

AMERICAN ARBITRATION ASSOCIATION

In the Matter of Arbitration Between

Fraternal Order of Police, Lodge No. 5 : AAA Case Number: 01-19-0004-1595
and : Grievance: P/O Novice Sloan
City of Philadelphia : Discharge

Opinion and Award

Hearing Dates: May 31 and July 17, 2023
Briefs Received: November 4, 2023
Arbitrator: Thomas P. Leonard, Esquire

Appearances:

FOP Lodge #5

Thomas M. Gribbin, Jr., Esquire
Willig, Williams & Davidson

City of Philadelphia

Lindsey Cordes, Esquire
Nicole Morris, Esquire
Law Department

Procedural History

Pursuant to the terms of a Collective Bargaining Agreement (CBA) between the Fraternal Order of Police Lodge No. 5 (FOP) and the City of Philadelphia (City) and the Labor Arbitration Rules of the American Arbitration Association, the parties selected the undersigned arbitrator to hear and decide the dispute described below. Upon due notice, arbitration hearings were held on May 31, 2023 and July 17, 2023 in the Philadelphia offices of the American Arbitration Association.

At the arbitration hearings, the parties presented testimony, cross-examined witnesses and introduced documentary evidence. The parties submitted submitted post-hearing briefs on November 4, 2023.

Issues

Whether the City had just cause to discharge the grievant, Police Officer Novice Sloan?
If not, what shall be the remedy?

Relevant CBA Provisions

XX. DISCIPLINE AND DISCHARGE

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J. Disciplinary Code

1. The Disciplinary Code (attachment M) shall be effective immediately for all infractions that are charged by the Department on or after the date that this Award is issued, regardless of when the underlying conduct occurred.

Relevant Disciplinary Code Sections

Introduction

The intent of this Disciplinary Code is to instill and support the core values of the Philadelphia Police Department by establishing fair and consistent penalties for violations of Philadelphia Police Department rules, policies, and principles. The Articles herein are intended to direct the Police Board of Inquiry and all Commanders in administering such fair and uniform penalties. This code shall apply to all personnel of the Police Department. The core values of the Philadelphia Police Department are:

Honor – It is a privilege to serve as a member of the law enforcement community and especially as a member of the Philadelphia Police Department. Each day when you pin on your badge, remember those who went before you and the sacrifices made in the name of this badge. Treat your badge with honor, respect, and pride. Do nothing that will tarnish your badge, for one day you will pass it to another Philadelphia police officer to honor and respect.

Service – Service with honor means providing police service respectfully and recognizing the dignity of every person. We can demand that others respect and honor our work only when we respect them and their rights. We are in the business of providing police service with the highest degree of professionalism. Every day we come into contact with crime victims. Residents are afraid to enjoy their neighborhoods, and young people scared to stand up and do the right thing. Our job is to help them and to do so with courtesy and compassion.

Integrity – Integrity is the bedrock of policing and the foundation for building a successful relationship with our partners. Integrity means reflecting our values through our actions. It is not enough to espouse honor, service and integrity. Each of us must live these values in our professional and personal. Lives. We do this by being honest in our dealings and abiding by the laws and respecting the civil rights of all. Serving with integrity builds trust between the community and the police.

Members of the Philadelphia Police Department must be morally and ethically above reproach at all times, regardless of duty status. All members shall respect the sanctity of the law and shall be committed to holding themselves to the highest standard of accountability. No member shall depart from standards of professional conduct or disobey the law.

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Conduct Unbecoming

Article 1: Conduct Unbecoming

1-§021-10: Any incident conduct, or course of conduct which indicated that an employee has little or no regard for his/her responsibility as a member of the Police Department.

1 st Offense	2 nd Offense	3 rd Offense
30 days or Dismissal	Dismissal	_____

1-§026-10: Engaging in any action that constitutes the commission of a felony or misdemeanor which carries a potential sentence of more than (1) year. Engaging in any action that constitutes an intentional violation of Chapter 39 of the Crimes Code (Related to theft and related offenses.) Also included any action that constitutes the commission of an equivalent offense in another jurisdiction, state or territory. Neither a criminal conviction nor the pendency of criminal charges in necessary for disciplinary action in such matters.

