

AMERICAN ARBITRATION ASSOCIATION

In the Matter of Arbitration Between:

FRATERNAL ORDER OF POLICE, LODGE 5

and

CITY OF PHILADELPHIA

**AAA Case #01-20-0007-3513
(Gr: P/O Alvarez Discharge)**

Walt De Treux, Arbitrator

*Hearing Date: 6/17/24
Briefs Received: 9/30/24
Decision Date: 11/1/24*

Appearances: For the FOP – Thomas M. Gribbin, Esq., *WILLIG WILLIAMS & DAVIDSON*
For the City – Benjamin L. Shechtman, Esq., *COZEN O’CONNOR*

Introduction and Statement of Relevant Facts

City of Philadelphia Police Officer Jesse Alvarez had a relationship with [REDACTED] between [REDACTED] and [REDACTED]. [REDACTED] and her [REDACTED] moved into Officer Alvarez’ home in mid-[REDACTED] after she [REDACTED]. In [REDACTED], their [REDACTED].

[REDACTED] had a difficult relationship with Officer Alvarez’ family. Soon after the [REDACTED] birth, the relationship between her and Officer Alvarez began to deteriorate. On [REDACTED], [REDACTED], they had an argument, during which [REDACTED] said she was done with the relationship and was “going to the courthouse in the morning.” That same day, Officer Alvarez obtained a Protection from Abuse (PFA) Order against [REDACTED], alleging that she threw a wallet and keys and bit him during an [REDACTED] argument. The PFA required her to leave the home with her [REDACTED] and [REDACTED]. [REDACTED] originally from New York and intending to return there, stayed temporarily with Officer Alvarez’ uncle and grandmother. On [REDACTED], she obtained

a PFA, alleging that Officer Alvarez had burned her on the hip with an iron as she slept on [REDACTED]; pushed her against a pillar and struck her arms during an argument on [REDACTED]; and threatened her with a gun at an unspecified date in the past.

When the Department learned of the PFA against Officer Alvarez, it placed him on restricted duty and launched an internal investigation. After interviewing witnesses, Internal Affairs (IA) referred the matter to the District Attorney's Office. On [REDACTED], the DA approved charges for two counts of misdemeanor Simple Assault. On [REDACTED], Officer Alvarez turned himself in for arrest.

IAD sustained a charge of Domestic Assault against Officer Alvarez for burning [REDACTED] on the hip with an iron and pinning her against a pillar and squeezing her arms on [REDACTED]; grabbing, tripping, and choking her during a [REDACTED] argument; and pointing a gun at her head sometime in the past. On March 5, 2020, then-Police Commissioner Denise Outlaw suspended Officer Alvarez for 30 days with intent to dismiss for conduct unbecoming a police officer.

On September [REDACTED] 2023, Philadelphia Court of Common Pleas dismissed the criminal charges "due to successful completion of an informal diversionary program."

Officer Alvarez timely grieved his discharge. The parties did not resolve the grievance through the contractual steps and referred the matter to arbitration. During a June 17, 2024 hearing held 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 filed post-hearing briefs 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 Jesse Alvarez? If not, what shall be the remedy?

Relevant Provisions of the Philadelphia Police Department Disciplinary Code

Article 1: Conduct Unbecoming

...

1-§021-10: Any incident, conduct or course of conduct which indicates 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.

Analysis and Decision

According to Captain Gregory Malkowski, Commanding Officer of the Labor Relations Unit, the City terminated Grievant due to the pendency of the criminal charges and the conclusions of the IA investigation.¹ The IA investigation found that [REDACTED] credibly alleged that Grievant burned her with an iron on [REDACTED]; pushed her against a pillar that same day and squeezed her arms enough to leave bruises; grabbed, tripped, and choked her during an argument on [REDACTED]; and at an unspecified time in the past, choked [REDACTED] and put a gun to her head. Grievant denied any of the alleged incidents occurred. The City bears the burden of proving the allegations.

[REDACTED] described a difficult relationship between her and Grievant after their [REDACTED] was [REDACTED]. She wanted to go back to school for nursing; but after the [REDACTED] had an accident in [REDACTED], she felt the need to stay home with him. She was financially dependent on Grievant, who, according to her, preferred to go to the gym rather than give her breaks from watching [REDACTED]. Under these circumstances, their relationship deteriorated and arguments ensued. Although [REDACTED] testified there were instances of domestic violence in the past, including allegedly throwing her on the bed and pointing at gun at her head in either [REDACTED] or [REDACTED], she never called police or otherwise reported those alleged acts of violence. She first filed for a PFA only after Grievant obtained a PFA against her and evicted her from the house.

