three separate occasions. The first instance occurred in March 2020 in the beginning of the Covid-19 pandemic after [REDACTED] went to Puerto Rico to assist with displaced people after an earthquake. Upon his return, [REDACTED] said that Grievant voiced his concern over [REDACTED] traveling and not quarantining before returning to work. [REDACTED] testified that he was "displeased" and that he told Grievant he followed all City of Philadelphia Covid-protocols.

The second incident occurred online when Grievant and [REDACTED] commented on the Facebook post of another firefighter. Grievant and [REDACTED] engaged in a back-and-forth in the comments section which got heated. Both men called each other names and exchanged insults. [REDACTED] testified that Grievant wrote "you know where to find me," which [REDACTED] understood to be a threat.

The third incident occurred at a fire station on [REDACTED] when [REDACTED]'s ladder truck arrived at Grievant's fire station to get gas. Although there is conflicting testimony as to whether Grievant approached [REDACTED] from behind or in front, there is no dispute that

Grievant was the one to initiate the interaction at the fire station. When Grievant approached [REDACTED], he said, "are we good?" [REDACTED] testified that Grievant spoke in an aggressive tone and interrupted his conversation with other fire fighters. [REDACTED] said that he responded, "I'm good. We can do whatever you want, but I am not throwing the first punch." According to [REDACTED] and [REDACTED] [REDACTED] [REDACTED] who was present during the exchange, Grievant said, "I will knock you the fuck out." [REDACTED] said that he felt threatened but he acknowledged that Grievant did not raise his fist or follow him after [REDACTED] took a step back.

At the first day of arbitration hearing, [REDACTED] was presented with an electronically signed statement. (C1) [REDACTED] denied making the statement or authorizing the electronic signature.

The Notice of Suspension notifies Grievant that he is suspended without pay for 24-Hours for the following:

Violations: 4.4.1 CONDUCT UNBECOMING
4.4.3 INSUBORDINATION
Sections: 1:07, 1:12, 1:23, 3:01
(J2)

██████████ ██████████ testified that Grievant is held to a higher standard because he is a lieutenant. A lieutenant supervises firefighter and is expected to set a good example. ██████████ said that she was concerned that Grievant was going to strike on ██████████ ██████████ if she did not intervene. Later that day, ██████████ presented charges against Grievant and then those charges went through the Fire Department's established process which ultimately reached the instant arbitration.

Approximately a week later, Acting ██████████ ██████████ counseled ██████████ and Grievant about the ██████████ ██████████ incident. ██████████ ██████████ testified that once she presented charges, ██████████ did not have the authority to issue a verbal reprimand.¹

There is confusion in the record about whether ██████████ issued a verbal warning or a counseling to ██████████ and Grievant. There is also confusion about whether ██████████ had the authority under Directive 25 to issue discipline or

¹ There is conflicting testimony about whether an Acting ██████████ has the authority to issue a verbal reprimand even when no charges are filed.

a counseling at all. There is no dispute that a union representative was not present when ██████ met with ██████ and Grievant.

On the first day of arbitration hearing, ██████ ██████ testified about his role in the Special Investigations Office (SIO). ██████ said that he assists ██████ ██████ with investigations, including the investigation regarding Grievant. On the second day of arbitration hearing, ██████ ██████ testified about his role in the SIO investigation. ██████ and ██████ gave contradictory testimony about what charges were ultimately upheld against Grievant. ██████ testified that the four (4) charges contained in the Notice of Suspension were accurate. ██████ testified that Grievant was not charged with the four (4) charges contained in the Notice of Suspension, rather, according to ██████, Grievant was only charged with a violation of 1:23.

██████ testified that on August 24, 2020, Grievant was interviewed as part of the SIO's investigation. ██████ said that the purpose of the interview with Grievant was to get his side of the story. Then, if he or Chief ██████ found that any of the charges

were not appropriate, they would remove them. [REDACTED] said that all four (4) charges were upheld and then, following Department procedure, Grievant was offered three options: 1- admit guilt, 2- go to a trial board, or 3- plead guilty and take the discipline but reserve the right to grieve. On August 24, 2020, Grievant chose the third option and accepted the discipline, then he filed the instant grievance. (C4)

The Parties presented the following stipulated issue at the hearing: Whether the City had just cause to suspend Grievant? If not, what shall be the remedy?

EMPLOYER POSITION

The City asserts that Grievant engaged in unprofessional behavior and that it had just cause to suspend Grievant for 24-Hours. It acknowledges that the record is a little "messy," but insists that the evidence establishes that Grievant failed to de-escalate the situation on [REDACTED] and that he should be held to a higher standard as a supervisor.

The City points out that Grievant admitted that he should have received the suspension and his true concern is that he believes it is unfair that he was disciplined and ██████ was not. The City acknowledges the confusion over whether ██████ should have issued a reprimand or a counseling and admits that ██████ did not follow the protocol of Directive 25. It insists that ██████'s reprimand or counseling of ██████ and Grievant was not considered discipline by anyone.

Ultimately, the Department contends that it charged Grievant with Section 1.23 and insists that it had just cause to discipline him for his behavior, particularly because he is a supervisor. It stresses that the messiness on procedure and documentary evidence should not diminish Grievant's responsibility as a supervisor.

The City contends that the grievance should be dismissed and the 24-Hour suspension upheld.

