

**AMERICAN ARBITRATION ASSOCIATION**

*In the Matter of Arbitration Between:*

**AFSCME DISTRICT COUNCIL 33,  
LOCAL 394**

**and**

**CITY OF PHILADELPHIA**

**AAA Case #01-22-0002-0739  
(Gr: Kenneth Murphy Termination)**

**Walt De Treux, Arbitrator**

*Hearing Dates: 5/10/23, 5/30/23*

*Briefs Received: 8/24/23*

*Decision Date: 9/25/23*

**Appearances:** For the Union – Neal Goldstein, Esq. and Vlad Kachka, Esq.,  
*SPEAR WILDERMAN*

For the City – Ryan Mulgrew, Esq., *ASSISTANT CITY SOLICITOR*  
Sharon Ulak, Esq., *DEPUTY CITY SOLICITOR*

**Introduction and Statement of Relevant Facts**

Kenneth Murphy has been a brick mason in the Philadelphia Water Department since 2018, responsible for repairing sewers. On [REDACTED], he reported to work around [REDACTED] for an overtime assignment. He saw a stack of work orders, some of which included his name and truck number. He went to the office of [REDACTED], Water Conveyance Supervisor and his second level of supervision, to complain about the amount of work assigned to him. Murphy and [REDACTED] had a verbal interaction that led to a physical confrontation. The details of the verbal and physical altercation are in dispute.

Murphy alleges that he told [REDACTED] he could not perform all the work assigned. In response, [REDACTED] asked, "What are you bitching about?" and proceeded to insult him. As Murphy left [REDACTED]' office, [REDACTED] said, "Run little bitch." When Murphy turned around, [REDACTED] punched him

in the face and slammed him to the ground. Murphy briefly lost consciousness. When he came to, [REDACTED] was repeatedly punching him in the face with both hands until another employee intervened.

[REDACTED] asserts that Murphy entered his office complaining about his work assignment with an aggressive attitude. Murphy lifted [REDACTED]' desk up and down. [REDACTED] told him to leave the office as Murphy continued to complain. When Murphy did not leave, [REDACTED] tried to leave but was briefly blocked by Murphy. Murphy followed [REDACTED] out of the office, leaning over top of him saying, "Look at these hands...know what I can do." [REDACTED] turned to face him and said, "Everything you say to me is feminine." Murphy head butted him. The two men tussled and fell to the ground. A co-worker separated them.

[REDACTED] called 911 and EMTs and police responded. EMTs treated [REDACTED] for a cut on his finger. He was later diagnosed with a concussion, shoulder injury, broken finger, and neck pain. Murphy refused transport in the ambulance and drove himself to the hospital. Murphy had a bruised and swollen left eye and a concussion. [REDACTED] remained out of work for several months due to his injuries and stress and anxiety. Prior to his termination, Murphy also missed time from work due to his injuries.

After talking with both men, the police handcuffed [REDACTED] and placed him in a police cruiser. The officer drove him to the police station but did not take him inside. Instead, she gave him an incident report number and drove him back to work. Neither [REDACTED] nor Murphy were ever charged with a crime.

The Department held separate disciplinary hearings for both men several days after the incident. Murphy did not have much recall of the altercation, a fact he attributes to the effect

of his head injuries. After hearing, the Department credited ██████' version of events and found Murphy to be the aggressor. The City terminated Murphy "[d]ue to your non-credible and inconsistent testimony; long history of progressive discipline for similar outbursts and refusing to perform assigned work, and violation of the Department's strict zero tolerance for workplace violence by initiating and engaging in a physical altercation with a co-worker." The Department suspended ██████ for 10 days for unprofessional conduct unbecoming of a supervisor.

Murphy timely grieved his termination. The parties did not resolve the grievance through the contractual steps and referred the matter to arbitration. On May 10 and May 30, 2023, a hearing was held in the law offices of Spear Wilderman in Philadelphia, Pennsylvania. Both parties had a full and fair opportunity to present documentary and other evidence, examine and cross-examine witnesses, and offer argument in support of their respective positions. The parties filed post-hearing briefs and submitted the matter to the Arbitrator for a decision.

## Issue

The parties stipulated to the following issue,

*Did the City of Philadelphia have just cause to terminate Grievant Kenneth Murphy? If not, what shall be the remedy?*

## Analysis and Decision

Grievant and his supervisor engaged in a physical altercation in which both men suffered injuries. Both men give very different accounts of what happened before and during the confrontation. The City argues in its brief, “Only one account can be true.” But as often happens in these situations, the truth likely lies somewhere in between the participants’ versions.

Grievant portrays himself as an employee calmly complaining about a work assignment who tries to leave when the supervisor erupts with a string of vulgar names (bitch, pussy, faggot) and physically attacks him. He denies headbutting the supervisor. In his account of the incident, he does not take any physical action toward [REDACTED]. Rather, [REDACTED] punches him, slams him to the ground, and repeatedly punches him in the face.