It is certainly plausible that [REDACTED] did not report previous acts of violence because she feared she would not be believed or receive police assistance. According to [REDACTED], Grievant warned her, "I am the law" and "Blue backs blue." But questions regarding the credibility of

¹ Former Commissioner Outlaw made the disciplinary decision but did not testify at arbitration.

█████ allegations arise because of the inconsistencies in her statements to the IA investigator, in the PFA paperwork, and at the arbitration hearing. Further, she offered her █████ as a witness to at least some of the allegations. Although interviewed by IA, the █████ did not testify at the arbitration hearing. IA based some of its conclusions on statements the █████ made, including statements inconsistent with █████ interview. By not calling him to testify and subjecting him to cross-examination, the City cannot rely on the █████ IA interview to meet its burden of proof.

In her November 25, 2019 IA interview, █████ identified four incidents of domestic violence.² She alleged:

- 1) on █████, after an argument about the gym, Grievant burned her while she slept as he ironed clothes on her bed.
- 2) on the same day, they had an argument, and he pinned her up against a pillar and squeezed her arms, causing bruises.
- 3) on █████, during an argument about the gym, he tripped her to get the keys out of her hand.
- 4) sometime in █████ or █████, after telling Grievant not to leave his gun on their wardrobe, he pointed the gun at her right cheek.

When █████ filed for the PFA on █████, █████ days before the IA interview,

² The City introduced photos purportedly showing bruises on █████ arms and legs. The darkly-lit photos do not show █████ face or otherwise demonstrate that █████ was the subject in the photos. The photos also do not include any time-stampe to identify when they were taken. Neither the IA investigator nor the police officers who served the PFA on █████ recalled observing bruises on her body. It was not clear from the witnesses who actually took the photos. The IA investigator did not recall if she or █████ took them. █████ expressed the same confusion. In his IA interview, █████ claimed he took some of the photos. For these reasons, the photos do not substantiate the alleged acts of domestic violence.

she alleged that Grievant burnt her with the iron on [REDACTED]. That allegation is consistent with her IA interview. She also alleged that Grievant pushed her against a pillar on [REDACTED]. In her IA interview, she described that incident as happening four days earlier. For the PFA, she made no allegation that Grievant had tripped her to get the keys out of her hand on [REDACTED], even though that incident had allegedly happened only two days earlier. Without any detail, the PFA generally alleges that Grievant threatened her with a gun in the past.

Without reconciling the inconsistencies in her interview and PFA allegations, the IA investigation concluded that Grievant burned [REDACTED] with an iron and later pinned her up against a pillar on [REDACTED] and grabbed, tripped, and choked her on [REDACTED]. It further found that he choked her and pointed a gun at her head “on one occasion.” Presumably, the two choking allegations are based on her [REDACTED] IA interview. Again, the [REDACTED] did not testify at hearing, and the allegations made in his IA interview did not match the allegations his mother made. [REDACTED] did not say in the IA interview or the PFA proceeding that Grievant choked her on [REDACTED] or [REDACTED]. [REDACTED] never claimed Grievant choked her. [REDACTED] also reportedly said that the gun incident occurred “recently” while [REDACTED] said it occurred three years prior.

At the arbitration hearing, [REDACTED] testified that Grievant threw her on the bed and pointed a gun at her head in [REDACTED]. In her earlier recount of that allegation during the IA interview and PFA proceeding, she did not mention being thrown on the bed. She described the [REDACTED] burn incident, but she conceded that it may have been accidental as he was ironing clothes on the bed as she slept. She stated that he pushed her up against the pillar on

██████████, again in conflict with her IA interview in which she said it happened the same day as the iron burn. At hearing, she did not allege that Grievant tripped her or choked her on ██████████ while trying to get her keys.

