

**BEFORE THE
AMERICAN ARBITRATION ASSOCIATION
ALAN A. SYMONETTE, ARBITRATOR**

IN THE MATTER OF:)
)
Fraternal Order of Police, Lodge #5)
)
and) Case No. 01-22-0003-6608
)
City of Philadelphia)
)
Grievance: Lt. Anthony McFadden)
(207582))
_____)

OPINION AND AWARD

Before: Alan A. Symonette, Esq.
Impartial Arbitrator

Appearances: FOP Lodge 5 Jessica Caggiano, Esq.
City of Philadelphia Megan Malone, Esq.

Subject: Termination; Just Cause; Conduct Unbecoming, Inappropriate Language,
Conduct, or Gestures to Police Department Employees While on Duty,
Inappropriate Communications Based on Race; Remedy, Evidence

Date of Grievance: July 5, 2022

Date of Hearing: September 26, 2023
Philadelphia, PA

Statement of the Award: For all the reasons set forth herein, the grievance is partially sustained, and the discipline mitigated. The discipline shall be reduced to a thirty-day suspension. It is ordered that he shall be reinstated to his former position and rank with back pay including applicable overtime. This payment shall be offset by any compensation received from his pension payments and other jobs worked. In addition, and for the reasons set forth herein, it is ordered that the Grievant, within thirty days after his return to work, appear before the Police Commissioner, the 911 dispatcher, [REDACTED], and the Citizens Oversight Board. He is to apologize for the use of his language and provide his explanation at that time.

This matter concerns a dispute that has arisen pursuant to the Collective Bargaining Agreement between the City of Philadelphia (“City”) and the Fraternal Order of Police Lodge No. 5 (“FOP or Union”). The underlying grievance was filed on July 5, 2022 on behalf of the Grievant, Lieutenant Anthony McFadden. The Union alleged that the Grievant, who was then assigned to the 39th Police District was discharged without just cause. The Union requested that the Grievant be reinstated to his former position and otherwise be made whole.

The City denied the grievance stating that the Grievant was properly charged with two charges of conduct unbecoming. Specifically, he was charged with using inappropriate language to Police Department employees while on duty and for making an inappropriate communication based on race. While in conversation with a 911 police dispatcher and while on hold, the Grievant used the N-Word. This was overheard by the dispatcher who subsequently filed an Equal Employment Opportunity complaint with the Internal Affairs Department against the Grievant. The Grievant was subsequently terminated from the police force by direct action of the then Police Commissioner.

The parties were unable to resolve the dispute through the grievance procedure. Accordingly, on August 17, 2022 the Union demanded that the dispute be arbitrated pursuant to the Voluntary Labor Arbitration Rules of the American Arbitration Association. The undersigned was selected to hear the evidence and resolve the dispute. A hearing was held on September 26, 2023 in the offices of the American Arbitration Association. Throughout the hearing the parties were represented by counsel who presented evidence through the sworn, oral testimony of witnesses and through documents. Counsel also had the opportunity to confront

the evidence presented by the opposing side. The proceedings were transcribed. The hearing was closed after the presentation of oral summations.

BACKGROUND

The facts underlying the Grievant's termination are not significantly in dispute. The Grievant was a Lieutenant with the Philadelphia Police Department. He was hired in 1990 [T.154].¹ Throughout his tenure with the Department, he worked in several assignments including the Special Victims Unit, the 15th Police District and the Homicide Division. At the time of his termination, he was assigned to the 39th Police District and was responsible for the supervision of assigned Officers and patrol supervisors as well as the day-to-day operations of the District.

In the afternoon of [REDACTED], the Grievant was driving from his residence to the 39th District. He was also listening to police radio. As he was driving, he heard several incidents within his District and the adjacent District. One of the calls involved a call about a person with a gun. The Grievant decided to assist in the call and called the 911 dispatcher to obtain a call back number to reach the person making the claim [T,161]. In making that call he reached dispatcher [REDACTED] and requested the number. After receiving the request, she told him to hold on while she obtained the number [T.168]. According to the Grievant, as he was driving, another car came out of a store parking lot and cut him off causing him to brake and maneuver to avoid the potential accident. He said his lunch and coffee flew onto the floor [T.169]. As he went to retrieve the items, the Grievant stated "Fu – king Ni—er. The utterance was heard on

¹ References to transcript pages and exhibits shall be as follows: Transcript Page – [T.#]; Joint Exhibits [J.#]; City Exhibits [C.#] and Union Exhibits [U.#]

police radio by Ms. [REDACTED] and was recorded. Ms. [REDACTED] responded with the information, the Grievant said thank you and proceeded to his assignment [T.170].