1 st Offense	2 nd Offense	3 rd Offense
30 days or Dismissal	Dismissal	_____

(Joint Exhibit 1, Disciplinary Code, pp. 1, 2, 10 and 12).

Facts

The grievant was a Philadelphia Police Officer in the 17th District. He served for a little over 14 months before his discharge. He was appointed to the Department on June 18, 2018 and was discharged effective October 28, 2019, by Commissioner's Direct Action following a complaint by a citizen, [REDACTED], that he sexually assaulted her.

After Ms. [REDACTED]'s complaint, Sergeant James Norbury of the Department's Internal Affairs Division (IAD) interviewed her and her caseworker. Sergeant Norbury also obtained through a search warrant electronic and digital evidence from the grievant, including a video recording taken by him engaging in sexual activities with Ms. [REDACTED].

The following facts are derived from Sgt. Norbury's investigation; the testimony in this arbitration of Sgt. Norbury, Sgt. [REDACTED] of the District Attorney's Office and Acting Commissioner Christine Coulter; the grievant's video recording and from the grievant's testimony in this arbitration.

Ms. [REDACTED] did not testify in this arbitration hearing, even though the City subpoenaed her for both days. At the first day of hearing, the City asserted that her absence was due to child care issues. I continued the hearing to a second day to allow Ms. [REDACTED] to appear. She did not appear at the second day of hearing. The City offered the testimony of a social worker to testify that her absence was due to her being "in treatment."

The grievant first met Ms. [REDACTED] while he was working in the 17th District. The grievant met Ms. [REDACTED] at her place of employment, a convenience store that was on his beat. She agreed to go on a date with him. Late on the evening of [REDACTED], he picked her up at her residence. They bought takeout from a Chinese restaurant. They went to an adult novelty shop where they purchased items.

When they got to his residence, he excused himself to go upstairs to get a shower. He testified that when he came out of the shower she said she wanted to get drunk and get high before she had sex with him. He has an open bar on the two floors of his residence. He described it as “open bottle” by which anyone could have access to the alcohol. He did not see her drink but that she told him that she did. She told him that she “get lit” which to him meant “she wanted to get drunk and high.” (Tr. 220) Later, when they engaged in sexual relations, he smelled alcohol on her.

The video recording showed that the two then engaged in a variety of sexual activities. The video shows him setting up the video camera to film their sex acts. The video lasts over seven (7) minutes. It appears that the activities began as consensual. However, she started crying during the video. At one point she cried “What are you doing to me?” (02:35 to 02:40). Throughout the video she is in tears and not entirely coherent. At another point, he slapped her face. (05:26) Later, the video showed him standing on the bed with his penis near her face while she is sitting on the bed. He again slapped her face. (06:46). He then pulled her chin up to him. He then ejaculated on her face (07:01). Toward the end of the video, one of the last scenes is of Ms. [REDACTED]'s face with ejaculate matter over her face.

On August 13, 2019, Ms. [REDACTED] made a complaint the 17th District Captain that the grievant sexually assaulted her. The Captain sent the complaint to IAD. IAD investigator Norbury interviewed Ms. [REDACTED]; [REDACTED], a worker at [REDACTED] where Ms. [REDACTED] was staying; and Lt. Jennifer Vrana, who talked to a counselor at Project Home about Ms. [REDACTED]'s complaint. IAD Sergeant Norbury and his superiors then contacted the District Attorney's Office of Special Investigation to obtain a probable cause determination for a request a search warrant. The DA's office then obtained a search warrant for the grievant's phone records, social media accounts, digital evidence and the video recording made by the Grievant at his home.

On September 26, 2019, the District Attorney's Office County Detective [REDACTED] submitted an arrest warrant for the grievant charging him with Rape, Sexual Assault, Indecent Assault and Simple Assault. The Court approved the arrest warrant.

On September 27, 2019, Sergeant Norbury recommended that the Department find the grievant to have violated the following articles in the Philadelphia Police Department Disciplinary Code:

Article 1: Conduct Unbecoming

1-§021-10: Any incident conduct, or course of conduct which indicated that an employee has little or no regard for his/her responsibility as a member of the Police Department.

