

American Arbitration Association
Case Number: 01-23-0002-7601

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In the Matter of the Arbitration

Between

AFSCME DISTRICT COUNCIL 47
"UNION"

OPINION

-and-

AND

CITY OF PHILADELPHIA
"CITY"

AWARD

Grievance 2187-23-08 – Sierra Green
-----X
BEFORE: Randi E. Lowitt, Esq., Arbitrator

APPEARANCES

For the City

Andrew J. Rolfes, Esq.
Cozen O'Connor

For the Union

Jordan Konell, Esq.
Willig Williams Davidson

Pursuant to the provisions of the collective bargaining agreement between THE CITY OF PHILADELPHIA (hereinafter, "the City") and AFSCME DISTRICT COUNCIL 47 (hereinafter, "the Union"), the above-named arbitrator was designated by the American Arbitration Association as Arbitrator to hear and decide the matter in dispute between the above-identified parties.

A hearing was held by ZOOM, with consent of all parties, on January 10, 2023. The parties were represented by counsel and were afforded a full and fair opportunity to conduct direct and cross examination of sworn witnesses, to present relevant evidence and to argue their relative positions. The record was closed after oral closing arguments. All matters, while not necessarily cited in this Opinion and Award, have been considered. All Claims not expressly granted herein are denied.

The parties arranged for a court reporter for the hearings. That record was made available. Any additional notes taken by the Arbitrator and all materials attendant to the arbitration will be destroyed or deleted at the time this Opinion is disseminated.

The Issue:

Did the City have just cause to terminate Ms. Sierra Green

If not, what shall be the remedy?

BACKGROUND

Sierra Green began working with the Philadelphia Police Department (PPD) as a Forensic Scientist 1 in or around January 3, 2022. She had moved to Philadelphia the prior year, with her then-boyfriend, [REDACTED]. They lived together. At some point, Green determined that she wanted to end her relationship with [REDACTED]. On August 4, 2022, [REDACTED] filed a report with Internal Affairs (IA) of the PPD, alleging that Green had engaged in domestic violence, punching him in the face, causing a bloody lip and a black eye. On November 29, 2022, Detective Daria Jackson filed an Affidavit of Probable Cause for Arrest Warrant to be issued against Green. (City Exhibit #1). A criminal complaint was also sworn by Detective Jackson on the same day. (City Exhibit #2). A warrant for Green's arrest was issued on November 29, 2022, as well. (City Exhibit #3). Green turned herself in, an arrest report was filed, and Green was charged with Misdemeanor 2 Simple Assault. (City Exhibit #4). On December 28, 2022, Green was issued a Notice of Intent to Dismiss by the Commissioner of Police. (Joint Exhibit #4). Subsequently, on January 3, 2023, Green was dismissed from her job. Green grieved the discharge. (Union Exhibit #2). When the grievance was not resolved, the Union filed a demand for arbitration, leading to the instant hearing. (Joint Exhibit #3).

[REDACTED] testified that he had been living with Green from May 2021 to May 1, 2022. He alleged that on April 24, 2022, leading up to his

moving out on May 1, he woke up on the couch, and Green was very angry because ██████ had not sent her money he owed her. According to ██████, she began yelling, throwing items at him, taking his property, and threatening to take more if he did not pay her. At one point, ██████ said Green threw a shoe at him, hitting him in the head; she took his car keys and his cell phone and his wallet. After telling Green that he did not want anything to do with the situation and saying he wanted to separate himself from it, ██████ alleged that Green punched him in the face multiple times, busting his lip. ██████ said he went into the bathroom and took pictures. (City Exhibit #s 7, 8). Alleging he was in shock from the situation, ██████ said he called his family, specifically ██████, and said he was going to come stay with them until he could move out on May 1. ██████ said he did not live there again, only returning to move his belongings out on May 1. ██████ did not file a police report at that time. ██████ thought he went to IA in June 2022, but was reminded that he had gone in August 2022.