Ms. [REDACTED] reported the statement to her supervision and eventually with the support of that supervision filed an EEO Complaint which was assigned to an IAD investigator for review [C.2,T.44]. The assigned officer, Sergeant Stephanie Williams was given a copy of the recording. She had had prior dealings with both Ms. [REDACTED] and the Grievant [T.47]. The Mayor's office of Labor Relations, Employee Relations Unit was also notified of the complaint. She interviewed Ms. [REDACTED] on June 24, 2022 and subsequently the Grievant on June 30, 2022. The Grievant admitted making the statement [C.2]. The audio recording was consistent with the Grievant's admission. He admitted that he had just avoided an accident and was angry and stressed at the moment [T.56].

The incident eventually became public and was the subject of discussion throughout the Department and in the local media. According to [REDACTED], the [REDACTED] for the Department, the comment also came to the attention of the Philadelphia Citizen Police Oversight Commission. They contacted Ms. [REDACTED] and invited her to join a community meeting [T.28]. According to Ms. [REDACTED], the community participants expressed a lot of anger and concern and called for some sort of response and questioned whether or what the Police Department was going to do about the Lieutenant's statement [T.30].

The day following the Grievant's interview, July 1, 2022, Commissioner Danielle Outlaw, through Commissioner's Direct Action, terminated the Grievant and charged him with three counts of Conduct Unbecoming – Inappropriate Language Conduct or Gestures to Police Department Employees While on Duty; Any Act Conduct or Course of Conduct which

Objectively Constitutes Discriminating or Harassing Behavior Based on Race, Color, Gender, Religion, National Origin, Age, Ancestry, Sexual Orientation, Disability, or Gender Identity; and Inappropriate Communication(s) Based on Race, Color, Gender, Religion, National Origin, Age, Ancestry, Sexual Orientation, Disability or Gender Identity Conveyed in any Manner.

The Acting Commissioner at the time of the hearing testified that Direct Action is used when there is an egregious violation – as the case that was considered here [T.98].

Commissioner John Stanford testified that he agreed with the final decision. There was no place for this type of language and what that represents [T.102]. Commissioner Stanford recognized the Grievant's lengthy career and service. However, his use of that word creates a different circumstance [T.107]. In the scope of one's career in this profession, it can be but one incident that will ultimately decide the Grievant's role as a police officer [T.107]. He believed that the discipline was appropriate given the Grievant's responsibility to the Dispatcher involved and other officers. Such language has no role. It adds tension to the relationships formed between members of the force and impacts the trust in the police. It especially puts officers in a difficult position of having to deal with the repercussions of such language since such language has consequences across the department and in the community [T.105].

The Grievant testified at the hearing. He noted that he had thirty-two years of service without any discipline. He never had a complaint filed against him for use of language during that time. [164]. With respect to the incident himself he stated that he had never met [REDACTED] until speaking with her that afternoon. While he was driving and on his speaker phone he was cut off and had to swerve making his coffee and lunch fly to the floor of his vehicle. When he made the statement, he was on hold while Ms. [REDACTED] was retrieving the information

request, and he was hoping that he had not been heard. Had he known that she heard his comment, he would have apologized immediately and explained to her what happened. He was just mad. Nothing was directed toward her [172]. According to the Grievant, he regretted saying it. Any other time he would have said a different word to vent his frustration and stress [T.169].

The Grievant acknowledged supporting the filing of the grievance to get his job back. He stated that he made a mistake. “It was something stupid. I was frustrated. ... I never use that word. I know it’s taboo. It is not used in my house, my household. It is not used by our family. It’s not used by me [T.182].”