Grievant denies the allegations in their entirety and denies ever physically assaulting ██████████. Grievant has credibility issues of his own. In 2017, he received a 25-day suspension for submitting fraudulent doctor notes during a departmental investigation. To avoid the criminal charges, he enrolled in and completed a diversionary “intimate partner abuse” program and “took accountability for his behavior,” according to a letter from the program’s executive director. The City did not offer any testimony about the program or the definition of “intimate partner abuse.” If ██████████ is to be believed on the nature of their relationship after ██████████ ██████████, she likely suffered from Grievant’s emotional abuse. It is not evident that Grievant admitted, through completion of the program, to domestic assault, the charge the IA investigation sustained. Notwithstanding Grievant’s credibility issues, the City’s case falls on the inconsistency of ██████████ testimony.

While the burn incident likely occurred, ██████████ description of the incident varied. She told IA that she was sleeping when it occurred. In the PFA, she said it occurred as she lay in bed during a heated argument. At hearing, she testified on direct that she was sleeping. On cross, she amended that statement to allege that he burned her while they were arguing. She then conceded that the burn may have been accidental. The evidence is insufficient to prove that Grievant purposely burned her with iron in an act of domestic violence.

██████████ alleged that Grievant pushed her against the pillar. She inconsistently asserted that it happened on either ██████████ or ██████████. She claimed her ██████████ was present during the

scuffle. During his IA interview a month after the alleged incident, [REDACTED] did not mention the pillar incident. When prompted with the specific allegation, he said, "I think I remember" but could not recall when it happened. Given [REDACTED] inability to recall when the incident occurred and the lack of corroboration by the [REDACTED] in his IA interview, I find that the City has not offered sufficient evidence to support that allegation.

The IA investigation found that Grievant grabbed, tripped, and choked [REDACTED] on [REDACTED] to wrest keys from her hand. [REDACTED] did not allege in her IA interview, in the PFA proceeding, or at hearing that Grievant choked her. Further, she did not mention the incident at all when attempting to secure the PFA, even though the PFA was obtained only two days after the alleged incident. Nor did she repeat the allegation during the arbitration hearing. The inconsistency in her account and its absence of any mention of the alleged incident in the PFA and arbitration proceedings precludes a finding that the incident occurred.

Finally, [REDACTED] described an argument about Grievant's gun on their wardrobe, during which he pointed the gun at her right cheek. At arbitration, [REDACTED] after the incident and for the first time, [REDACTED] testified that Grievant threw her on the bed before pointing the gun at her head. She did not mention being thrown on the bed in her IA interview or in the PFA proceeding. Her [REDACTED] told IA that Grievant choked her on the bed to the point her faced turned purple as he pointed the gun at her. [REDACTED] has never alleged she was choked. The [REDACTED] said the incident occurred "recently," although [REDACTED] said it occurred 2-3 years prior. The inconsistencies in the testimony for such a traumatic event raises serious doubt as to the credibility of the allegation.

For these reasons, I find that the City did not carry its burden of proving that Grievant engaged in domestic assault and conduct unbecoming a police officer. Accordingly, the City did not have just cause to discharge the Grievant.

Captain Malkowski testified that, during his 17-year tenure in Labor Relations, police officers charged with crimes related to domestic violence had never remained in the employ of the City during the pendency of the charges. Capt. Malkowski agreed on cross-examination that the City could have kept Grievant on restricted duty pending resolution of the charges but remarked that he had “never seen it in 17 years.” The City suspended Grievant for 30 days with intent to dismiss on March 5, 2020, immediately following the DA’s approval of criminal charges. The Court dismissed the charges on September 15, 2023. As a matter of Department practice and policy toward officers charged with crimes related to domestic violence, Grievant was unable and unavailable to work as a police officer during the pendency of the criminal charges. Accordingly, a make whole remedy for the just cause violation will exclude the time period during which the criminal charges were pending.

Award and Remedy

The grievance is sustained. To remedy the just cause violation, the City is directed to reinstate Officer Jesse Alvarez to his previous position without loss of seniority as soon as practicable after issuance of this Award and after he has met all conditions of employment, including but not limited to, reinstatement of his MOPETC certification. The City is further directed to make Grievant whole for any losses incurred as a result of his discharge, including but not limited to, back pay and benefits for the period from September 15, 2023 (the date of dismissal of the criminal charges) to the date of his reinstatement, less interim earnings. I am denying Grievant's make whole request for the period his criminal charges were pending, as Capt. Malkowski offered unrefuted testimony that Grievant could not serve as a police officer as a matter of Department practice and policy during that period.

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

Walt De Treux

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