On cross examination, ██████ was asked about his claim of taking the pictures in the bathroom; he was asked about the overhead light and the vent on the wall, at which point he was not sure where he took the pictures, saying it was a long time ago. ██████ did attend the criminal trial against Green, at which she was found not guilty.

Detective Daria Jackson has been at Detective with IA since 2018, but has been with the PPD since 1995. Her current position has her

investigating departmental violations and criminal allegations against police officers and the civilian workforce at the PPD. Jackson received the complaint from [REDACTED]. According to Jackson, she investigated, watched video, and talked to the complaining witness ([REDACTED]) as well as witnesses he recommended ([REDACTED]). Jackson said that the complaint alleged that [REDACTED] was physically assaulted and was also being harassed. [REDACTED] alleged a split lip and a black eye. [REDACTED]'s [REDACTED] confirmed that [REDACTED] had told her Green assaulted him; she also alleged that [REDACTED] had broken glasses. Jackson then filed an Affidavit of Probable Cause, a Criminal Complaint, and an Arrest Warrant against Green. (City Exhibit #s 1-2). At her arrest, Green was asked to provide a statement, which she declined to do on advice of counsel.

On cross examination, Jackson acknowledged that, pursuant to the timeline, the alleged incident occurred in April 2022, the complaint was made in August 2022, and the warrant was issued at the end of November 2022.

Captain Gregory Malkowski is the Commanding Officer of the Labor Relations Unit at the PPD, a position he has held for sixteen (16) years. He explained that, when a grievance comes to his attention, he typically makes efforts to resolve it by way of a Police Board of Inquiry. However, in this instance, instead of a Police Board of Inquiry, the Commissioner took direct action and issued the Notice of Intent to Dismiss and then the

Dismissal. (Joint Exhibit #s 4, 5). When asked why dismissal, Malkowski explained that the Commissioner takes domestic violence very seriously, and that he usually directs dismissal.

Malkowski acknowledged that the Notice of Intent and the Dismissal both reference Conduct Unbecoming. (City Exhibit #6). He noted Section 1-026-10, and explained that Green's alleged actions would lead to either a thirty (30) day suspension or dismissal, but that, since PPD takes domestic violence claims so seriously, and because PPD spends time every day handling domestic violence cases, it must act with its own employees as it would act with the Philadelphia community.

On cross examination, Malkowski acknowledged that Green was not interviewed prior to her arrest, during the course of the investigation. Malkowski was not aware of who was interviewed during the investigation or how the investigation was conducted.

Green testified on her own behalf. She began working for PPD in her "dream job" in January 2022. During her time with the PPD, she had no disciplinary issues, but she was having personal problems with her then-boyfriend, ████████, from whom she was trying to extricate herself, noting that their relationship was "rocky, mostly towards the end." Green asked him to move out in December 2021, before she began with PPD, but he did not, and would not; ultimately, he was to move out in May 2022. During the remainder of their time in the same apartment, Green said she slept in the

bedroom and ██████ slept on the sofa in the living area. She did file a Petition for Protection from Abuse on August 5, 2022. (Union Exhibit #2), because, although ██████ had moved out, he damaged her property, told her that he would come around whenever he wanted, and threatened to get a gun. An Order of Protection was issued to her. (Union Exhibit #1). Additionally, Green filed two police reports against ██████ for Domestic violence, one in June 2022 and one in August 2022. (Union Exhibit #s 3, 4). Green related that she had told her supervisor and "several higher ups" at work about the issue she was encountering with ██████.

Green noted that she had never been called in for an interview prior to receiving the Intent to Dismiss. (Joint Exhibit #4). With regard to the allegations ██████ made about Green throwing items at him, taking his items, and becoming physical with him on April 24, 2022, Green insisted that she was not even home on that date. As to his allegation that she prevented him from leaving, Green said she would have been happy for him to leave, because she had been asking him to leave. Just prior to the date on which ██████ reported Green to IA, she recalled that he had invited her over to "see his new place," wanting to get back together with her, but she refused to go. As to ██████'s contention that she hit him and he went into the bathroom to take pictures, Green insisted that the pictures were not taken in the bathroom, based on the light fixture and the vent on the wall.

