AMERICAN ARBITRATION ASSOCIATION

In the Matter of Arbitration Between:

FRATERNAL ORDER OF POLICE
LODGE #5

and

CITY OF PHILADELPHIA

AAA Case #01-21-0016-5558
(Gr: P/O Darren Kardos Discharge)

Walt De Treux, Arbitrator

Hearing Date: 12/8/23
Decision Date: 1/4/24

Appearances: For the FOP – Thomas M. Gribbin, Esq., *WILLIG WILLIAMS & DAVIDSON*
For the City – Karli Lubin-Tamlo, Esq., *BALLARD SPAHR*

Introduction and Statement of Relevant Facts

City of Philadelphia 19th District Police Officer Darren Kardos took a vacation day on October 26, 2020. In the early evening, he received a call from his supervisor to report to work for an "all hands on deck" situation. Earlier that day, two City of Philadelphia police officers fatally shot Walter Wallace, a black male. The shooting sparked protests, riots, and civil unrest, particularly in the 18th Police District located in West Philadelphia.

Officer Kardos reported to the 19th District. After being told to grab a riot helmet, Officer Kardos and other officers were transported by police van to the area around 52nd and Chestnut Streets. Upon arrival, they found no staging area or senior commanders. They received no orders or direction. The officers encountered a full-scale riot that eclipsed the lawful protests. Officer Kardos smelled smoke, heard firecrackers and/or gunshots, witnessed stores being looted, and observed a police car burned to its shell. Rioters threw rocks and other projectiles

at the police, some of whom did not have riot gear. In the early morning hours of October 27, a pickup truck crashed after running over a police sergeant and inflicting serious injury.

Officers began holding the crime scene around the truck. A sergeant instructed Officer Kardos and his fellow officers to move further up the street to block vehicles from approaching the crime scene. A pickup truck drove in the direction of the officers. An SUV and a white car soon followed. Officers shouted for the pickup truck and the SUV to stop. (The white car stopped soon after entering the street, rolled down its windows, and complied with police instructions.) The pickup truck slowed, and officers approached that vehicle before it sped off. The SUV turned toward the curb, as if to make a U-turn. As officers approached the vehicle, one officer yelled for the vehicle to back up while other officers ordered the driver and occupants to exit the vehicle. The SUV remained angled toward the curb with its tinted windows rolled up and the engine running.

Officers surrounded the vehicle, shouting commands. When the driver and occupants did not immediately respond, Officer Kardos used his metal asp (baton) to break out the windows. Seeing a small child in the back seat, at least one officer yelled, "We have a baby," while other officers, including Officer Kardos, continued to instruct the driver and occupants to exit the vehicle. Officer Kardos opened the driver side door and pulled R[redacted] Y[redacted], the driver, out of the vehicle. Officer Kardos handcuffed Y[redacted], questioned her, and subsequently arrested her. (Charges were later dropped.)

The riots and the arrest of R[redacted] Y[redacted] received national attention. Y[redacted] later filed a complaint with the Department and a lawsuit, alleging that officers pulled her out of the vehicle by her hair and struck her with their fists, batons, and other objects. The Department

conducted an extensive internal investigation of police conduct during the riots. As part of the investigation, it found an Instagram video from an unidentified poster. The video showed Officer Kardos breaking out the windows of the SUV and extracting Y[redacted] from the vehicle. Investigators also reviewed bodycam footage from officers on scene.

Without interviewing Officer Kardos and relying solely on the Instagram video, the Department concluded that Officer Kardos struck Y[redacted] with his asp twice on her back. IA sustained charges of "Physical Abuse – ASP/Baton" and "Damaged Property Private." The Department referred the matter to the District Attorney's Office for prosecution.

The DA charged Officer Kardos with Aggravated Assault, Simple Assault, Recklessly Endangering Another Person, and related charges. A Municipal Court Judge initially dismissed the charges. After the DA refiled the charges, the case went to trial. The Court found Officer Kardos not guilty on all charges.

Prior to the criminal proceedings and effective July 1, 2021, the Department terminated Officer Kardos' employment through Direct Action of the Commissioner (rather than through a Police Board of Inquiry hearing and recommendation). The Department charged Officer Kardos with Conduct Unbecoming, Section 1-§012-10 (Unauthorized and/or excessive use of force).

