

In the Matter of Arbitration Between:

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CITY OF PHILADELPHIA		
	:	
("City")	:	OPINION
	:	
and	:	AND
	:	
	:	AWARD
AFSCME, LOCAL 427		
	:	
("Union")	:	
	:	
	:	
	:	
<u>AAA Case No. 01-21-0018-0483</u>	:	

The issue in this case concerns whether the City had just cause to suspend Charron Reid ("Grievant") for nine (9) days. The City maintains that just cause did exist and that the grievance is therefore entirely without merit. The Union contends that there was not just cause for any discipline and therefore seeks a "make whole" remedy for the Grievant.

The arbitration hearing in this matter took place in Philadelphia, Pennsylvania. Ellen Berkowitz, Esquire represented the City. Jordan Konell, Esquire represented the Union.

FACTS

The City's Department of Streets ("Department") has responsibility for picking up trash from residential properties within the City. The Union represents Heavy Equipment Operators who drive trash trucks and other employees who work on those vehicles ("laborers").

The Department has a strong policy prohibiting employees from engaging in the unauthorized removal of trash, such as taking it from commercial properties at the request of the business owner. The severity

of this prohibited practice, known as "swagging", is enhanced if an employee accepts money for doing so. According to a Standard Schedule of Disciplinary Offenses and Penalties, the minimum penalty for swagging is a suspension of fifteen (15) days. Pursuant to Streets Order 100, the penalty for swagging and accepting money is termination.

The Grievant has worked for the City approximately 18 years. She had a voluntary break in service around 2018, but thereafter returned to the Department to resume her work driving a trash truck as a Heavy Equipment Operator. The Grievant has been considered a good employee by all those familiar with her work.

On [REDACTED] (" [REDACTED] "), the Grievant was the driver of a trash truck doing a route she had covered many times. Also working on the Grievant's truck that day were [REDACTED] (" [REDACTED] ") and [REDACTED] (" [REDACTED] ").

According to testimony given at the arbitration hearing by Waste Collection District Supervisor [REDACTED] (" [REDACTED] "), on [REDACTED] he received a call that the crew of a sanitation truck on Helen Street, in the Frankfort section of the City, was swagging. [REDACTED] then went to Helen Street to investigate.

[REDACTED] found the truck driven by the Grievant backed into and parked in the 3600 block of Helen Street. This block is small and dead-end, with some residential properties and two garages that [REDACTED] believed belong to unmarked businesses that do auto repair work. [REDACTED] remained at the end of the block while he observed what was taking place. [REDACTED] believed he saw [REDACTED] accept money from a person at one of the garages and then hand that money to the Grievant, who was driving the truck. He also saw the crew picking up trash from the garages and saw

the Grievant briefly enter one of the garages before returning to her truck. [REDACTED] took several pictures on his phone while making these observations.

The Grievant saw [REDACTED] observing her truck and asked him why he was doing so. [REDACTED] responded that it was his job to observe what crews under his supervision were doing but did not at that time claim that he saw the Grievant and her crew swagging or taking money.

The Grievant then proceeded to the dump to empty her truck, followed by [REDACTED]. At the dump, [REDACTED] took additional pictures of what had been emptied from the Grievant's truck. Thereafter, [REDACTED] returned to Helen Street to take additional pictures, which included empty trash cans.

[REDACTED] reported what he observed to his supervisor, [REDACTED] [REDACTED] [REDACTED] (" [REDACTED] "). [REDACTED] subsequently met with the Grievant about the events of [REDACTED]. [REDACTED] found the Grievant's explanations of the events of that day to be unsatisfactory.

It was determined that the Grievant, [REDACTED], and [REDACTED] [REDACTED] should all be disciplined for what occurred on [REDACTED]. [REDACTED] resigned before discipline was imposed and [REDACTED] decided not to contest his suspension, but the Grievant did contest being disciplined. Ultimately, Deputy Commissioner [REDACTED] decided to impose a nine-day suspension upon the Grievant, which was below the established guidelines.

