

AMERICAN ARBITRATION ASSOCIATION

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In the Matter of the Arbitration :
 :
 between : AAA Case No.
 : 01-19-0004-5596
 :
FRATERNAL ORDER OF POLICE, LODGE NO. 5, : Opinion & Award
 :
 “Union” : Re: Chief Inspector
 : Carl Holmes - Discharge
 - and - :
 : Hearing: September 8, 2023
CITY OF PHILADELPHIA, :
 :
 “City” :
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APPEARANCES

For the Union

WILLIG WILLIAMS & DAVIDSON
Thomas M. Gribbin, Jr., Esq.

For the City

COZEN O’CONNOR
Benjamin L. Schectman, Esq.

BEFORE: David J. Reilly, Esq., Arbitrator

BACKGROUND

The Philadelphia Police Department (the “Department”) discharged Chief Inspector Carl Holmes, effective October 24, 2019. It took this action upon charging him with violating two sections of its Disciplinary Code: (1) Section 1-§026-10 – Conduct Unbecoming – Engaging in Any Conduct Constituting a Felony or Misdemeanor Carrying a Sentence of More Than One Year; and (2) Section 1-§021-10 – Conduct Unbecoming – Any Incident, Conduct, or Course of Conduct Indicating Employee Has Little or No Regard for His/Her Responsibility as a Member of the Department. Both violations stem from a criminal indictment charging Holmes with several sexually based felonies.¹

The Union contends the City lacked just cause to impose this discipline. It asks that Holmes be reinstated to his former position with the Department and be made whole for all pay and benefits lost as a consequence of his discharge. It also requests that the City be directed to revise Holmes’s personnel records to expunge all reference to his discharge to the extent consistent with governing law.

The relevant facts of this case, including the areas of dispute, may be set forth succinctly:

Holmes’s Employment History

At the time of his discharge, Holmes had been a member of the Department for nearly thirty years. (City Exhibit 1.) He had no record of active prior discipline.

¹ Specifically, in identifying the felonies on which Holmes was indicted, both charges state: “As the result of a Grand Jury investigation, the District Attorney’s Office issued Warrant #285569 with the following charges: As to complaining witness 1: 18 Pa. C.S. §3125A, Aggravated Indecent Assault (F2); 18 Pa. C.S. §3126, Indecent Assault (M1); 18 Pa. C.S. §3126(a)(1), Indecent Assault (M2); as to complaining witness 2: 18 Pa. C.S. §3125A, Aggravated Indecent Assault (F2); 18 Pa. C.S. §3126, Indecent Assault (M1); 18 Pa. C.S. §3126(a)(1), Indecent Assault (M2); 18 Pa. C.S. §901(a), Attempt; 18 Pa. C.S. §3123, Attempted Involuntary Deviate Sexual Intercourse (F1); 18 Pa. C.S. §901(a), Attempt; 18 Pa. C.S. §3124.1, Attempted Sexual Assault (F2); as to complaining witness 3: 18 Pa. C.S. §3125A, Aggravated Indecent Assault (F2); 18 Pa. C.S. §3126, Indecent Assault (M1); 18 Pa. C.S. §3126(a)(1), Indecent Assault (M2).

His performance reports from 2007 – 2018 reflect his consistent receipt of satisfactory ratings. Likewise, they show positive comments from his rating officers. (Union Exhibit 1.)

During his tenure, Holmes received numerous promotions. As a result, he advanced through the ranks of Sergeant, Lieutenant, Captain and Inspector, ultimately reaching Chief Inspector.

Decision to Discharge

Chief Inspector Christine Coulter, who was serving as Acting Commissioner as of October 2019, testified regarding her decision to discharge Holmes. (Tr. 42.)²

She recounted that on or about October 23, 2019, the District Attorney notified her that a grand jury had indicted Holmes on multiple felony counts involving sex crimes. (Tr. 42.) As a result, she averred conferring with Deputy Commissioner Robin Wimberly, who oversees the Department’s Office of Professional Responsibility. (Tr. 42-45.) In doing so, she reported confirming her understanding that as a matter of Department practice, any individual charged with a felony cannot remain in the Department’s employ. (Tr. 43.) This standard, she explained, reflects that it would adversely affect the Department to retain any officer facing such grave charges. (Tr. 43.)

