

**American Arbitration Association
Arbitration Pursuant to Agreement of the Parties
Before Timothy J. Brown, Esquire**

In the matter of:

Fraternal Order of Police, Lodge 5

and

City of Philadelphia

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**AAA Case No. 01-22-0003-6823
(Barry M. Stewart – 7-Day Suspension)**

Decision and Award

Appearances:

On behalf of FOP, Lodge 5:

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On behalf of City of Philadelphia:

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Introduction

This arbitration arises pursuant to a July 25, 2022 grievance filed by **Fraternal Order of Police, Lodge 5** (the FOP or Union) with the **City of Philadelphia** (the City or Employer) alleging the City violated the parties’ Bargaining Agreement (the Agreement or CBA) by issuing Police Officer **Barry M Stewart** (Grievant) a seven-day suspension without just cause. The parties were unsuccessful in resolving the dispute through their grievance procedure and the Union thereafter filed a demand for arbitration. The parties selected the undersigned arbitrator through the processes of the American Arbitration

Association to conduct a hearing on the grievance and render a final and binding arbitration award. The matter was heard by the undersigned on January 16, 2024 in Philadelphia, Pennsylvania. The FOP and the City were afforded the opportunity for argument, examination and cross-examination of witnesses and the introduction of relevant exhibits. Grievant was present for the entire hearing and testified on his own behalf. A transcript of the hearing was taken. Following the hearing the parties elected to submit oral post-hearing argument. Upon the receipt of which the dispute was deemed submitted at the close of business January 16, 2024.

This decision is made following careful consideration of the entire record in the matter including my observations of the demeanor of all witnesses.

Issues

The parties stipulated that: (1) there are no procedural bars to the arbitration of the matter; (2) the matter is appropriately before the arbitrator, (3) the arbitrator has the authority to render a final and binding decision and award in the matter, and (4) the issues presented by the subject grievance may accurately be described as:

Did the City have just cause to suspend Grievant for seven-days and if not, what shall be the remedy?

Facts

By Notice Served on or about July 15, 2022 Grievant was notified of his suspension without pay for Conduct Unbecoming (5-days) and Neglect of Duty (2-days) relating to certain [REDACTED] conduct of Grievant. In relevant part, the Notice provides:

CONDUCT UNBECOMING, SECTION 1-§016-10:
(Inappropriate language, conduct or gestures to Police

Department employees while on duty.)

Internal Affairs Investigation EEO #18-0035 SUSTAINED an allegation against you in reference to a photograph you took of P/O [REDACTED]. P/O [REDACTED] alleged that she felt violated as a result of you capturing a photograph of her while on-duty, without her knowledge, and you forwarded the photograph within your squad's group text. The Internal Affairs Investigation determined that this act, along with P/O [REDACTED]'s (SIC) perception as to what was depicted and sent to her male colleagues created a hostile working environment for her.

NEGLECT OF DUTY, SECTION 5-§011-10 (Failure to comply with any Police Commissioner's orders, directive, memorandums or regulations; or any oral or written orders of superiors.)

Internal Affairs Investigation EEO #18-0035 SUSTAINED a Directive Violation – PPD Directive 6.10, Social Media and Networking against you in reference to a photograph you took of P/O [REDACTED]. The Internal Affairs Investigation determined that you violated PPD Directive 6.10 when you took the photograph on-duty and in a city vehicle of P/O [REDACTED]. PD Directive 6.10 defines social media as “On-line sources that allow people to communicate, share, and/or exchange information with others via some form of on-line or cellular network platform, information may include, but is not limited to, text, photographs, video, audio, and other multimedia files.”

PPD Directive 6.10 Social Media and Networking, Section 4-7 states “While on-duty status employees are prohibited from using privately-owned property to engage in personal use of social media.

On or about September 5, 2018 Philadelphia Police Officer [REDACTED] filed a City EEO Complaint alleging discrimination/hostile-work-environment based upon gender and naming Grievant and her Sergeant, [REDACTED], as individuals responsible for the alleged discrimination. In regard to the alleged conduct of Grievant, the EEO Complaint referred to a photograph taken by Grievant on his personal cell phone on August 30, 2018 without