Green said she did not learn that ██████ had filed a criminal complaint against her until September 2022. While criminal charges were filed against Green, she was found not guilty, as shown on the Trial Disposition and Dismissal form of February 15, 2023. (Union Exhibit #5). However, prior to that, she was dismissed from her job. She was not interviewed prior to dismissal, nor did she provide any statement on her own behalf because none was requested prior to her arrest and, upon advice of counsel, she would not provide one while her trial was pending.

Green said that she has been working at three (3) jobs since the termination, in an effort to keep herself financially afloat. Her mental health has suffered; every aspect of her life has been impacted.

On cross examination, Green acknowledged that she did not know if ██████ had been apprised of her filing a Domestic Violence report in June or August 2022. She acknowledged that ██████ went to IA on or about the same day she filed a report against him in August 2022. She reiterated that she did not hit or punch ██████ and did not cause his split lip in August 2022.

████████ testified as a character witness for Green. Harrison said the two became friends approximately two (2) years earlier. According to ██████, Green spoke very highly of her position and loved the work, telling ██████ it was her dream job. Harrison also recalled Green telling her about the relationship with ██████, how it was finally nearing the end, that

██████ was not nice to her and was very vindictive to her throughout their relationship. ██████ attended Green's trial and was a character witness for her at the trial.

Relevant Portion of the Disciplinary Code

Section	Charge	1 st Offense	2 nd Offense	3 rd Offense	Reckoning Period
1-§026-10	Engaging in any action that constitutes the commission of a felony or a 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 (relating to Theft and Related Offenses). Also includes 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.	30 Days or Dismissal	Dismissal	-----	Duration of Employment

(City Exhibit #6)

POSITIONS OF THE PARTIES

The City:

The City insisted it had just cause to discipline and discharge Green. It specifically takes note of the fact that Green was arrested for simple assault, reviewed the testimony of Jackson and Malkowski, and argued that Green was held to a high or higher standard than the general public, as are all employees of the police department. It highlighted the testimony of [REDACTED], and the fact that it was consistent with what he had related to Jackson when he gave her his information, leading to her affidavit of probable cause, which led to the arrest warrant. And, it points to the disciplinary code, which specifically holds that conduct unbecoming, which this most definitely would be, can lead to dismissal, which was the penalty that the Department found appropriate and warranted.

While acknowledging the “extremely rocky, maybe even combustible relationship” between Green and [REDACTED], the City again asserted that, notwithstanding the fact that the charges against Green were dismissed, the disciplinary code does not demand that there be a conviction, only that they be charges brought. And, further, the standard of proof needed to be met in this arbitration proceeding is different than that of a criminal proceeding. “A criminal conviction requires proof beyond a reasonable doubt. That’s not the standard that’s applied in arbitration. Whether you apply a clear and convincing standard, or merely

a preponderance of the evidence standard...either of those is less than the standard required to obtain a criminal conviction. ...The absence of such a conviction doesn't undermine the City's determination that Ms. Green engaged in conduct unbecoming." Therefore, the City demands that the discipline be sustained and the grievance denied.

The Union:

The Union avers that the City has not proven just cause to discipline or to terminate Green, by any standard. The Union is not persuaded that the evidence of ██████'s allegations, as set forth in his testimony and as accepted by the City in its findings, are valid. It finds that the facts of his testimony and that of Green differ, and insists that Green is the truthful witness. It questions the alleged investigation done by Jackson, taking specific note of the fact that she did not make any efforts to speak to Green prior to her arrest, and only spoke to ██████ and two of his relatives, who were not even present when the alleged incident occurred. The Union finds this to be a deficient investigation and a violation of Green's due process, specifically because Jackson did not make any attempt to speak to Green prior to her arrest and then only tried to speak with her after her arrest. The Union cannot understand how the City was surprised, dismayed, or reasonable in any way when it then decided Green was unwilling make a statement.