On this basis, she concluded that Holmes should be discharged and, in turn, directed the Internal Affairs Division (“IAD”) to prepare the necessary charges and issue the required notice to Holmes. (Tr. 45.) This decision, she said, rested solely upon Holmes’ indictment on felony charges. (Tr. 50.)³

² References to the transcript of the September 8, 2023 hearing will be identified as “Tr.” followed by the applicable page number(s).

³ On cross-examination, Coulter confirmed her understanding that the allegations underlying the criminal charges came from former Department officers. (Tr. 50-51.) She also reported being aware that: (1) in or about 2015, IAD, in investigating such allegations from at least two of three complainants, did not substantiate their assertions of

Testimony Lieutenant Thomas Reynolds

IAD Investigator Lieutenant Thomas Reynolds testified to being tasked on October 24, 2019 with processing Holmes' discharge and effecting the related arrest warrant. (Tr. 22-23.) This assignment, he said, did not involve performing any investigation of the underlying allegations. (Tr. 24; City Exhibit 1.)⁴

In performing these functions, he confirmed conducting a *Gniotek* hearing with Holmes that same day, at which he issued him the charges and advised of his thirty-day suspension with intent to dismiss. (Tr. 25; Joint Exhibit 2.) Following this hearing, he averred serving him with the arrest warrant. (Tr. 26; City Exhibit 1.)

Procedural History

In response to Holmes's discharge, the Union filed the instant grievance. (Joint Exhibit 3.) When the parties were unable to resolve the matter at the lower stages of the grievance procedure, the Union demanded arbitration. (Joint Exhibit 4.) Pursuant to their contractual procedures, the parties selected me to hear and decide the case. (Joint Exhibit 1.)

I held a hearing in the matter on September 8, 2023, at the offices of the American Arbitration Association in Philadelphia, Pennsylvania. At that time, the parties each had full opportunity to present evidence and argument in support of their respective positions. They did so. Upon the conclusion of the hearing, I held the record open for submission of the parties' post-hearing briefs. Following the receipt of the City and the Union's briefs on November 3, 2023 and November 17, 2023, respectively, I declared the record closed as of the latter date.

sexual misconduct; and (2) upon referral of the matter to the District Attorney's Office, then DA Lynne Abraham declined to bring criminal charges against Holmes. (Tr. 48.)

⁴ On cross-examination, Reynolds, referencing his IAD report, averred that the conclusion sustaining the charges against Holmes was "based on the grand jury's recommendation of criminal charges." (Tr. 36.) Although having no personal knowledge of the allegations underlying the criminal charges, he stated, they arose from incidents that reportedly occurred between July 2004 – July 2007. (Tr. 33.)

DISCUSSION AND FINDINGS

The Issue:

The parties have stipulated that the issues to be decided are as follows:

1. Did the City have just cause to discharge the grievant, Chief Inspector Carl Holmes, effective October 24, 2019?
2. If not, what shall be the remedy?

Positions of the Parties

City's Position

The City contends that its discharge of Holmes should be affirmed. The felony charges filed against him, it maintains, compel that result.

In support, it cites the testimony of then Acting Commissioner Coulter. In particular, it highlights: (1) in discharging Holmes, she averred relying upon his indictment by a grand jury on multiple felony counts involving sexual misconduct, which she characterized as “serious charges” that “can obviously impact the Department;” and (2) before taking that action, she conferred with Deputy Commissioner Wimberly, who verified that “anyone charged with a felony can’t remain in [the Department’s] employment until those charges have been resolved in some way.”

Accordingly, for these reasons, it submits that the Union’s grievance should be denied.