UNION POSITION

The Union contends that there is a myriad of reasons why this grievance should be dismissed. Not only

should the grievance be dismissed on the merits but also Grievant's due process rights were violated and, thus, the grievance should be dismissed.

The Union points out the many ways that this case and the evidence in support of the City's position is "messy." It challenges the credibility of [REDACTED] and [REDACTED] for their differing descriptions of the event on [REDACTED]. It also challenges [REDACTED]'s characterization of his participation in the Facebook messages. Additionally, it questions the significance of [REDACTED]'s improperly issued written or verbal reprimand. According to the Union, whether or not [REDACTED] failed to comply with Directive 25 and should receive retraining, the effect that the reprimand or counseling had on Grievant should not be ignored.

The Union makes a disparate treatment claim and asserts that [REDACTED] also violated the Disciplinary Code with his actions and yet he did not receive any discipline. The Union contends that even if Grievant warranted a higher level of discipline due to his rank, [REDACTED] should not have gotten a "pass" on the charges. Moreover, the Union points out that Grievant is a 29-year employee with no

prior discipline, thus the suspension amounts to excessive discipline.

The Union asserts that Grievant's due process rights were violated and, therefore, the grievance should be sustained. The Union highlights several ways that it believes the City violated Grievant's due process rights. Grievant was prejudiced because there were witness statements that were never shared with Grievant or the Union, which inhibited the ability to prepare a proper defense. The Union also stresses that the bedrock of a full and fair investigation is the concept that documents should not be falsified and the alleged statement made by [REDACTED] appears to be fraudulent. It points out that [REDACTED] denies that he wrote the statement or signed the statement. (C1)

Finally, the Union points out the lack of fair notice of the charges against Grievant. It stresses that the Notice of Suspension contains four charges and on the first day of hearing, [REDACTED] testified that all four charges -- 1.23, 1.07, 1.12, and 3.01 -- were upheld. Yet on the second day of hearing [REDACTED] testified that only one charge was sustained. The Union insists that the

effect of not knowing what Grievant was actually charged with hindered its ability to effectively prepare for the arbitration.

The Union requests that the grievance be sustained and Grievant be made whole.

FINDINGS

A determination as to whether there was just cause for a suspension must be made on a case-by-case basis, in light of the relevant facts and circumstances in a particular record. It is the City's burden to prove that Grievant engaged in the behavior for which he was disciplined, but as an initial matter, in this particular case, there are several due process issues to consider.

It is well established that due process is a fundamental element of just cause. Here, the Union asserts that the City violated Grievant's due process rights and provides several examples in support of its decision.

Even the City admits that this case is "messy." I could not agree more. The following is a brief list of

the "mess" in this record: whether or not [REDACTED] issued discipline when he met with Grievant and [REDACTED] after the [REDACTED] incident, whether or not Grievant believed [REDACTED] has issued discipline, whether or not [REDACTED] made the statement which was presented by the City and contained his alleged electronic signature, where the witness statements were during the three years between when they were allegedly made and the second day of the arbitration hearing when the City attempted to introduce them into the record, and whether or not the SIO upheld all four (4) of the charges in the Notice of Suspension or only one (1) charge as [REDACTED] testified to in the second day of the hearing.

Turning first to whether the City gave Grievant and the Union adequate notice of the charges which were upheld, the Notice of Suspension specifically references four (4) sections of the Disciplinary Code. On the first day of hearing, [REDACTED] testified that Grievant was charged with the four (4) sections of the Disciplinary Code referenced in the Notice of Suspension. Then at the second day of hearing, [REDACTED] testified that Grievant was only charged with one (1) section -- 1.23 -- of the Disciplinary Code. The City offered no explanation for the inconsistent

testimony from the two individuals tasked with conducting the SIO investigation. The Union persuasively asserts that not knowing the accurate charges for which Grievant was suspended affected its ability to appropriately prepare for the arbitration hearing. Moreover, I find the earlier lack of appropriate notice to Grievant similarly troubling. In August 2020, Grievant was given three options at the conclusion of the SIO investigation and he chose to accept discipline and then grieve. At that time, he believed -- apparently erroneously -- that all four charges in the Notice of Suspension were upheld.

Grievant's ability to make an informed choice was undermined by the lack of sufficient and accurate notice of the charges which led to his suspension. Additionally, Grievant and the Union's ability to consider possible settlement or to prepare for the arbitration hearing was undermined by the lack of sufficient notice during the almost three (3) years that passed from the time of the discipline through the arbitration hearing. Here, I find that the lack of adequate notice significantly undermined the ability of Grievant to make informed decisions and undermined the ability of the Union to adequately prepare for arbitration. Given all the facts and circumstances in

this particular record, these violations of Grievant's due process rights, whether intentional or not, are fatal to the City's ability to establish just cause. Even without addressing the Union's other due process claims, I find that Grievant was unduly prejudiced by the lack of adequate notice; therefore, this decision does not address those other due process claims, nor does it include an analysis of the merits.

Given the above analysis, the City has failed to establish just cause for Grievant's 24-Hour suspension.

AWARD

For the reasons set forth above, the grievance is sustained. The City shall rescind Grievant's 24-Hour suspension and Grievant shall be made whole.



Samantha E. Tower, Arbitrator
June 2, 2023