1-§026-10: Engaging in any action that constitutes the commission of a felony or misdemeanor which carries a potential sentence of more than (1) year. Engaging in any action that constitutes an intentional violation of Chapter 39 of the Crimes Code (Related to theft and related offenses.) Also included any action that constitutes the commission of an equivalent offense in another jurisdiction, state or territory.

Neither a criminal conviction nor the pendency of criminal charges is necessary for disciplinary action in such matters.

Sergeant Norbury's supervisors agreed with his recommendation on the disciplinary charges. On September 27, the grievant was arrested and brought to Internal Affairs Division for his criminal Gniotek warnings. At that time, the grievant was notified of the charges against him, the Department provided the opportunity to make a statement, and notified him of his right to remain silent and right to counsel. Id. He chose not to make any statements on the advice of FOP counsel. He then formally signed the Gniotek warnings.

The CBA and the Disciplinary Code gives the Police Commissioner ultimate authority to determine appropriate discipline for any violation of the Code. Based on the IAD investigation, the Department's executive team determined a Commissioner's Direct Action was most appropriate in this case, as bargained under the CBA, issuing a thirty day suspension and notice of intent to dismiss. The bargained-for penalties under each section are as follows: 1-§021 first offense, 30 days or dismissal and 1-§026 first offense, 30 days or dismissal;

After the Gniotek warnings on September 27, 2019, the grievant received his Notice of Intent to Dismiss and was also later personally served a copy. Jt. Ex. 5. Acting Commissioner Christine Coulter formally signed the CDA on November 4, 2019. Jt. Ex. 4. The grievant was also personally served notice of his dismissal effective October 28, 2019. Jt. Ex. 6.

The FOP then filed the present grievance. The FOP and the City agreed to hold the grievance in abeyance pending the disposition of the criminal charges against the grievant. On January 16, 2020, Municipal Court Judge Karen Simmons, at the close of a two day preliminary hearing, dismissed the criminal charges of rape, sexual assault, indecent assault and simple assault against the grievant. Judge Simmons stated that the DA had not met its burden of

proving their case ” by a preponderance of the evidence to show more likely than not” that the defendant had committed those offenses. To the Judge, the video did not show that Ms. [REDACTED] said “No” to the grievant’s actions.

Discussion

The issue in this is whether the City had just cause to discharge the grievant.

The City’s Position

The City met its burden of proving just cause under the traditional requirements for proving just cause. The Police Department IAD responded to Ms. [REDACTED]’s complaint in a fair and impartial manner by conducting an objective and thorough investigation of Ms. [REDACTED]’s complaint. The IAD investigator came to a well supported conclusion that the grievant’s date with Ms. [REDACTED] on the evening of August 8, changed from what may have been a consensual visit to the grievant’s residence to have sexual relations to nonconsensual sexual and physical assaults on an intoxicated woman. The grievant’s own video recording and his testimony in this arbitration hearing proved that Ms. [REDACTED], who the grievant admitted was “lit,” did not have the capacity to consent to the full range of the sexual activities that the video showed. At the very least, Ms. [REDACTED] did not consent to the grievant slapping her face, ejaculating on her face and recording the entire encounter on video. His conduct violated the Disciplinary Code

The FOP’s Position

The City did not meet its burden of proving just cause because the City’s case is entirely built on hearsay and circumstantial evidence. Because Ms. [REDACTED] did not testify in this

arbitration hearing, all of the City's evidence against the Grievant that was in the IAD investigation alleging that he sexually assaulted her constituted uncorroborated hearsay evidence that cannot serve as the basis for making a finding of fact. Also, the City's disciplinary charges against the Grievant are grounded on the premise that the grievant violated the Crimes Code. This premise has been nullified when a Municipal Court Judge dismissed the criminal charges at the conclusion of a preliminary hearing for the grievant on the grounds that the DA did not make a prima facie case and the Judge saw no evidence in the video that Ms [REDACTED] said "No" to the grievant's actions.

Analysis

In any discipline case, the burden of proof is on the employer to prove that it had just cause to discharge the employee, in this case, discharge.