Officer Kardos timely grieved his discharge. The parties did not resolve the grievance through the contractual steps and referred to the matter to arbitration. Once the criminal proceedings had resolved, the grievance proceeded to arbitration. At a December 8, 2023 hearing at the Philadelphia offices of the American Arbitration Association, the parties had a full and fair opportunity to present documentary and other evidence, examine and cross-examine

witnesses, and offer argument in support of their respective positions. The parties closed their presentations with oral argument and submitted the matter to the Arbitrator for a decision.

Issue

The parties stipulated to the following issue,

Did the City of Philadelphia have just cause to discharge Officer Darren Kardos? If not, what shall be the remedy?

Analysis and Decision

The riot sparked by the death of Walter Wallace and civil unrest months earlier following George Floyd's death in Minneapolis presented the Department with a situation unprecedented in recent City history. Inspector Derrick Wood, Commanding Officer of the Southwest Division, described the scene on October 26-27, 2020 to Internal Affairs,

> "This was a riot. We hadn't had a riot in the city since 1964. This was the second one in 6 months. This was a violent and chaotic night where a sergeant was almost killed. Residents, supervisors and officers were all afraid. I could see it in their eyes. Many of them have never experienced anything like this and probably never will. We had to barricade our own police facility at the 18th district because people were threatening to take over and overrun the district. This was a traumatic event that will take decades for the community as well as officers to heal from."

Now-retired Deputy Commissioner Robin Wimberly, whose testimony from an earlier hearing was introduced in the present case, admitted, "Well, being that we have not dealt with civil unrest in a very long time, there was no blueprint for it."

Officers, like Grievant, arrived on the scene of a full-scale riot with no orders, no direction, and no senior commanders readily leading the police response. Grievant exited the police wagon and smelled smoke, heard firecrackers and/or gunshots, and saw a police vehicle

burned to its shell. Rioters threw rocks and other projectiles at the officers, causing injuries to some. A sergeant suffered life-threatening injuries when a pickup truck ran over her.

It was in that chaotic atmosphere that Officer Kardos and his fellow officers were instructed to secure a crime scene by preventing vehicles from driving down a street leading to the scene. Despite the heavy police presence, at least three vehicles attempted to drive down the street. One car complied with police instruction, pulling over and rolling down its windows. A pickup truck and Y[redacted]'s SUV continued further down the street before slowing down or pulling over. As officers approached the SUV, they could not see into the vehicle due to the tinted windows. They shouted for the occupants to exit the vehicle. When the occupants did not comply, Grievant smashed the windows and removed the driver from the car. Other officers extracted the passengers.

The City alleges that Grievant did not give Y[redacted] sufficient time to comply with his and other officers' verbal commands before breaking the SUV windows and pulling her from the vehicle. It further alleges that he struck Y[redacted] twice with his asp. The City has not produced sufficient evidence to support those allegations.

The City relies solely on the Instagram video and some police bodycam footage as evidence that Grievant used excessive force against Y[redacted]. The police bodycam video actually leads to the opposite conclusion, i.e., that Grievant used the force necessary to effectuate an arrest and to protect the safety of himself and his fellow officers. The footage from several officers captured the chaotic scene during the riots. As officers try to secure the crime scene, vehicles drive down the street and protestors, rioters, looters, and bystanders are in the street and on the sidewalk, leading one officer to question why they were allowing vehicles to drive

down the street. When the officers proceed up the street, a pickup truck drives straight toward them before briefly stopping and speeding off as they reach the vehicle. As the officers approach the SUV, officers can be heard giving verbal commands to exit the vehicle, with one officer telling the SUV to back up. Y[redacted] and her passengers did not comply with either command.

Grievant testified that the occupants' refusal to comply with commands and the officers' inability to see into the tinted windows posed a security threat. Chief Inspector Deborah Francis, then-Commanding Officer of Internal Affairs, agreed that the tinted windows blocking the officers' view of the vehicle's interior was a security threat, but she posited that Grievant should have first asked for Y[redacted]'s cooperation before breaking the windows and removing her from the vehicle. Chief Inspector Francis' analysis falls short, however, as it is clear from the bodycam footage that neither Y[redacted] nor her adult passengers were cooperating with the officers' request to either get out of the SUV or back up the vehicle. They remained in a running vehicle with tinted windows that did not allow the officers to see who or how many people were in the vehicle or whether the occupants had weapons or presented any other danger.