While the Union agrees that domestic violence is not acceptable, it does not believe that Green engaged in domestic violence, and holds forth the dismissal of the charges against her. Additionally, and despite the disciplinary code, the Union points out that the investigation that led to the discipline imposed by the City was so deficient as to be unjust. "...In light of the City's dim evidentiary record, in light of Mr. [REDACTED]'s incredible testimony, in light of what the municipal court found, in light of the City's admission that its investigation is antithetical to the core values of industrial due process..," the Union demands that the grievance be sustained and that Green be reinstated with lost wages, seniority, and benefits.

OPINION

After a complete review of all the evidence and testimony, I find that this City did not have just cause to discipline or to discharge Green. My reasoning follows.

A main question to be answered is not whether or not Green engaged in the actions alleged, or whether or not she was arrested, but whether or not there was just cause for discharge. The City based its actions on the Disciplinary Code. (City Exhibit #6). That Code states, in part, that its "intent" is to "instill and support core values of the Philadelphia Police Department by establishing fair and consistent penalties for violations of Philadelphia Police Department rules, policies, and principles." That is a noble aspiration. Certainly, those who are sworn to uphold the law, as well as those who are civilian employees, are held to a high standard. But, that standard is not unlimited. Employees are still entitled to due process, and, the City must still meet its just cause burden when imposing discipline. And, while a person need not be convicted to be subject to disciplinary action, again, certain standards must be met for the disciplinary action to be sustained.

Obviously Green and [REDACTED] were in an unhealthy relationship. [REDACTED] had motive to be vindictive. Jackson did not do a thorough investigation prior to sending the case to the DA – she said she spoke to [REDACTED] and to his mother and to his aunt. She did not speak with Green prior to sending

the case on; asking Green for a statement post arrest is disingenuous. She did not investigate whether Green had spoken to any of her colleagues or superiors about the relationship. ██████'s credibility is lacking.

Domestic violence is abhorrent, but to fabricate about it is more so, which is what appears to be the case with ██████ and his allegations of what transpired on ██████. He is simply not a credible witness. More importantly, and based on the various orders of protection and issues Green had with ██████, it appears that he is vindictive. Whether he was aware that his complaint could lead to loss of job, or merely an arrest, it appears that ██████ was trying to wreak further havoc on Green's life. Conversely, Green was a credible witness.

Sometimes we err in our personal lives and it spills over into our professional lives. In this instance, it flooded over and Green is still mopping up, but, clearly the City, possibly with the best of intentions regarding domestic violence claims and its need to protect the people of the City of Philadelphia from domestic violence, has not fulfilled its obligation to prove just cause to discharge this employee in this instance. In fact, there is no doubt that the City did not prove any of its allegations about conduct unbecoming, against Green.

In view of the foregoing, I issue the following:

AWARD

1. Green is to be reinstated within forty-five (45) days of the issuance of this Opinion & Award. This should give sufficient time for fitness for duty and return to work protocols to be accomplished.
2. Green's seniority, pension rights, and other benefits are to be bridged.
3. Green is to be made whole in the manner requested by the Union; however, the City may query the amount of back pay owed, based on income and unemployment received during Green's time out of work. Additionally, the City shall reimburse the Union for the costs of the health and welfare plan contributions made on Green's behalf during her time out of work, if applicable.
4. If the parties are unable to reach an agreement on the back pay owed or any other part of this Opinion & Award, either party may request that the Arbitrator make a determination. That request shall be made in writing to the Arbitrator and opposing counsel. Email is acceptable.
5. The Arbitrator shall retain jurisdiction for the implementation of any and all of this Opinion & Award for two (2) years from its issuance. This time frame may be extended by request of either of the parties, if there are further issues, specifically with regard to compliance and/or implementation.



Randi E. Lowitt
Arbitrator

Dated: January 29, 2024

State of New Jersey)
) ss.:
County of Morris)

I, Randi E. Lowitt, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Award.



Randi E. Lowitt
Arbitrator

Dated: January 29, 2024