The seven factors of just cause are whether (1) there was notice of the possible or probable disciplinary consequences of the conduct; (2) the work rule or managerial order is reasonably related to the orderly, efficient and safe operation of the employer's business and the performance properly expected of the employee; (3) the employer conducted an investigation to determine if the misconduct occurred; (4) the investigation was fair and objective; (5) whether substantial evidence or proof supported the finding of misconduct; (6) the employer applies its rules, orders, and penalties fairly and without discrimination to all employees; and (7) the discipline is proportionate to the offense and employee's record. American Fed'n of State, Cty. & Mun. Employees, Dist. Council 88, AFL-CIO v. City of Reading, 130 Pa. Cmwlth. 575, 582, n. 3 (1990).

Within the framework of the seven factor just cause analysis, the narrow issue in this case is whether City proved the fifth factor, whether “substantial evidence or proof supported the finding of misconduct.” In this case, the City has the burden to produce evidence to prove that the grievant violated the two sections of the Disciplinary Code.

As a threshold matter, the primary evidence that the City relies on is the grievant’s own video recording of the activities. Because it is his own recording of what he did, it is not hearsay. This facts of this case are distinguishable from my decision in the case of the discharge of *City of Philadelphia and FOP Lodge No. 5*; AAA Case No. 01-20-0000-6900 (Discharge of Joseph Stevenson) In that case, I found that another officer’s body worn camera video recording was inadmissible hearsay because the other officer was not available for cross examination. As stated above, the grievant in this case made the video that the Department relied on, so the unfairness of relying on someone else’s video that was an issue in Stevenson is not present here.

The first section of the Disciplinary Code at issue is 1-§021-10: Any incident, conduct, or course of conduct which indicated that an employee has little or no regard for his/her responsibility as a member of the Police Department. “

The conduct in this case concerns the grievant’s actions on [REDACTED] during a date with Ms. [REDACTED]. Acting on a complaint by Ms. [REDACTED], the IAD conducted an investigation that led to IAD obtaining a search warrant that found that the grievant video recorded his sexual activity with Ms. [REDACTED]. It was the video, combined with the interview with Ms. [REDACTED], that convinced the IAD to recommend that disciplinary charges be brought against the grievant,

that he sexually assaulted Ms. [REDACTED]. The Department's executive team then decided that the charges be made as a Commissioner's Direct Action, rather than via a Police Board of Inquiry. Acting Police Commissioner Coulter then suspended the grievant with the intent to dismiss.

The City has proven that it had substantial evidence to support the discharge of the grievant. The grievant's own video recording of his conduct with Ms. [REDACTED] gave the Department the evidence to justify its decision.

The City argues that the video of the grievant and Ms. [REDACTED] showed that his conduct went beyond consensual sexual intercourse with Mr. [REDACTED]. He assaulted her by slapping her in the face two times and ejaculating in her face. To put these actions in context, he did these actions after she was crying "What are you doing to me?"

The FOP argues that the video showed that that the Grievant and Ms. [REDACTED] engaged in planned, consensual sexual intercourse. The FOP contends that based on the Grievant's testimony, the record shows Ms. [REDACTED] did not withdraw her consent.

The video evidence and the grievant's testimony in this arbitration does not support the FOP's argument. While the sexual activities may have begun as consensual, the video evidence is convincing that they did not remain consensual.

Ms. [REDACTED] was crying at various points in the seven minute encounter. At one point, in a crying voice, she asks, "What are you doing to me?" He slapped her face two times. Following this second slap, he ejaculated on her face. A final part of the video is a close up of video is Ms. [REDACTED]'s face covered with ejaculate matter.

It also appears to me that Ms. [REDACTED] was intoxicated. Her eyes looked glassy. Her speech was slurred. The grievant admitted that Ms. [REDACTED] had been drinking in his residence and that she was "lit." Meanwhile, the grievant testified he did not drink at all. Given this

evidence, it is difficult for me to conclude that she truly gave her consent to this particular conduct of the grievant, either the grievant's actions or his video recording of his actions. The Department has substantial evidence to support its conclusion that Ms. [REDACTED] did not consent to these aspects of her evening date with the grievant.