██████'s knowledge while she was driving a police vehicle also occupied by Grievant and then forwarded to other officers in Grievant's and ██████'s squad/unit. Upon the filing of the EEO Complaint, the matter was referred to the Police Department Internal Affairs Division (IAD) for investigation. The IAD investigation was conducted by Sergeant Stephanie Williams. Williams interviewed all members of the involved 16th District NETS unit, including Grievant and ██████. The resulting March 18, 2021 investigation report sustained the conduct unbecoming allegation against Grievant relating to his taking a photograph of ██████ and texting the photo to unit members and sustained the allegation that Grievant had violated PPD 6.10 by photographing and texting while on duty. A Police Board of Inquiry (PBI) hearing was conducted on November 18, 2021 concerning Grievant's alleged violation of the Department Disciplinary Code Article 1, Section 016-10 and Article 5, Section 011-10.¹ The PBI recommended finding Grievant not guilty of both counts. Upon review, the Deputy Commissioner (Nash) recommended that Grievant be found guilty of both counts and given a five-day suspension for violation of 1-016-10 and a two-day suspension for violation of 5-011-10. On February 2, 2022 then-Police Commissioner Outlaw approved the recommendations for the 5- and 2-day suspension.²

Regarding the photograph/texting events of August 30, 2018, ██████ testified that she was unaware that the day was scheduled to be a plain-cloths day for the unit and ended up wearing her police uniform pants and a T-shirt. She testified that sometime in the morning another officer in the squad used the group text to send the squad a picture of a flier

¹ **1-§016-10** *Inappropriate language conduct or gesture to Police Department employees while on duty* provides a discipline range of Reprimand to 10-days suspension for the first offense. **5-§011-10** *Failure to comply with any Police Commissioner's orders. Directives, memorandums, or regulations, or any oral or written orders of superiors* provides a discipline range of Reprimand to 5-days suspension for the first offense.

² Grievant served the seven days of suspension August 22 - 30, 2022.

announcing a police-wear customer appreciation sale.

██████ testified that she and Grievant were not usually partners but, on that day, Grievant's normal partner was off duty and she and Grievant were paired together by their sergeant. The pair's assignment was to drive to a location and park their vehicle in the vicinity of a drug surveillance conducted by another unit officer and respond, detain, and search individuals identified by the surveillance officer as potential narcotics customers.

██████ testified that she drove the vehicle and that while in the driver seat she heard a text notification go off on her cell phone. She eventually looked at her phone – located to her left side – and saw a picture of herself from the torso down sitting in the vehicle. She observed that the photo had been texted from Grievant to all the members of the unit. ██████ testified that she did not say anything at the time and that soon thereafter the surveilling officer notified ██████ and Grievant by radio of descriptions of a male and a female suspected of purchasing narcotics and the two then located and stopped the suspects. ██████ testified that she interacted with the female while Grievant focused upon the male. Both suspects were cleared. ██████ testified that when she and Grievant returned to their vehicle, she asked Grievant; “You took a fucking picture of me?” To which, according to ██████, Grievant laughed and gave what ██████ described as an “oh shit” look, but said nothing more.

██████ soon thereafter transferred to another unit and filed her EEOC complaint.

In regard to the events of August 30, 2018, **Grievant testified** that he had a cordial relationship with ██████ and did not ostracize her or treat her inappropriately. He confirmed that he was assigned to work with ██████ on ████████████████████. He testified that the photograph at issue was taken by and texted from his personal cell phone, but that it was done by mistake and without his knowledge or intent. Grievant testified that he used his cell

phone to “clear” the male suspect while [REDACTED] was dealing with the female suspect. In such regard, Grievant testified, he took a photo of the suspects driver’s license for information for his report to be completed when he returned to the station. The photograph of [REDACTED] must have somehow been taken, Grievant testified, when he got back into the police vehicle. Or, Grievant added, maybe when he was scrolling through his phone before being notified of the two suspects. He testified that [REDACTED] did not confront him about the photo until the two returned to the Police station.

Grievant testified that the photo must have been taken and then texted by accident, such as happens with a “butt-dial.”

Positions of the Parties

City Position

It is important to keep in mind that the penalty imposed here is on the lower range of penalties permitted for the offense in the Disciplinary Code; a Code and penalty range established through bargaining by the parties. In so bargaining, the FOP recognized the authority and discretion granted the City to enforce a standard of professionalism in the Police force. The way officers treat each other at work is important and the way officers misuse their personal cell phone devices at work can subject them to discipline. It's common sense. Officers can't do things at work to coworkers that are perceived as harassing. The testimony of Ms. [REDACTED] establishes that she was very disturbed by the bullying conduct of Grievant.

In regard to the elements of just cause; there clearly were work rules violated. Grievant admitted that he understands the rules involved. The language of Section 1-16-10, inappropriate language, conduct, or gestures to Police Department employees while on duty is very, very

broad. If the Union wanted to bargain for something more specific, they could have, but obviously this is language that is broadly written, because; (1) the parties could not possibly anticipate all circumstances in which someone might be inappropriate to a co-worker, and (2) the idea of discretion of the Police Department is built in and a penalty range – a range to be exercised by the Department - was bargained for.