Alternatively, it asserts, if the grievance is granted and the City is ordered to reinstate Holmes, any make-whole remedy should exclude the period during which the felony criminal charges were pending and any subsequent period during which he was unavailable for duty due to the disposition of those charges. Prior arbitration awards in matters involving the City and

the Union, it asserts, recognize such a limitation on damages. *See, e.g., Fraternal Order of Police, Lodge No. 5 -and- City of Philadelphia*, AAA Case No. 01-18-0005-3380 (Reilly 2023) (in reinstating officer acquitted of felony assault, held back pay should exclude period during which felony charges were pending or officer was unavailable for duty); *Fraternal Order of Police, Lodge No. 5 -and- City of Philadelphia*, AAA Case No. 01-15-0003-0329 (Grey 2016) (held back pay should commence as of date of criminal trial acquittal).

Finally, referencing Article XXI(L) of the governing collective bargaining agreement, it states, any award of reinstatement should be contingent upon Holmes satisfying all conditions of employment, including the mandates of the Municipal Police Officers Education and Training Program (“MPOETC”), 37 P.S. §203, et seq.

Union’s Position

The Union, on the other hand, maintains that the City lacked just cause to discharge Holmes. It submits that the City has failed to satisfy its burden of demonstrating that he is guilty of the charged offenses; namely, that he: (1) engaged in conduct constituting a felony or misdemeanor with a potential sentence of more than one year; and (2) displayed conduct indicating little or no regard for his responsibilities as a police officer.⁵

The testimony of Chief Inspector Coulter, it avers, confirms that Holmes’ discharge rests solely upon his indictment on felony charges. Yet, it contends, the record does not contain actual proof of those charges.

The City, it explains, cannot satisfy its evidentiary obligation in this regard by simply referencing the indictment. By definition, it avers, the indictment constitutes hearsay. *Heddings v. Steele*, 514 Pa. 569 (1987); PA. Rules of Evidence 801(a), (c). As such, it concludes, the

⁵ In view of the gravity of these charges, the Union argues that the requisite burden of proof here should be elevated to the clear and convincing evidence standard. *Champion Spark Plug*, 93 LA 1277 (Dobry 1989).

record of such criminal charges, without more, is insufficient to prove Holmes' alleged misconduct, as part of the "just cause calculus." *Kellogg Co.* 138 LA 1595, 1600 (Bonney 2018).

Instead, it reasons, to substantiate that Holmes committed the charged offenses, the City needed to present direct evidence demonstrating his guilt as to the felonies for which he was indicted, such as testimony from witnesses with first-hand knowledge of the underlying circumstances. However, the City neglected to do so. The testimony of Chief Inspector Coulter and Lieutenant Reynolds, it asserts, cannot substitute for this purpose, as both were limited to confirming that Holmes was criminally charged. Neither had knowledge of the incidents on which those charges were based.

Accordingly, for these reasons, it submits, the City's case must fail. As such, the grievance should be granted, and the requested relief awarded.

Regarding the make whole remedy, it asserts that Holmes' should be awarded back pay and benefits from the date of his discharge, notwithstanding the then pending felony charges. In support, it notes the absence of any City policy mandating Holmes' discharge merely because of the indictment. In addition, it points out that Coulter acknowledged that the criminal charges Holmes faced were based on dated allegations, which IAD had previously investigated and determined to be unfounded; and as to which the former District Attorney had declined to prosecute. Therefore, it concludes, Holmes is entitled to be compensated for the time lost from work, while awaiting resolution of the "baseless criminal charges" brought against him.

Opinion

There can be no dispute that the City's Police Department has a right and a duty to ensure that its officers adhere to certain standards of conduct, both on and off duty. This

expectation, no doubt, includes the requirement that officers adhere to the laws that they are sworn to uphold and enforce. Officers who breach this obligation by engaging in conduct that constitutes a felony or a serious misdemeanor can and should expect that serious discipline will result. This principle applies with particular force to the circumstances presented in this matter, which involve allegations of sexually based offenses perpetrated against fellow members of the Department.

