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	:	
	:	**AAA Case No. 01-22-0003-7200**
and	:	**(Josue D. Rodriguez – 5-Day Suspension)**
	:	
City of Philadelphia	:	

Decision and Award

Appearances:

On behalf of FOP, Lodge 5:
John R. Bielski, Esq.
Willig, Williams & Davidson
1845 Walnut Street, 24th Floor
Philadelphia, PA 19103

On behalf of City of Philadelphia:
Ellen Berkowitz, Esq., Senior Attorney
Labor & Employment Unit
City of Philadelphia 19102
1515 Arch Street, 15th Floor

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 **Josue D Rodriguez** (Grievant) a five-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 November 17, 2023 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 written post-hearing argument. Upon the receipt by the undersigned of the transcript and closing briefs the dispute was deemed submitted at the close of business March 22, 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 five-days and if not, what shall be the remedy?

Facts

Grievant has been a Police Officer for the City for approximately 13 years. At times relevant to this matter, he was in a romantic relationship with [redacted], a Police Officer with the City for approximately 17 years. Both Grievant and officer [redacted] work in the 26th District. The relationship of Grievant and [redacted] began to dissipate in the first half or so of

2020, such that in March 2020 Grievant moved out of the home jointly owned by him and [redacted]. Thereafter, for a period, the two officers continued to have occasional contact. The underlying incident that gave rise to the suspension at issue herein took place on [redacted]

On [redacted] Grievant and [redacted], along with [redacted], travelled in [redacted]s vehicle to [redacted] in Pocono Manor, Pennsylvania, where [redacted] had made a reservation for one night. The [redacted] includes an indoor water park, arcade, and other attractions. Once checked in, the three changed into bathing suits and went to the water park. After a few hours, the two officers began to argue. Grievant eventually told [redacted] he was going to leave the resort. Grievant then left the waterpark area. According to Grievant the two officers exchanged text messages after Grievant left the water park, during which Grievant reported he was going to take an Uber home. [redacted], wanting to give Grievant time to collect his things and leave the resort, continued in the waterpark, and then spent time in the arcade with her son. In the meanwhile, Grievant, learned that the cost of his return by Uber would be more than he was willing to pay and went to the hotel room. Grievant did not report to [redacted] by text message or otherwise that his plans had changed. When [redacted] and her son returned to the room, they unexpectedly found Grievant there.

The two [redacted] then argued. Both cursed at one another. [redacted] told Grievant repeatedly to leave the room. Grievant said he couldn't as he had no way home. The two continued to curse. Grievant picked up a can of Pringles and threw it against the room wall causing the can to explode with chips scattering about the room. [redacted] went toward Grievant

[1] All dates are 2020 unless otherwise indicated.

yelling that he needed to leave. Grievant pushed [redacted] causing her to fall toward one of the two beds in the room and fall on her knees. Grievant threw another can of pringles against the wall causing it to also explode. [redacted] rose up and went toward Grievant again and Grievant again pushed [redacted] causing her to fall on the side of a bed and then to the floor, hitting her head and knees.[2] [redacted] rose up and moved toward Grievant and swung her arm having her hand contact Greivant's nose. Grievant nose began to bleed profusely. Grievant left the room and was given a towel for his nose by a neighboring hotel guest. As it turned out, Grievant's nose was broken.

Security was called. Soon thereafter [redacted] attempted to leave the resort with her son, but Grievant had resort security accompany him to the parking lot, where, as [redacted] was sitting in her vehicle's driver seat, Grievant sat on [redacted] lap, pushed the parking break and took the vehicle keys out of the hands of [redacted]. Security informed [redacted] she could not leave as she had broken Greivant's nose on private property. The two officers, [redacted] and security then reentered the resort where they awaited the Mount Pocono Regional Police.

The Mount Pocono Police eventually arrested [redacted] for assault. Grievant was not arrested. Grievant refused treatment at an area hospital and took [redacted] vehicle home. Grievant did not ask permission to use [redacted] vehicle. [redacted] arranged for her child's care and was taken by the Pocono Police to their offices where she requested to be taken to a hospital for examination of her injuries. She was examined at a local hospital emergency room, then taken to the county jail and released the next morning. Both officers informed their sergeants of the incident, including [redacted] of her arrest. The criminal charges against [redacted] were eventually dropped.

[2] Causing scrapes on [redacted] s knees.