The Grievant stated that he found it to be “embarrassing, basically. It’s something I completely regret. I don’t think I’ll ever get past it.” He described the incident as one mistake that was against the policies. He stated that he knew what is right and what is wrong. He made a mistake. “I know it was wrong. [T.184].”

On cross examination, the Grievant acknowledged that in his capacity as a Lieutenant, he should be held to a higher standard because of his role as a supervisor. Yet even though he was stressed and had many other opportunities to vent his frustration, the first word that came to his mind was to use the “N-word.” He just did not know why he said it [T.187]. It was noted that when he tried to avoid the other car, he did not see the person inside. He just said it in the air [T.190].

When the Grievant was terminated, he filed for his service pension [T.180] He did not intend to retire but he needed the service pension to support his children who were in high school

and in college [T.181]. He did not want to lose everything that he had invested in over the thirty-two years.

Finally, the Grievant was asked if he were reinstated how would he recover the trust of the citizens of Philadelphia he was supposed to be serving. He responded that he served his time and learned a lesson, but this was only a mistake [T.192].

STATEMENT OF THE ISSUE TO BE DECIDED

The parties stipulated that the issue should be stated as follows: Was the Grievant terminated for just cause? If not, what shall the remedy be?

SUMMARY OF THE ARGUMENTS OF THE PARTIES

According to the City, the Grievant was terminated for just cause. It acknowledged that the Grievant had thirty-two years of unblemished service. He also has numerous accolades and commendations from the Department. However, he was also familiar with the Department's EEO directive that was implemented to prohibit discrimination based on race and other protected classes. He was trained in that and in implicit bias and clearly understood that as a Lieutenant, he was held to a higher standard. Yet the Grievant's use of this vile word had a significant impact that negated all those years of service and nullified all the anti-discrimination training.

The evidence demonstrated that the use of that word in that single incident had a greater impact beyond the single dispatcher that heard it. Evidence was presented that it had impact on the force but also on the citizens as reflected in the Citizen Police Oversight Commission meeting. The evidence showed that the citizens were genuinely angry and upset.

Commissioner Stanford testified that even though he was not the Commissioner when the decision was implemented, he agreed with it. He was also questioned about prior instances of officers using that language but still receiving a lesser penalty. The Acting Commissioner stated unequivocally that he was disgusted by the fact that individuals have used that word and were not fired. Even though most of this involved interaction with fellow officers the question becomes whether if one can treat his co-workers in that manner, how does one treat the public the officer is supposed to serve.

The City also argued that the Grievant's explanation was not credible. He testified that he was alone in his car and his statement was not directed to anyone. Just because it was not heard does not mean it could be excused. The Grievant as a Lieutenant understood the stresses of the job. He also understood that he interacts with people of all races, religions, and genders. Therefore, he should have known the impact of that language.

The reinstatement of the Grievant would say to the citizens of this city that the Department is soft on discipline and has stifling future cultural progress in the Department. Citizens are hoping for a culture change. The grievance should be sustained because it is fair. The Grievant admitted to his actions and this is a proportional punishment. The grievance should be denied.

The Union on the other hand states that there was insufficient cause to terminate the Grievant. One must ask, according to the Union, whether one mistake, under these circumstances would obliterate an otherwise excellent thirty-two-year career. The Grievant has thirty-two years' worth of commendations and satisfactory evaluations including comments from

his commanding officers over the various units and assignments. His evaluations were well above satisfactory.

There was no indication that the Grievant was a racist. He has conducted himself in a professional manner and treated people respectfully. Yet the Grievant had been described as not being credible because how would it just be something that you blurt out one time. Yet the only evidence is that one time and the only evidence is that the Grievant saying it is not language that he routinely uses. The Grievant must be viewed in consideration of his extensive record of bravery, heroism, and service to hundreds upon hundreds of people in stressful situations.