POSITION OF THE CITY

Streets Order 100, which the Grievant stipulated she understood, prohibits unauthorized pickup of trash and unauthorized pickup for payment. Swagging is a serious issue for multiple reasons. It delays pickup for other City residents, it deprives the City of money that businesses are supposed to pay for special pickup, and the collection of non-residential trash can be dangerous. Workers are paid to pick up residential trash and Streets Order 100 exists to prevent them from ignoring that essential municipal work in favor of individual pickups for cash.

Supervisor [REDACTED] credibly testified that he saw the Grievant stop her truck and with her coworkers took unauthorized, non-residential trash and accepted payment for it. [REDACTED] took photographs of the truck and saw the laborers going in and out of the garage. He then followed the truck to the dump where he saw emptied from the Grievant's truck a large blue tarp, which [REDACTED] later admitted taking, that would not be consistent with residential trash.

There is no reason at all to think that [REDACTED] had any motivation to make up any of what he testified seeing, or that he was inaccurate in what he saw. To the contrary, [REDACTED] testified that he had perfect 20/20 vision. Also credible was the testimony of [REDACTED] and [REDACTED] about the multiple hearings that were conducted concerning the Grievant and the reasons they did not find the Grievant's explanations credible concerning what occurred on [REDACTED].

The Grievant continued to give incredible testimony at the arbitration hearing. Also incredible was the testimony of [REDACTED] and [REDACTED]. It was only at the arbitration hearing that [REDACTED]

██████████ claimed for the first time that on ██████████ he was handing the Grievant a phone, not money. That claim could arguably have made a difference, but despite multiple opportunities no such claim was made until the arbitration hearing itself. That contention is therefore highly suspect.

The City does not dispute that the Grievant is a good colleague. Indeed, the City gave her a massively reduced penalty because of her good record and because the City was trying to retain employees during this portion of the pandemic. Pursuant to Streets Order 100 the Grievant could have been terminated. The penalty she did receive was clearly a win for her.

While the Union makes much of the fact that the Grievant was permitted to keep working after ██████████ discovered her swagging, that demonstrates nothing. The Grievant's services were needed and other employees in similar situations have also been allowed to continue working.

The Grievant received ample due process. Five hearings were held before a decision was made to suspend her. The Grievant was not a victim of disparate treatment, as ██████████ received the same penalty and on other occasions unauthorized pick up of trash has resulted in termination of employees.

The arbitrator must therefore deny the grievance and uphold the Grievant suspension

POSITION OF THE UNION

As this is a case involving discipline, the City has the burden of proof. It has not come close to meeting that burden.

The City's key witness to the alleged swagging was [REDACTED]. Although [REDACTED] testified that he saw the Grievant and her crew swagging and accepting money for doing so, his testimony was not credible. [REDACTED] account of what occurred is filled with questionable and illogical assertions as well as contradictions. For example, [REDACTED] gave contradictory explanations concerning how he came to discover the Grievant's alleged swagging, and the specific source of his information for this alleged misconduct was never identified.

[REDACTED] incredible assertions lack any corroborating evidence whatsoever. Although [REDACTED] took photographs when he saw the Grievant and her coworkers on Helen Street, none of those photographs show them accepting money or even swagging. While [REDACTED] also took photographs at the dump, those photographs only show a blue tarp and trash and scattered debris underneath the tarp. Although [REDACTED] also took photos later that day after he returned to Helen Street, none of those photographs show that swagging had occurred. In the end, all the City has as evidence is [REDACTED] alleged 20/20 vision and his recollections.

In sharp contrast, both members of the Grievant crew on [REDACTED], [REDACTED] and [REDACTED] did appear at the arbitration hearing as corroborating witnesses for the Grievant. Both testified that there was no swagging and no exchanging of money. There was nothing incredible about their testimony, and it is in no way undermined because they decided for personal reasons not to challenge their discipline and/or to leave City employment after this incident.