Because of the "domestic" incident and arrest, the matter was subject to an IOD investigation by the City. An investigation was performed by Lieutenant Jo Anne Garvey. The investigation included interviews of the two officers, review of Pocono Mountain Police reports and relevant medical records, pictures taken by the Officers and attempts to contact individual Pocono officers involved. The IOD Investigation resulted in a conclusion sustaining findings of unbecoming conduct, Domestic Assault by both Grievant and [redacted]. A subsequent PBI resulted in recommendations for three-day suspensions for each officer. The length of suspensions were thereafter increase by Chief of Police Outlaw to five days [redacted].

Positions of the Parties

City Position

The burden of the City in this matter is to show by a preponderance of the evidence that it had just cause to issue Grievant a five-day suspension. Even assuming for purposes of argument only that the City had a greater burden, the evidence establishes there was just cause for the five-day suspension of Grievant. Through his own admission Grievant was aware that as a Philadelphia Police Officer he is held to a higher standard of conduct than members of the public and that as a police officer he should not participate in fights in public. Grievant also admitted that he, in the presence of the young son of officer [redacted]: (1), did not leave the hotel room of officer [redacted] when first asked to leave; (2), during an angry argument with officer [redacted] threw two cans of Pringles against a hotel room wall; (3) pushed officer [redacted] to the ground twice; and (4) physically prevented officer [redacted] from leaving in her own vehicle. In addition, (5) Grievant took officer [redacted]s automobile and drove the vehicle home without the owner's permission.

The City has shown that it has satisfied all of the elements of just cause. Grievant admitted that he was aware of the Disciplinary Code contained in the bargaining Agreement, its Conduct Unbecoming Section, and the punishment range of reprimand to dismissal therein provided for a first offense. The Disciplinary Code related directly to the orderly, efficient and safe administration of law enforcement as the Code is intended to support the core values of the Department of honor, service and integrity. The Department conducted a thorough, fair and neutral investigation; an investigation that included interviews of all witnesses who were available to the investigator, reviewing evidence and providing Grievant the opportunity to offer his side of the story. Based upon the investigation the City came to the reasonable conclusion that Grievant had engaged in conduct that violated the Disciplinary Code. The penalty imposed on Grievant was fair and proportional considering the nature of Greivant's offense and his disciplinary record. Grievant could have received a longer suspension or termination and instead was issued a relatively short suspension, a discipline consistent with the progressive discipline considerations of just cause. The City has shown that it takes domestic violence among officers extremely seriously and has consistently applied a similar level of discipline for similar violations of the Code. The grievance should be denied.

Union Position

The Union argues that because of the nature of the charges against Grievant the City should be required to meet a high standard of proof, a standard requiring the City to show just cause for its suspension of Grievant by clear and convincing evidence. Grievant is a dedicated and distinguished officer who has served the City since 2010. Throughout

his years of service he has received good performance evaluations and has never been disciplined except for written warnings regarding sick leave use.

As with most cases of domestic assault, the merits of this matter rests upon the arbitrator's assessment of the credibility of the two individuals involved. Between Grievant and officer [redacted], Grievant should be credited. [redacted] was inconsistent in her statements to the Pocono Regional Police, the IAD investigation and at arbitration, whereas Grievant has presented a consistent narrative throughout.

The City's investigation was not complete and failed to meet the standard required by just cause. In her investigation Lieutenant Garvey failed to gather pertinent information. She never went to see the hotel room or examine the heavy and difficult to open door. She did not review medical records of [redacted] or confirm that [redacted] had completed anger management training. She did not track down the police officer who conducted the original investigation into the incident between Grievant and [redacted] (an officer who left the Pocono Regional Police). Thus, Lt. Garvey could not confirm the claim of [redacted] that the investigating officers never spoke to her.

The City did not have a sufficient basis to conclude that Grievant violated the Department's rules and even assuming for purposes of argument that it did, the City failed to apply progressive discipline by, instead, bypassing disciplinary steps and going directly to the sever step of suspension; and even when considering suspension, went beyond the three-day suspension recommended by the PBI.

Unable to show that it satisfied all of the elements of just cause, the City failed to meet its burden here. The grievance should be sustained and Grievant should be made whole including all back pay and lost overtime.

Discussion

Introduction

An analysis of whether Greivant's suspension was for just cause under generally recognized standards in labor arbitration in the public sector in Pennsylvania requires consideration of all of the circumstances in determining whether the issuance of discipline was "fair." Some of the several factors often considered by arbitrators when applying the just cause standard include whether or not: (1) the rule or policy being enforced is reasonable and relates directly to the orderly, efficient and safe administration of law enforcement; (2) there was prior notice to the employee of the rule and the consequences for its violation; (3) the disciplinary investigation was adequately and fairly conducted and the employee was afforded an appropriate level of due process under the circumstances; (4) the employer was justified in concluding that the employee engaged in the conduct as charged; (5) the rule has been consistently and fairly enforced and (6) the discipline issued was appropriate given the relative gravity of the offense, the employee's disciplinary record and considerations of progressive discipline.