With respect to the incident itself, there is no indication of animus in the Grievant's tone when he was talking to the dispatcher who he did not know. He did not have any prior relationship where there was any reason for him to be stressed out at her. Indeed, context matters. In the prior examples submitted into evidence, the circumstances are always a bit different. That is why there is a range of discipline. It is also always why there is a full investigation to review every situation. In this instance, the Union noted that Commissioner Outlaw acted before the full investigation was completed. According to the Union, "to suggest that past Commissioner's are soft on discipline just because they took the time to examine [the] context and look at the work record ... is disingenuous to the process." The just cause standard was negotiated into contract because it did not want to be at the "whim" of the charging political heads of the departments. Especially here when a Commissioner decides to make an example of an officer.

Finally notice in just cause means that the individual charged can expect a certain penalty. According to the Union, it is not doing something that other people have done and

getting hit with termination where everyone else has been penalized with some kind of suspension. In the case here, there is a person with no prior discipline and has been remorseful. All of these are critical in terms of just cause and should have been considered. No one in this case considered the Grievant's work history, the quality and length of service and the lack of prior discipline. The standard in the contract applies to everyone regardless of what level of inappropriate language is used in a particular moment.

The Grievant has been consistent. This was a regrettable outburst. According to the Union, since the Grievant is remorseful with a long and unblemished career it is a fair consideration for some kind of progressive discipline. The Union requests that the Grievant be reinstated and treated as others have been treated who have engaged in similar conduct.

ANALYSIS

I have reviewed all the evidence presented including the transcript, my notes of testimony and documents. The underlying facts are not in dispute. The Grievant, while on a call with a 911 dispatcher, had to serve to avoid an accident and used the N-word in reaction. The utterance was heard by the dispatcher who reported the incident to her supervisor who initiated an EEO investigation. The then Police Commissioner, by Direct Action, decided to dismiss the Grievant two weeks later.

The Union, while acknowledging that the word was used and was in violation of Department policy, claimed that the penalty of dismissal was too harsh. It claimed that the language was not directed at anyone but was speech due to the frustration and anger because of the near miss. Such a context was never completely considered. Regardless, the Grievant was

remorseful. It also noted that the Grievant had thirty-two years of service without discipline and that other officers who have been charged for using this language received less discipline.

There are very few words in the North American lexicon that invokes the 400-year history of the pain and trauma of slavery, institutional racism, degradation, violence, and oppression than the word used by the Grievant on June 22, 2022. In the report on the investigation, [REDACTED], the 911 dispatcher described her reaction after hearing the Grievant utter the N-word while she was trying to retrieve a call back number. She said:

“Civilian [REDACTED] stated she was in shock and there was no supervisor at the front desk at the time. Civilian [REDACTED] went to the Tape Room and spoke with Corporal [REDACTED], W/F. Civilian [REDACTED] stated she wanted to hear the call with Lt. McFadden again, to be sure she heard what she believed McFadden stated. Civilian [REDACTED] stated the call was replayed in the presence of Corporal [REDACTED], who then stated, “Oh no, that is not acceptable.” Civilian [REDACTED] stated Corporal [REDACTED] pulled up an EEO complaint form, which was submitted.

Civilian [REDACTED] stated she returned to the front desk after some time, and explained to Corporal Robert [REDACTED], B/M, the reason she had been gone for an extended time. Civilian [REDACTED] stated Cpl. [REDACTED] replayed the call and immediately notified Captain [REDACTED] B/M.” [C.2].

The Grievant’s statement almost immediately became the subject of consternation and anger in the community. Chief [REDACTED] testified to her attendance at the Citizens Oversight Commission. She stated that the Grievant’s statement caused substantial anger and demands that the Commissioner do something to address the Grievant’s action. Within a matter of days thereafter, before the conclusion of the official IAD investigation, the then Commissioner took direct action and dismissed the Grievance.

Acting Commissioner John Stanford testified in support of the direct-action decision. I agree with his take on the Grievant’s statement that there is no place for this type of language. He especially noted that it was disheartening from a person in a supervisory rank since officers

look toward supervision for guidance and direction [T.103]. He noted that the statement was made in a less than a provoking manner because of simply being placed on hold. This is an interesting qualification of the statement since on cross examination, when asked what, in his view, context meant in situations. He stated as an example, if the Lieutenant was fighting for his life and made the statement he did not think anyone would hold it against him [T.115] I find this to be interesting because the foundation of the concept of just cause requires the arbitrator to consider such factors as context in considering the propriety of certain discipline. The Commissioner also stated that he found that many of the prior suspension for the use of this word to be “disgusting” in that some of those officers were even still employed.