The City, of course, carries the burden of proof here. It must demonstrate by a preponderance of the credible evidence that Holmes committed the charged offenses. It must also establish that the level of discipline imposed is appropriate.

The Union, on the other hand, has no corresponding burden. It need not disprove the allegations lodged against Holmes. Indeed, he is entitled to a presumption of innocence.

After carefully reviewing the record and giving due consideration to the parties' respective arguments, I am convinced that the City has not satisfied its burden. My reasons for this conclusion follow.

As Chief Inspector Coulter's testimony makes plain, both charges (i.e., Section 1-§026-10 – Conduct Unbecoming – Commission of a Felony or Misdemeanor Carrying a Sentence of More Than One Year; Section 1-§021-10 – Conduct Unbecoming – Incident, Conduct or Course of Conduct Exhibiting Little or No Regard for Responsibility As a Department Member) stem solely from Holmes' October 2019 indictment on numerous sex crimes. Indeed, the specification for each charge consists of nothing other than the exact same recitation of the criminal charges filed by the District Attorney in response to the grand jury's investigation. (Joint Exhibit 2.)

Therefore, proof of the charged misconduct requires that the City demonstrate to a

reasonable degree of certainty that Holmes is guilty of the referenced criminal offenses. On the evidence presented, I conclude that it has failed to do so.⁶

It is clear from the record and the arguments advanced by the City that it relies exclusively on the indictment to substantiate the charges. Doing so, I conclude, proves fatal to its case.

The indictment is, no doubt, hearsay. Indeed, it falls squarely within the recognized definition of that term. While hearsay is admissible under the evidentiary standards applicable in arbitration, it cannot, standing alone, be received for the truth of the matter asserted, especially where it bears on the ultimate issue in the case. Simply put, without more, the indictment falls short of the proof required to substantiate that Holmes committed the referenced criminal acts cited in the charges against him.

This evidentiary standard applies for good and sound reason. A contrary approach would deny Holmes the fundamental due process right to confront his accusers and subject their allegations to the test of cross-examination.

In weighing this consideration, I take note that Holmes has never had an opportunity, in any forum, to hear and challenge the direct evidence supporting the allegations underlying the indictment. A criminal trial was never held. Rather, as the parties stipulated, the District Attorney ultimately withdrew or dismissed all of the charges.

Moreover, such disposition severely reduces what weight, if any, I could possibly accord to the indictment.

The balance of the City's evidence here does not remedy this deficiency of proof. Stated

⁶ As referenced above, the Union argues for the application here of a heightened standard of proof (i.e., clear and convincing evidence). I find that it is unnecessary for me to resolve this issue, as I am convinced the City's evidence fails to satisfy even the lesser preponderance of the relevant evidence standard.

otherwise, neither Chief Inspector Coulter nor Lieutenant Reynold's testimony can breathe life into the indictment. As both made clear, they have no first-hand knowledge of any of the incidents on which the criminal charges were based. Plainly then, their testimony corroborates only the basis for the decision to discharge Holmes and the procedure by which that the Department affected that decision. It has no bearing on the essential issue of whether Holmes is guilty of the charged misconduct.

Chief Coulter's testimony regarding the Department's practice does not support a contrary result. Simply put, a Department standard barring the continued employment of an officer charged with a felony does not override the just cause standard of the governing collective bargaining agreement. In the event such action is grieved, as occurred here, the City cannot rely upon the indictment as a sword and a shield. Instead, it must prove through the presentation of satisfactory supporting evidence that the officer is in fact guilty of the crimes as to which he/she has been indicted. On the record here, the City has plainly failed to do so.