As for Grievant not following a Department directive, it is very clear that the social media policy, which is a Department directive, forbids the use of personal cell phones while on duty. The record establishes that the directive establishes a commonsense rule. Not every instance of text messages on a personal cell phone device cause a disruption to the workplace, or contributes to what ends up being a sustained complaint of bullying and harassment in the workplace after many hours of department investigative work. The personal cell phone usage here wasn't "take the chicken out of the freezer," "I'm going to be an hour late for dinner," or "there's an accident." No. Grievant's photo and text had real impact upon the workplace.

The City conducted a thorough investigation. All involved were interviewed. Grievant was given the opportunity to provide his side of the story and it was established that the photograph and text at issue were taken and sent by Grievant. Following a full investigation, Internal Affairs concluded that the allegations against Grievant were sustained. Notwithstanding the recommendation of the PBI to the contrary, the Deputy Commissioner and Commissioner had reasonable basis to conclude that it was more likely than not that Grievant had violated the rules involved.

What makes sense? What is more likely than not? [REDACTED], the only woman in the unit, arrived at work and was not dressed the way everyone else was that day. She wasn't prepared, and she didn't realize it was going to be an undercover day. It doesn't take a far stretch of the

imagination to understand why a random picture of a colleague's pants might go on a text thread when she's the only one wearing pants that day. The photo of [REDACTED] in her uniform pants was not accidental. The photo was not blurry – as would be expected if a photo was taken by accident as someone was moving - and was consistent with the context of [REDACTED] not being dressed for undercover work. To take a picture is a multiple step process. But, even if such occurs “by accident,” it is another matter to believe that Grievant could somehow accidentally and unknowingly go through the additional multiple step process of unlocking his phone, opening the text chain of the police unit, isolating the photo, attaching the photo to the text, and then sending the text... It is just not credible that Grievant’s conduct was an accident and that it just so happened to be coincidental that all the photo taken by Grievant captured was [REDACTED]’s pants and [REDACTED] was the only one wearing pants that day.

As for the failure to comply with a directive, Grievant testified that he could have taken the picture or sent the text by accident when he was looking at his phone for personal use during down time. Granted, people commonly use their cell phones at work. But when such personal use interferes with the workplace, then it is a violation of the Department’s policy. Even if Grievant is taken at his word that he must have sent the text while using his phone for other reasons, the fact that it was sent establishes a violation of policy.

The City has established that Grievant engaged in the conduct alleged and violated the policies identified. As for the appropriateness of the discipline imposed, the suspension ordered by the Commissioner was in the middle of the range of punishment agreed upon by the parties in bargaining for such offenses and there is no basis in the record for finding that the penalties imposed upon Grievant were excessive.

Union Position

Contrary to the argument of the City, the evidentiary standard in this case should be at least clear and convincing evidence. Grievant is accused of serious misconduct. He's accused of bullying, and being cruel to his co-worker. And implicitly, although, he was not charged for lying in the course of an official investigation, the City is essentially alleging that he lied; that he lied when he said that he accidentally took the photo and accidentally sent the text. However, even if the case is evaluated by the preponderance of the evidence standard, the City has not met its burden.

The conduct unbecoming charge requires proof that Grievant engaged in inappropriate language, conduct, or gestures to Police Department employees while on duty. Inconsistent with such a finding, officer ██████ testified on cross-examination that she did not interpret the photo to ridicule her personal appearance. Instead, she testified that her issue with the photo was part of pattern of bullying, of her being socially isolated on her Squad. There is absolutely no evidence – other than ██████'s mere allegation – that she was bullied, subject to isolation or alienated. None of the witnesses interviewed by IAD corroborated ██████'s claim. Additionally, Grievant credibly testified that he had no problem with ██████, that they socialized at work functions and that he was not aware of any officers having any problems with ██████. As for ██████'s subjective belief that she was being bullied, that alone is not enough to prove a policy violation by Grievant.

Importantly, the photo alone does not establish bullying and, when it is fairly considered, is better explained as an accident rather than an intentional effort to bully. In this regard, the photo is framed in a haphazard angle that would be consistent with a photo taken by accident from Grievant's hip. It additionally makes no sense that if Grievant was attempting to belittle

█████ among others on the squad that he would have included █████ in the text, and, inconsistent with the presence of an audience keen on belittling the subject of the photo, there is no evidence of any member of the squad making any response whatsoever to the photo. There is really no direct or circumstantial evidence of an effort to bully █████.

As for the City's claim that it would be cumbersome and unbelievable for Grievant to have accidentally taken and texted a photo of █████ because of the complicated process to do so on Grievant's cell phone, the City has offered no evidence of such. The City has not established what phone Grievant had in 2018 or how complicated or simple a process Grievant would have had to have followed to accidentally take and text a photo. Butt dials are common, and we all know that cell phones are capable of doing complicated things by accident. The City has not met its burden of establishing that Grievant engaged in intentional conduct.