The Grievant herself also credibly testified at the arbitration hearing. This included her explaining that what was passed to her on [REDACTED] was a phone, not money. She also accurately explained that she had previously mentioned this, but that she didn't feel like she was fully able to explain while this matter was under consideration what happened on Helen Street.

The Grievant gave an accurate picture of what occurred on [REDACTED]. She backed on to Helen Street, approached the owner of a business whose bathroom she often used, went in to use that bathroom, and came back out to resume her work. The Grievant then went to the dump, not because she had been caught by [REDACTED] doing anything improper but because the truck was full. The Grievant unequivocally testified that she was not swagging and never accepted money.

The Grievant came back to the City after a brief interlude working elsewhere because she enjoyed driving a trash truck. On [REDACTED] she was still on probation after her return to work, and she would never have done anything to put a job she worked so hard to recover at risk, or to bring her integrity into question.

Neither would it have made sense for anyone on Helen Street to ask the Grievant and her crew to swag. This street has residential properties, and the alleged commercial properties are not clearly marked. There would have been no need for the owners of these properties to have paid for trash removal, as they could have simply placed their commercial trash with the residential trash.

Finally, the City's investigation of this incident was clearly inadequate. [REDACTED] never interviewed the business owner who allegedly gave the money. It is apparent that he never even attempted to do so,

as during the arbitration hearing he refused to answer a question about this. The City also failed to obtain a single name of any business that the Grievant was allegedly taking unauthorized materials from. The City also has no notes of any of the grievance meetings to support its claim that it was not until the arbitration hearing that the Grievant and her co-workers claimed that it was a phone rather than money that was being passed to the Grievant.

The Arbitrator should therefore sustain the grievance and provide the Grievant with a make hole remedy.

OPINION

The City has fully established through the forceful testimony of its witnesses that swagging, the taking of unauthorized refuse by those who work on trash trucks, is a serious offense. The magnitude of this offense is enhanced when accompanied by the taking of money to swag. To its credit, the Union does not argue to the contrary.

The City has also fully established that if the Grievant did what is alleged, specifically engaged in swagging on [REDACTED] while taking money to do it, just cause would abundantly exist for the nine-day suspension imposed upon her. Indeed, pursuant to Streets Order 100, such misconduct exposes an employee to the penalty of dismissal, and testimony established that the City has in other situations not hesitated to impose that penalty.

I further agree with the City that it provided the Grievant with adequate due process. Although arguments raised by the Union in this regard might establish that the City's investigation was not as thorough

as it could have been, nothing that did or did not occur negated the existence of just cause on due process grounds.

The pivotal question in this case therefore quickly narrows to whether the City has also carried its burden of establishing that the Grievant did engage in the misconduct alleged: swagging and accepting money for that prohibited act. After careful consideration, I agree with the Union that the City lacks sufficient evidence to have this question resolved in its favor.

The primary basis upon which the City has attempted to establish the Grievant's guilt is through the testimony of Supervisor [REDACTED] [REDACTED] testified that he had received a call that a crew was swagging, and he went to the identified location and personally observed what was there occurring. [REDACTED] further testified that he then saw one of the laborers working with the Grievant ([REDACTED]) being given money from someone at a garage on the street and then pass that money to the Grievant. [REDACTED] also testified that he then saw the laborers picking up trash from the garages, which he believed to be commercial establishments, and the Grievant briefly enter one of the garages.

While I do not doubt that [REDACTED] truly believes that he did observe the above, and in good faith concluded from his observations that the Grievant and her crew were swagging and taking money, I also believe that there is a distinct possibility [REDACTED] was mistaken in his observations and/or conclusions. Notwithstanding [REDACTED] assertion that he has perfect vision, the fact remains that, as evidenced by the pictures he took at the scene, he was a considerable distance away from the Grievant and her coworkers when he believes he saw money being given to the Grievant by [REDACTED].

The distance [REDACTED] was away from the events now at issue, and therefore the reliability of his observations, are important considerations. This is particularly true because there is no evidence that corroborates [REDACTED] belief about what he saw. No additional witnesses claimed to personally have seen anything improper being done by the Grievant, and the Union is correct that none of the photographs [REDACTED] took on [REDACTED] show money changing hands or directly prove that swagging was occurring. At best, the pictures are circumstantial evidence.