Chief Inspector Coulter (Acting Commissioner at the time of the grievant's discharge) noted in her testimony that she stands by the determination to discharge the grievant because his conduct was unbecoming of a police officer regardless of whether there was a criminal proceeding or not. (Tr. at 168.) She further stated that there was enough evidence in the investigation that inappropriate actions occurred that were detrimental to him being a part of the Department Id.

As the City's brief stated, the section of the Disciplinary Code at issue here reasonably relates to the orderly, efficient, and safe administration of law enforcement and the performance properly expected of employees like the grievant. The intent of the Disciplinary Code is to instill and support the core values of the Department by establishing fair and consistent penalties for violations of the PPD rules, policies and principles. The core values of the PPD are honor, service, and integrity. The Disciplinary Code makes clear that employees shall treat their badge with honor, respect, and pride. Employees shall do nothing to tarnish that badge. Further, the Code highlights integrity as "the bedrock of policing and the foundation for building a successful relationship with our partners." Integrity does not stop when the workday is over, rather integrity is espoused by being honest in our dealings and "abiding by the laws and respecting civil rights of all." All members "shall respect the sanctity of the law and shall be committed to holding themselves to the highest standard of accountability."

Coulter testified at length about the trust that is paramount between a police officer and the citizens he serves. She highlighted that the actions of the grievant were so damaging to the reputation of the department, that it would be a danger to have him continue to serve. (Tr. at 157.)

As Chief Inspector Coulter testified, having an officer on the force who videos himself having sex with a woman, slaps her in the face then ejaculates on her face after the woman questions on video “what are you doing to me” erodes public trust. *Id.* at 158. Chief Inspector Coulter emphasized how police officers have access to people, and reinstating an individual who commits the violent actions such that P/O Sloan did would be an absolute danger. *Id.* at 159.

If the Department had not discharged the grievant under the facts of this case, then it would have allowed the grievant to make a mockery of the core values of the Department as set forth in the Introduction to the Disciplinary Code: Honor, Service and Integrity.

The grievant’s degrading conduct toward Ms. [REDACTED], which he video recorded, is Conduct Unbecoming an officer that justifies his discharge under 1-§021-10.

The second section of the Conduct Unbecoming article is 1-§026-10,

Engaging in any action that constitutes the commission of a felony or misdemeanor which carries a potential sentence of more than (1) year. Engaging in any action that constitutes an intentional violation of Chapter 39 of the Crimes Code (Related to theft and related offenses.) Also included any action that constitutes the commission of an equivalent offense in another jurisdiction, state or territory. *Neither a criminal conviction nor the pendency of criminal charges is necessary for disciplinary action in such matters.*

(Emphasis added by arbitrator)

The FOP argues that the Municipal Judge's dismissal of the criminal charges against the grievant means that the City has not produced substantial evidence that the grievant violated 1-§026-10 of the Disciplinary Code.

The City points out two problems with this FOP argument. The first is that 1-§026-10 of the Disciplinary Code states that a "criminal conviction" is not necessary to find an officer has violated this section. The second is that the arbitrator in this matter sits as an independent fact finder and views the case in totality as it relates to the CBA.

The City's two arguments are persuasive. They convince me that the City had substantial evidence before it that the grievant violated 1-§026-10 of the Disciplinary Code. I am convinced that the City made its discharge decision based on video evidence, made by the grievant himself, that the grievant slapped Ms [REDACTED] in her face two times, ejaculated on her face and took a video shot of her face covered with the ejaculate matter.

The evidence convinces me that the Department had substantial evidence that the grievant's conduct, captured on his own video recording, at the very least constituted sexual assault, indecent assault and assault.

I must defer to Acting Commissioner Coulter's testimony that she does not know why the criminal case failed, but that in her opinion, the facts of the case show that the grievant's conduct violated the Pennsylvania Crimes Code. Coulter is a veteran of several decades of police experience and is due this deference.

The City, based on the evidence, proved that it had just cause to dismiss the Grievant from his employment as a sworn police officer for Conduct Unbecoming under 1-§026-10 of the Disciplinary Code

Award

For the reasons stated above, the City has proven that it had just cause to discharge the grievant, Novice Sloan. The FOP's grievance is denied.

December 18, 2023
Harrisburg, Pennsylvania


Thomas P. Leonard, Esquire