Turning to the neglect of duty charge, It is clear that some personal use of cell phones is permitted by the Department and it is not clear from the text of Directive 6.10 that accidental use of personal cell phone while on duty – as is the circumstance here -violates the policy.

As for the appropriateness of the discipline issued against Grievant, each arbitration needs to be considered in isolation. A seven-day suspension might not be the worst punishment in the grand scheme of things as argued by the City when considered in the context of its many instances of discipline. But a seven-day suspension without pay is a very hefty punishment for someone who did nothing wrong. The issue is; was there just cause to suspend Grievant, for seven days. Here, the City has failed to meet its burden of establishing such. The grievance should be sustained and Grievant should be made whole.

Discussion

Introduction

An analysis of whether or not Greivant's suspension was for just cause under generally recognized standards in labor arbitration requires consideration of all of the circumstances in determining whether the issuance of discipline was "fair." Of the several factors often considered by arbitrators when applying the just cause standard I find that at issues here are two: (1) whether the City has shown that Grievant engaged in the conduct alleged – specifically whether Grievant knowingly took the photograph at issue and knowingly texted the photo to others in his unit - and (2) whether or not the discipline issued Grievant was appropriate given the relative gravity of the offense, the employee's disciplinary record and considerations of progressive discipline.

It is well recognized that in arbitrations of cases presenting questions of discipline or discharge for cause, it is the employer's burden to show that its discipline satisfies all of the requirements of just cause. In the instant matter, considering the record as a whole, including all evidence and argument offered by the parties as well as my observations of the demeanor of all witnesses, I find that the Employer has met its burden of showing just cause for the suspension of Grievant.

Findings

Based upon the full record in the matter, including the testimony of all witnesses at the arbitration hearing, I find:

- 1) The photograph at issue was taken during on-duty time.
- 2) The photograph was taken without the knowledge or permission of [REDACTED].
- 3) The photograph was taken by Grievant's cell phone.

- 4) The photograph was forwarded by text to all others in the unit during on-duty time.
- 5) The photograph was texted from Grievant's cell phone.
- 6) At all time material Grievant had possession and control of his cell phone, and
- 7) ██████ perceived the taking and distribution of the photograph to be hostile and humiliating.

Considering such, I find that the remaining, and the determinative, issue here as to whether the City has met its burden of establishing to the satisfaction of the undersigned that Grievant violated Section 1-016-10 Conduct Unbecoming, is the veracity of Grievant's claim – made by him during the IAD investigation and at the arbitration – that his cell phone took and texted the August 30, 2018 photograph by accident and without his knowledge.

Intentional vs Accidental Conduct

I am persuaded by the record as a whole that the City has satisfied its burden of establishing that the photograph at issue was not taken by mistake and that the photograph was not forwarded by text unknowingly and by accident by Grievant. I find the photograph's composition is not random and that, instead, it's focused upon the officer's uniform pants is contextually consistent with ██████ not having the appropriate "plain" cloths for the day's assignment. Although Grievant testified that he likely accidentally took the photograph after clearing a suspect and using his phone to photograph the suspect's driver's license, ██████ testified that the texted photo appeared on her phone prior to the two officers attending to the two suspects. In regard to the timing of the text, I find it more likely that ██████ rather than Grievant would have a more accurate recollection of the timing of the incident as she plainly considered the incident to be a significant event at the time.

I also find that it is just not believable that Grievant could happen to take the picture involved – a picture that would have required Grievant’s phone camera to be turned on and its lens directed at [REDACTED]’s apparel as she was driving – and that the photograph could somehow then be attached to a specific group-text link and then sent via the group text, all by accident and without Grievant having any idea that such multiple steps were occurring with the phone in his possession and, importantly, in his control. Within context established by the record, it is far too far a stretch for me to conclude such was just happenstance that could have occurred randomly. The established facts speak loudly on their face, and based upon such considerations, I find the [REDACTED] photograph and text were intentionally taken and sent by Grievant.

Grievant having used his personal phone to take the photograph and text the photograph to his unit, the evidence establishes plainly that Grievant also violated the Social Media Directive.

As for the suspensions at issue, I find that the 5 and 2-day suspensions issued Grievant were well within the range of managerial discretion recognized by the just cause standard and granted management under the circumstances.

Conclusion

Based upon the record as a whole, I find the City had met its burden of showing just cause for its discipline of Grievant.

The grievance is denied.

**American Arbitration Association
Arbitration Pursuant to Agreement of the Parties
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**AAA Case No. 01-22-0003-6823
(Barry M. Stewart – 7-Day Suspension)**

AWARD

The City has met its burden of establishing that it had just cause for issuing Grievant Barry M. Stewart a seven-day suspension.

The subject grievance is DENIED.



DATED: February 1, 2024.