There is, however, considerable additional evidence that challenges [REDACTED] observations and/or conclusions. Most important in this regard is, of course, the testimony the Grievant herself gave at the arbitration hearing. I was impressed by the forcefulness with which she denied accepting money for swagging on [REDACTED]. It is abundantly clear that the Grievant's reputation and integrity are of much importance to her, and she credibly testified that she would not engage in swagging because it would subject her to termination, particularly since at this time the Grievant was a probationary employee, having returned to her job with the City after a brief stint working for SEPTA.

It is also clear that swagging and the taking of money for doing that prohibited act would be a stark deviation from the Grievant's prior work record and reputation. By all accounts, the Grievant was a good employee. To its credit, the City does not contend to the contrary. The Grievant's co-workers went so far as to testify that others did not want to work with her because she was strict in abiding by rules.

The testimony given by the Grievant concerning her not accepting money for swagging on [REDACTED] was not inherently incredible. The

Grievant explained that one of laborers who worked with her, who she identified as [REDACTED] rather than [REDACTED] as testified to by [REDACTED], did not give her money, but rather his cell phone so that it would not be damaged or lost while he was working.¹ Furthermore, while [REDACTED] made much of the fact that the Grievant left her truck and went into a garage, the Grievant explained that it was a normal occurrence on this route for her to use the bathroom at this garage, and by all accounts there was nothing improper about her doing this.

Furthermore, the Grievant's two co-workers on [REDACTED], [REDACTED] and [REDACTED], both testified at the arbitration hearing and corroborated the Grievant's testimony about what occurred on that day. Neither still works for the City, and neither therefore would appear to gain any personal benefit from appearing at the hearing and testifying untruthfully.

Finally, in deciding this case I have considered the Hellen Street location where the Grievant is alleged to have swagged. This is a small dead-end street that has residences on one side and garages on the other. The garages are not marked as businesses in any way, and according to the Grievant's testimony those garages are the backside of residences connected to the next street over. Although [REDACTED] concluded that there was business activity going on in those garages, there is no evidence at all to support that conclusion. In this regard, it is undisputed that [REDACTED] never spoke to the owners of the "businesses," and it does not

¹ I recognize that there is a conflict in testimony concerning whether the Grievant contended during the grievance process that a cell phone had been passed to her, with the Grievant testifying she did make that claim and City witnesses testifying she did not. Suffice it to say that this conflict does not negate the overall credibility of the Grievant in this matter.

appear he ever made any concerted attempt to do so. In short, it is unclear whether there was anything wrong with the Grievant's crew picking up the trash it did on Helen Street, and even if [REDACTED] and [REDACTED] did pick up commercial trash it is unclear that the Grievant was aware that anything improper was occurring.

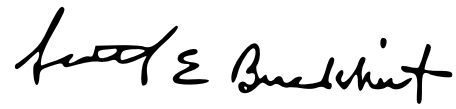
For all these reasons, I have concluded that the City cannot meet its burden of establishing that the Grievant engaged in the misconduct alleged. Accordingly, notwithstanding the City making every possible argument to the contrary, I must and will sustain the Grievant in full. As a remedy, the City shall rescind all discipline and make the Grievant whole for all wages and benefits lost because of her being suspended.

Finally, I will retain limited jurisdiction over this case., I will exercise this retained jurisdiction only in the unlikely event that the parties are unable to calculate for themselves the make-whole remedy I have granted.

AWARD

The grievance is sustained. The remedy is as set forth in the above Opinion. The Arbitrator retains limited jurisdiction over this case, as set forth in that Opinion.

Signed this 11th day of September 2023.

A handwritten signature in black ink, reading "Scott E. Buchheit". The signature is written in a cursive style with a horizontal line underneath it.

SCOTT E. BUCHHEIT, ARBITRATOR