Summary of Findings

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 five-day suspension of Grievant. In making this decision, I particularly rely upon my findings that; (1) Grievant was aware of the rules involved and potential discipline for violation of the rules, (2) Grievant engaged in conduct that plainly violated the rules and (3) the 5-day disciplinary

suspension issued to Grievant was well within the bounds of the managerial discretion of the City recognized by the just cause standard.

Grievant's Testimony

In his testimony, Grievant asserted that; (1) he was less at fault than [redacted] as he did not engage in the breaking-a-nose-conduct that did [redacted] and (2) that he was the "victim" in the incident and should not be subject to suspension. Based upon the record as a whole, but relying largely upon Grievant's own testimony, I find that on [redacted] Grievant, in front of a young child:

1. Refused multiple directives by [redacted] to leave her hotel room.
2. Cursed at [redacted] and engaged in a loud verbal argument with [redacted].
3. Twice violently threw objects in the hotel room.
4. Twice pushed [redacted] to the floor causing her injury.
5. Interfered with [redacted]'s use of her own vehicle and prohibited the movement of [redacted] and her son.
6. Took a vehicle not his own and used it to transport himself home.

I find that Grievant was not the *innocent* he attempted to portray. In such regard, Grievant asserted that he was not the aggressor in the hotel-room conflict between the two officers and that he tried to leave the hotel room but was prevented from doing so because of the lock on the room door and the heaviness of the door. Assuming for purposes of analysis only that the door was a hindrance to his egress, I am not persuaded that as a consequence of the claimed nature of the room door Grievant should be excused for his conduct toward [redacted]. Grievant was in the room of his own volition. Prior to the incident, Grievant had engaged in an ongoing text conversation with [redacted] after leaving the water park area. But notwithstanding that he had been in conversation with [redacted] and knew he could communicate with her, Grievant did not inform [redacted] of his decision not to leave the resort or, importantly, that he was occupying [redacted]s hotel room. Grievant knew [redacted] would be returning to the hotel room with her son at some point.

Unlike public areas of the resort where Grievant could have confronted [redacted] with his transportation challenge, the hotel room was a confined and private space and the unexpected and emotionally charged circumstance of [redacted] entering her hotel room and unexpectedly finding Grievant present there was largely a consequence of Greivant's making. The first response of [redacted] in discovering Grievant in the room was not to physically engage with Grievant. Instead, [redacted]s first response was to insist that Grievant leave. However, Grievant did not leave at his first opportunity to do so; at a time when Grievant could have exited the door free of the emergent circumstances that arose thereafter.

I am also not, in any other manner, persuaded that Grievant was the "victim" in the incident because he was the one who got a broken nose. Both officers engaged in conflict. Grievant did not de-escalate although he had opportunities to do so. Instead, Grievant; (1) occupied the hotel room of another person, (2) engaged in a not insignificant period of domestic conflict, (3) without authority to do so and on his own, physically prevented [redacted] from using her own vehicle, and (4) took possession of and drove a vehicle not his own. There is no "scorekeeping" under just cause to apply to the conflict between the two officers. The fact that Grievant may have received more severe injuries than did [redacted] does not act to exculpate Grievant from the consequences of his own conduct.

I find that the City has meet its burden of showing that Grievant engaged in conduct that violated the provisions of the Code identified by the City.

In regard to the appropriateness of the discipline issued, I find that Greivant's testimony shows a concerning lack of acceptance and understanding of his own culpability for the [redacted] incident or recognition of the potential impact of his conduct upon a young child. Contrary to the argument of the Union, I find that Grievant's suspension of five-days, under the circumstances

and in the context of Greivant's conduct, was a corrective exercise of discipline well within the progressive discipline paradigm of the just cause standard.

Conclusion

Based upon my close consideration of the entire record in this matter, including all testimonial and documentary evidence, my observation of the demeanor of witnesses and the arguments of the parties, I find the City has met its burden of showing just cause for the suspension of Grievant. I will accordingly deny the grievance.

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	:	
	:	**AAA Case No. 01-22-0003-7200**
and	:	**(Josue D. Rodriguez – 5-Day Suspension)**
	:	
City of Philadelphia	:	
	:	

AWARD

The City has met its burden of establishing that the City had just cause for issuing Grievant a five-day suspension.

The subject grievance is DENIED.

DATED: April 5, 2024.