Just cause as found in the Collective Bargaining Agreement is the basic standard of industrial jurisprudence and requires that this arbitrator consider the service record of the Grievant and the context in which it was uttered. Given the gravity of the word in any situation, the underlying circumstances would carry considerably less weight. However, the Grievant’s service record should be considered because it is the better indicator of the Grievant’s character.

The Grievant had been employed as a sworn officer for thirty-two years serving in numerous critical assignments. According to his testimony and the record, he was awarded forty-eight awards and commendations, two awards for bravery and heroism and annual evaluations that were satisfactory; many of which contained superlative language. What is also important here is that the Grievant has not incurred any discipline in 32 years of service and most importantly there was no evidence presented that there was ever a civilian complaint either founded or unfounded filed against the Grievant. It has been my experience and as previously argued by the Union that any officer can receive a civilian complaint on any given day even if

the complaint is eventually unfounded. The Commissioner, however, acknowledged the Grievant's record of service. He had worked with him in the past and while finding that it was something no one "can take away from him" found it to not be worthy of consideration with review of his termination. I disagree.

The Grievant testified that he used to word in reaction to just after avoiding a collision when someone pulled out into traffic in front of him. His coffee and lunch spilled to the floor. I credit his explanation that he was angry and frustrated. It was not directed to anyone. He could not identify the occupants of the other vehicle including their race. This according to the Grievant was an embarrassing mistake. While I do credit his remorsefulness, I do not credit the Grievant's explanation of his utterance, however. The Grievant testified that his statement was accidental. "I never use that word. I know it's taboo. It's not used in my house, my household. It's not used by our family. It is not used by me." [T.182] I find trouble with the concept that of all the words that can be used to express anger, stress, and frustration, this one comes to the fore. I cannot believe that this arrived in his mind from the ether. Overall, however, the Grievant's service record must be considered in weighing the appropriateness of his dismissal. Given the overall quality of that record, I must give it significant weight to mitigate the penalty.

It is my conclusion that a reduction to a 30-day suspension with reinstatement with back pay, including overtime compensation is appropriate. The compensation, however, should be offset by all earnings received by his current employment and pension payments. However, I cannot rest with this limited award. The infraction that the Grievant committed is quite serious. In my view it is insufficient to reinstate the Grievant so that he or others feel that he has been vindicated. For the community of coworkers, including civilians, this penalty leaves them with

no real sense of resolution. At the same time, if I upheld the dismissal, the Grievant would take such a decision as an unjust verdict given his years of service. Neither outcome would address the scope of the offense that occurred. The Grievant must work to restore their trust and respect as a Philadelphia Police Officer.

To restore some semblance of trust between the Grievant and other members of the Department and community, he must understand the impact of his use of such language on the listener regardless of the context. Accordingly in addition to the Award stated above, I am ordering that the Grievant appear in person before the following individuals to apologize and to provide an explanation for his actions: The Police Commissioner; the 911 Dispatcher who he offended, [REDACTED]; and the Citizen's Oversight Board. This must be done within thirty days upon his return to work. Hopefully, that will impress upon him the importance of his role and the impact of the use, even casually, of such language.

AWARD

For all the reasons set forth herein, the Grievance is partially sustained and the discipline mitigated. The discipline shall be reduced to a thirty-day suspension. It is ordered that he shall be reinstated to his former position and rank with back pay including applicable overtime. This payment shall be offset by any compensation received from his pension payments and other jobs worked. In addition, and for the reasons set forth herein, it is ordered that the Grievant, within thirty days of his return to work, appear before the Police Commissioner, the 911 dispatcher, [REDACTED], and the Citizens Oversight Board. He is to apologize for the use of his language and provide his explanation.

Dated: December 14, 2023

**Alan
Symonette** Digitally signed by Alan
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Alan A. Symonette, Arbitrator
Media, Pennsylvania