The bodycam footage shows that the officers were in a very fluid, potentially dangerous situation following an incident in which a vehicle had run over a sergeant. The footage also shows that the officers received little or no direction from command staff on how to proceed. Officers can be heard on the bodycam questioning what they should do, with one officer resignedly stating that he was "losing faith" in the situation. With the occupants of the SUV refusing to exit the vehicle or, at least, rolling down the tinted windows, Grievant's use of his

baton to break the windows was reasonable and justifiable. The Department's Use of Moderate/Limited Force Policy allows for the use of the asp "to assist in effectuating an arrest." Grievant used his asp to break the SUV windows so that officers could identify the occupants and better assess any threat they posed as a step in the arrest of the non-compliant suspects. Given the circumstances, I find that Grievant's use of the asp to break the windows was not a violation of policy.

The City also alleges that Grievant impermissibly used the asp to strike Y[redacted] twice on the back as he pulled her from the vehicle. To support that allegation, it relies on the unauthenticated Instagram video. The Instagram poster took the video from an elevated position, presumably inside a residence, several hundred yards away from the SUV. The video does not capture audio from Grievant, Y[redacted], or the other officers. Only the poster's voice can be heard.

The video shows Grievant breaking the SUV windows, including the driver side window, opening the driver side door, and quickly pulling Y[redacted] out of the car. As he pulling Y[redacted] from the vehicle, he continues to swing his baton at least twice. It is not clear from the video if he strikes Y[redacted] or whether he continued to strike the SUV. The video does not show the baton contacting any part of Y[redacted]'s body. The corresponding police bodycam footage, including a close shot of Y[redacted] being pulled from the vehicle, does not show her being hit with an asp. Moreover, Y[redacted] does not react as if hit by the metal asp. She does not cry out in pain or otherwise make any remark about being hit. Rather, she repeatedly and understandably calls out about her baby in the car. Her stream of comments is not interrupted by a cry of pain as

would be expected if she took blows from the asp. Notably, she made no complaint on scene of being hit with the asp or of suffering shoulder or back pain.

The City's reliance on the Instagram video is insufficient to prove that Grievant struck Y[redacted] with the asp. The City did not call Y[redacted] to testify. It did not offer any eyewitness testimony establishing that Grievant hit Y[redacted] with the asp. And it never interviewed Grievant to ask him if he used the asp on Y[redacted]. (Grievant denied at hearing that he used the asp on Y[redacted].) Chief Inspector Francis explained that the Department passed on such an interview because It had already determined that Grievant "committed a clear violation of policy."[1] Neither the Instagram or bodycam videos establish a clear violation of policy. Moreover, there is simply no reason the Department should not interview an employee for his version of events when his job hangs in the balance. At the very least, the City should have had the benefit of Grievant's explanation and recall of his actions before terminating his career as a Philadelphia police officer.

The City carries the burden of proving that Grievant engaged in excessive use of force when he broke the windows of Y[redacted]'s SUV, pulled her from the vehicle, and allegedly hit her twice with the asp. It cannot meet that burden without eyewitness testimony and by relying solely on an unauthenticated Instagram video that lacks audio and is contradicted by police bodycam footage that shows Grievant and other officers giving unheeded verbal commands before employing force to effectuate the arrest of Y[redacted] and her passengers. The video does not conclusively establish that Grievant struck Y[redacted] with the asp. The absence of any verbal

[1] IA will generally not interview an officer if criminal charges are pending against the officer. It is not clear whether the DA brought charges before IA decided not to interview Grievant. Chief Inspector Francis, however, did not assert that pending criminal charges were a factor in the decision not to interview Grievant.

reaction by Y[redacted] on the bodycam audio to alleged blows from a heavy metal object suggests she was not hit with the asp.

For these reasons, the City has fallen short of proving its charge of Conduct Unbecoming (Unauthorized and/or excessive use of force). Accordingly, it did not have just cause to discharge Officer Darren Kardos.

Award and Remedy

The grievance is sustained. To remedy the just cause violation, the City is directed to rescind Officer Kardos' discharge and remove it from his personnel record. The City is further ordered to reinstate Officer Kardos to his former position, without loss of seniority, as soon as practicable after issuance of this Award, and make him whole for any losses incurred as a result of the discharge, including but not limited to, back pay and benefits from the date of the discharge to the date of his reinstatement, less interim earnings.

The Arbitrator shall retain jurisdiction of the case for the sole purpose of resolving any dispute over the implementation of the remedy.

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