[REDACTED] portrays himself as a calm supervisor dealing with a verbally and physically aggressive employee. In [REDACTED]’ account, when he tries to leave, Grievant verbally threatens him (“Look at these hands...”) before headbutting him. [REDACTED] denies using any vulgar insulting language, insisting that he only told Grievant he was acting “feminine.”

Parsing the two accounts, it is likely Grievant did enter [REDACTED]’ office upset and aggressively complaining. He had acted in that manner just two months earlier when Water

Conveyance ██████████ held a hearing for Grievant on an unrelated issue. According to ██████████, during the hearing in which the issue was resolved, Grievant “had several outbursts and became angry.” ██████████ enlisted help from HR and the Union to refer Grievant for anger management. It is also likely that ██████████ responded, as Grievant alleged, “What are you bitching about?” ██████████ may not have used all the insulting terms Grievant alleged, but it is highly unlikely he simply called Grievant “feminine.” The use of that word simply does not ring true to anyone who has spent time on the shop floor.

The important question for the Department was to identify the aggressor in the physical confrontation. It admonished ██████████ for “perhaps even assist[ing] with escalating the physical altercation.” ██████████’ churlish responses to Grievant’s work complaints likely angered Grievant further and took the verbal interaction to the next level. But I credit ██████████’ testimony that Grievant initiated the physical contact when he headbutted Grievant. ██████████ lacked patience and professionalism. It is a far cry from that demeanor to suddenly and without warning punch Grievant in the face, particularly since ██████████ had no prior issue with Grievant and found him to be a satisfactory worker. Grievant, on the other hand, was angry and aggressive, pursued ██████████ out of the office, and was only getting personal insults from ██████████ in response. At that level of frustration, the next step was physical action. The headbutt also explains ██████████’ concussion. Grievant’s version does not include any acknowledgement that he physically struck ██████████ at any time during the confrontation. Grievant’s version does not account for ██████████’ injuries, particularly the concussion and shoulder and neck pain. If Grievant did not headbutt ██████████ and ██████████ never hit the ground except to climb atop Grievant and punch him in the face, ██████████ would not have had any occasion to incur the injuries he did.

Grievant's account also strains under scrutiny because he claimed he was dizzy and disoriented after the fight, but nonetheless, drove to the hospital (after talking to police who did not deem him unsafe to drive), called his union representative, and thought clearly enough to ask the ER nurse to take pictures of his injuries. He also denied any real recall of the event during the disciplinary hearing, yet remembered it in vivid detail almost two years later at hearing.

Even though I find Grievant to be the aggressor in that he took the first physical action, [REDACTED] clearly fought back, inflicting injury upon Grievant. The City was remiss in not charging [REDACTED] with violation of the workforce violence policy. Instead, it charged him with unprofessionalism and conduct unbecoming a supervisor and suspended him for 10 days. The Union argues that the City's discipline of [REDACTED] vis-à-vis the Grievant rises to the level of disparate treatment. I disagree.

As explained above, Grievant bears more responsibility for the verbal interaction escalating to a physical confrontation, and accordingly, a more severe disciplinary penalty is warranted. But even if Grievant and [REDACTED] were equally culpable in the fight, or if [REDACTED] was properly charged with a violation of the workplace violence policy, the City would still have reason to take harsher disciplinary action against Grievant.

[REDACTED] is a 27-year Water Department employee without, at least according to the evidence in this case, any prior documented discipline for aggressive, insubordinate, or violent behavior. At the time of the incident, Grievant had been employed with the Department approximately three years. In that time, he had accumulated a written warning for being "verbally abusive towards a co-worker and your immediate foreman...[and] belligerent in front

of other supervisors;" a 1-day suspension for insubordination after refusing to perform assigned work on two occasions; and a referral to anger management just two months prior to his fight with [REDACTED] after he had "several outbursts and became angry" at a hearing with the [REDACTED] [REDACTED] and his union representatives.

Disparate treatment requires that similarly situated employees receive unequal discipline for the same or similar offense. Grievant and [REDACTED] both violated the Department's Workplace Violence Policy, but they are not similarly situated employees. Grievant initiated the physical aspect of their confrontation. Moreover, he was a short-term employee with a history of conduct and disciplinary actions for insubordination and inappropriate aggression and anger in the workplace. Given Grievant's role in the fight and his work history, a difference in disciplinary penalties between Grievant and [REDACTED] does not rise to disparate treatment. Further, given Grievant's role in the fight and his work history, termination was within the range of appropriate penalties for his conduct.

For all these reasons, I find that the City had just cause to terminate Kenneth Murphy.

*Walt De Treux*

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WALT De TREUX