

In the Matter of the Arbitration Between

**PHILADELPHIA FIREFIGHTERS
UNION, LOCAL 22, IAFF**

-Union-

and

**AAA Case 01-23-0002-3485
(Discharge – Russell Suber)**

CITY OF PHILADELPHIA

Opinion and Award
(June 3, 2024)

-City-

Arbitrator:

Henry R. Protas, Esq.

Appearances

For the Union – Stephen J. Holroyd, Esq., Holroyd Gelman, P.C.

For the City of Philadelphia – Megan Malone, Assistant City Solicitor, the City of Philadelphia

OPINION OF THE ARBITRATOR

Procedural Background

The City of Philadelphia, herein called the City, and Philadelphia Firefighters Union, Local 22, IAFF, herein called the Union, are parties to a collective bargaining agreement, herein called

the Agreement. The Agreement consists of a series of documents negotiated over a period of time¹ The Agreement recognizes the Union as the exclusive collective bargaining representative of all uniformed Civil Service employees of the Philadelphia Fire Department below the rank of Commissioner.

The Agreement includes a grievance-arbitration procedure culminating in final and binding arbitration under the auspices of the American Arbitration Association. The instant matter arises from a grievance filed by the Union. The grievance alleges that the City's termination of probationary employee, Russell Suber violated the Agreement's prohibition against the discipline of employees absent just cause.

The City denied the grievance. As the issue of this dispute could not be resolved under the terms of the contractual grievance-arbitration procedure, the underlying grievance was referred to the American Arbitration Association for selection of an arbitrator. By letter dated June 2, 2023, the undersigned was appointed the arbitrator in this matter.

Pursuant to a Notice of Hearing issued on January 19, 2024, an evidentiary hearing was scheduled for May 20, 2024. On May 15, 2024, at the request of the City, the hearing was postponed so as to permit consideration of a Motion to Dismiss to be filed by the City. On May 21, 2024, the City submitted its Motion to Dismiss. It alleged that the grievance was not arbitrable. On May 22, 2024, the Union submitted its Response to the Motion to Dismiss.

Issue

Is the grievance substantively arbitrable?

¹ In addition to documents attached to the Motion to Dismiss, I have taken official notice of documents which collectively constitute the Agreement. I have also taken official notice of the Cadet Guide Booklet.

Relevant Agreement Provisions

4. UNION MEMBERSHIP AND DUES CHECKOFF

....

C. New Employees.

The provision of Section A, Subsection 1, of this Article shall become and be effective for new employees after thirty (30) calendar days from completion of their initial probationary period provided, however, that any firefighter shall have the right to join the Union on a voluntary basis at any time subsequent to their appointment and authorize dues checkoff in the manner prescribed in Section B of this Article.

23. DISCIPLINE AND DISCHARGE

A. General.

1. No employee shall be disciplined or discharged except as is consistent with the Home Rule Charter and the Regulations of the Civil Service Commission.

2. The disciplinary code is appended and made part of the January 9, 2015 Award.

....

24. GRIEVANCE AND ARBITRATION PROCEDURE

A. Definition.

1. Grievance as defined herein shall be limited to violations of the Contract, disciplinary suspensions, transfers, demotions and discharges.

2. The grievance arbitration procedure set forth herein shall include within its subject matter only alleged violations of Act 111 Awards and this Contract.

....

H. Authority of Arbitrator.

The Arbitrator will make findings and render a decision to resolve the disagreement. The arbitrator shall have authority to consider and decide only a claim based upon Act 111 awards or a specific provision of this Agreement. The arbitrator shall have no authority to add to, subtract from, or in any way alter the terms of the parties' contract and/or Act 111 arbitration awards.

29. MISCELLANEOUS

....

M. Probationary Period.

The probationary period for the classification of fire fighter, fire service paramedic and Fire Service EMT shall be one year. When a probationary employee has completed six (6) months of his or her twelve (12) month probationary period, the employee shall be permitted to work overtime and obtain outside employment on the same terms and conditions as non-probationary employees.