I recognize, as Chief Coulter testified, that the process followed here was the reverse of the Department's normal procedure. Specifically, it began with the District Attorney's decision to bring criminal charges against Holmes, as opposed to an IAD investigation substantiating the misconduct charges, followed by a referral to the District Attorney's Office for possible prosecution. These circumstances, however, do not alter the City's burden in this case. The fact remains that in proving just cause, the City must substantiate that Holmes is guilty of the charged misconduct. It cannot simply point to the indictment as a substitute for such direct evidence.

Accordingly, for all these reasons, I find the City lacked just cause to discharge Holmes. As to remedy, I direct the City to promptly reinstate Holmes to his former position with the

Department, without loss of seniority. In addition, I instruct the Department to revise his personnel record to delete all reference to his October 24, 2019 discharge, to the maximum extent permitted under the governing law.

As to the matter of make whole relief, the City is directed to make payment to Holmes for all wages and benefits lost as a consequence of his discharge, including overtime, through the date of his reinstatement, but excluding the period during which the felony charges referenced in the October 21, 2019 arrest warrant issued by the District Attorney were pending and any subsequent period when he was not available for duty relative to the disposition of those charges.⁷ In declining to award Holmes back pay for this period, I am persuaded by the City's assertion that while subject to felony charges, he could not remain a member of the Department.

I take note that the circumstances bearing on this issue present a much closer determination than was present in the prior arbitration cases cited by the City. *See, e.g., Fraternal Order of Police, Lodge No. 5 -and- City of Philadelphia*, AAA Case No. 01-18-0005-3380 (Reilly 2023); *Fraternal Order of Police, Lodge No. 5 -and- City of Philadelphia*, AAA Case No. 01-14-0000-4440 (Reilly 2016).

In contrast to those cases, there was no IAD investigation substantiating Holmes committed charged misconduct that formed the basis for the criminal charges. To the contrary, an IAD investigation conducted years earlier had failed to sustain those charges and a referral to the prior District Attorney resulted in a declination to prosecute.


⁷ The record does not include evidence of Holmes' actual damages. As such, the parties will need to meet and confer to determine the amount due him or return to me for a ruling in the event they are unable to do so. In addressing the matter of lost overtime, I note that the make whole award requires proof that is more than speculative. Instead, it necessitates showing to a reasonable degree of certainty that but for Holmes' discharge, overtime would have been offered to him and he would have worked such overtime.

Nonetheless, notwithstanding the Union's claim that the Department could have placed Holmes in a modified assignment during this period, I am not persuaded that the City acted unreasonably in not doing so under the circumstances here. In this regard, I take note of the very serious nature of the charges then pending against him, as well as that the decision to bring those charges represented an exercise of prosecutorial discretion by the District Attorney, a matter outside the City and the Department's control.

AWARD

1. The grievance is granted.
2. The City did not have just cause to discharge Chief Inspector Carl Holmes, effective October 24, 2019.
3. The City will promptly: (a) reinstate Carl Holmes to his immediate former position with the Department, without loss of seniority, subject to the requirements of Article XXI(L) of the governing collective bargaining agreement; and (b) revise his personnel records to delete all reference to his October 24, 2019 discharge, to the maximum extent permitted under the governing law. In addition, the City will make him whole for all wages and benefits lost as a consequence of his discharge, including overtime, through the date of his reinstatement, but excluding the period during which the felony charges referenced in the October 21, 2019 arrest warrant issued by the District Attorney were pending and any subsequent period when he was not available for duty relative to the disposition of those charges. Such make whole relief will also be reduced by all outside wages and other earnings received by him as to this period. I will retain jurisdiction of this matter to resolve any dispute as to the monies to be paid to Carl Holmes based on this award, including the issue of whether he satisfied his obligation to mitigate his damages.

December 1, 2023




David J. Reilly, Esq.
Arbitrator

STATE OF NEW YORK)
)
) ss.:
COUNTY OF NEW YORK)

I, DAVID J. REILLY, ESQ., do hereby affirm upon my oath as Arbitrator that I am the individual described herein and who executed this instrument, which is my Award.

December 1, 2023



David J. Reilly, Esq.
Arbitrator