April 16, 2020 Extension Agreement added to the Agreement

3. The parties agree to the following changes to the grievance and arbitration procedure:

(a) Performance reports, rejections during the probationary period, and written or verbal reprimands shall not be subject to arbitration.

Relevant Cadet Guide Booklet Provisions

DISCIPLINE/STANDARDS OF CONDUCT

1.15 Any action deemed by the Fire Academy Command Staff to be improper or unacceptable behavior, which is not specifically addressed in the Fire Academy's Discipline/Standards of Conduct, shall constitute an infraction of Fire Academy Policy and may result in disciplinary action up to and including rejection from employment.

Probationary Period

Your probationary period lasts for one year. See Appendix "H" for additional restrictions and limitations.

The Facts

Russell Suber was hired by the City and started working as a firefighter in the City's Fire Department on September 6, 2022. As a newly-hired employee, he held the position of cadet and was assigned to the Philadelphia Fire Academy. He was rejected from employment on December 13, 2022. According to the City, he was terminated for allegedly violating the Cadet Code of Conduct found in the Cadet Guide Booklet. According to the Union, in making this claim, the City was referencing an incident claimed by the City to involve Russell Suber's interaction with a clerical employee over a pay issue.

Russell Suber was terminated after less than four months of employment. The Agreement and the Cadet Guide Booklet therefore clearly provide that at the time of his termination he was a probationary employee.

The Parties' Positions

The City's Position

There is no dispute that Russell Suber was a probationary employee under the terms of the Agreement. In contending that Russell Suber's rejection from employment is not arbitrable, the City quotes hornbook law that, "the weight of arbitral authority supports the proposition that Management has broad, if not almost unlimited, discretion where probationary employees are concerned."² In addition, the City points to language in the parties' April 16, 2020 Extension Agreement incorporated into the Agreement that specifically states that, "... rejections during the probationary period, ... shall not be subject to arbitration." Finally, the City argues that probationary employees are not part of the bargaining unit and the Union therefore has no standing to process a grievance on behalf of Russell Suber.

The Union's Position

Notwithstanding the consensus among arbitrators that the termination of a probationary employee is generally not arbitrable, the Union notes that some arbitrators have set aside the terminations of probationary employees in instances where management's termination decisions were shown to be "arbitrary, capricious or discriminatory."³ According to the Union, the same has been true, in limited instances, where a termination has been found to violate public policy as suggested by an applicable statute or constitution.

Analysis and Discussion

There are serious impediments to establishing that the undersigned has authority to assume jurisdiction over the grievance at hand. While I do not necessarily agree that Russell Suber as a

² Elkouri & Elkouri, *How Arbitration Works*, Ch. 15.2.B.iii. (Sixth Ed. 2003)

³ *ibid.*

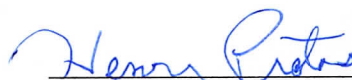
probationary employee was not a member of the bargaining unit, I still cannot find that the Agreement provides an arbitrator with jurisdiction to overturn Russell Suber's termination. The Agreement provides for a 12-month probationary period. That alone in the opinion of most arbitrators means that Russell Suber was an "at will" employee and that his rejection from employment is not arbitrable. This is the accepted interpretation of what it means to be serving a probationary period. Here, however, the Agreement goes further. With the incorporation of the April 16 2020 extension agreement, the Agreement provides a specific affirmative statement that Russell Suber's termination is not "subject to arbitration".

Faced with the indisputable meaning of the Agreement, the Union finds itself in a difficult spot to argue that grievance over Russell Suber's rejection from employment is arbitrable. It had no alternative but to argue that I should, in effect, ignore the clear meaning of the Agreement. While it is true that the Union was able to locate some cases in which probationary employees were reinstated, none of these cases have any applicability to Russell Suber's termination. There is nothing concerning his interaction with a clerical employee over a pay issue that suggests the City's termination of him violated public policy or was arbitrary, capricious or discriminatory. Accordingly, I find that the grievance concerning Russell Suber's termination is not arbitrable.

Consistent with the foregoing Opinion, I render the following:

AWARD

The grievance is hereby denied.



Henry R. Protas
Arbitrator
Merion Station, PA
June 3, 2024