

AMERICAN ARBITRATION ASSOCIATION

In the Matter of Arbitration Between:

FRATERNAL ORDER OF POLICE, LODGE #5

and

CITY OF PHILADELPHIA

**AAA Case #01-23-0001-9616
(Gr: Taylor Discharge)**

Walt De Treux, Arbitrator

Hearing Dates: 3/6/24, 3/11/24

Decision Date: 4/16/24

Appearances: For the FOP – Thomas M. Gribbin, Esq., *WILLIG WILLIAMS & DAVIDSON*
For the City – Christopher D’Amore, Esq., Frank E. Wehr II, Esq.
CITY LAW DEPARTMENT

Introduction and Statement of Relevant Facts

On March [REDACTED], 2022, City of Philadelphia Police Officer Timothy Taylor, his wife N [REDACTED], and their two sons went out to dinner with neighborhood friends, the G [REDACTED] family. After dinner, they returned to the G [REDACTED]’s house. Toward the end of the night, N [REDACTED] T [REDACTED] raised an issue with her husband regarding cell phones. He “started lecturing her about drinking, stop doing shots, it’s time to leave.” According to the officer, N [REDACTED] T [REDACTED] “got more angry and more excited.” Around 12:30am on March [REDACTED], Officer Taylor, his wife, and his 9-year-old son C [REDACTED] returned to their home. The couple argued in the car and continued to do so when they got home.

Officer Taylor brought C [REDACTED] to the couple’s bed. His wife continued to argue with her husband as he was trying to go to sleep. As the argument persisted, he told N [REDACTED] he wanted a divorce and was going to take the son and leave. According to Officer Taylor, N [REDACTED] blocked

him from getting to C ■■■, who was experiencing a nosebleed, and jumped on his back as they both fell to the floor. After getting away from her, he took C ■■■ into the bathroom to stop his nosebleed. N ■■■ pushed him away so she could take care of C ■■■. Officer Taylor retreated downstairs and called M ■■■ G ■■■ to take N ■■■ out of the house.

While Officer Taylor was downstairs, N ■■■ called the police but hung up before relaying an address. With dispatch reporting that it heard a female screaming, Northampton Police responded to the terminated call. When they arrived, N ■■■ reported that Officer Taylor had grabbed her neck and the back of her head and pushed her to the ground, pinning her on the carpet. The responding officers talked to C ■■■, who said Officer Taylor grabbed N ■■■ around her neck and the back of her head and “slammed” her. The officers arrested Officer Taylor and subsequently charged him with simple assault and related charges.

The Philadelphia Police Department learned of the arrest and assigned the matter to Internal Affairs. Sgt. Tamika Reid investigated by gathering the incident report, criminal complaint, affidavit of probable cause, and related paperwork. Internal Affairs concluded that Officer Taylor “engaged in an act of domestic violence against his wife” and violated the Department’s disciplinary code “when he engaged in an action that constituted the commission of a felony or a misdemeanor which carries a potential sentence of more than one (1) year.” On March 21, 2022, Sgt. Reid forwarded the results of the investigation to the Charging Unit. Officer Taylor was charged with Conduct Unbecoming under 1-§001 (unspecified) and 1-§021 (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) of the Disciplinary Code. On March 22, 2022, then-Commissioner Denise Outlaw took Commissioner’s Direct

Action to suspend Officer Taylor for 30 days with intent to dismiss. On March 24, 2022, Officer Taylor was administered criminal Gniotek warnings and advised of his suspension and pending dismissal. Officer Taylor declined to make a statement on advice of counsel. On April 21, 2022, the Department terminated Officer Taylor's employment.

Officer Taylor timely grieved his termination.

On December 5, 2022, Officer Taylor appeared in court on the criminal charges, pled guilty to a summary offense of Disorderly Conduct, and paid a fine and court costs. On December 12, 2022, FOP Lodge #5 requested reinstatement of Officer Taylor on the basis that "[a]ll charges were dismissed by the Court of Bucks County, Pa." The Department did not agree to reinstatement.

The parties did not resolve Officer Taylor's grievance through the contractual steps and referred the matter to arbitration. At hearings held on March 6 and March 11, 2024 in 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 terminate Officer Timothy Taylor? If not, what shall be the remedy?

Analysis and Decision

In its closing argument, the City rightly observed, “Domestic violence is a scourge on our city and our society and it’s certainly behavior that is unacceptable and unbecoming a police officer.” The City spent the bulk of its closing argument emphasizing that the body cam footage from the responding Northampton Police officers captured statements from N [REDACTED] and C [REDACTED] T [REDACTED] that, if credited, firmly establish that Grievant engaged in an act of domestic violence against his wife. The City contended that “[t]he body camera footage as presented to this arbitrator is incredibly damaging to the grievant.” Reiterating the importance it attaches to the body cam footage, the City urged the Arbitrator, “It’s 30 minutes of video. Please, please, please watch it again start to finish. You’ll notice the order of things. You’ll notice people’s mannerisms. These are all very important things in judging credibility in this case.” The City is asking the Arbitrator to review the video, make credibility determinations in favor of N [REDACTED] and C [REDACTED] T [REDACTED] based on that video, and to find from the video review that Grievant committed the conduct that led to his termination.

The problem with the City’s argument is that former Commissioner Outlaw did not review the body cam footage nor did she make the credibility determinations that the City now wants the Arbitrator to make. The City is asking the Arbitrator to rely on evidence that the

Department did not rely on as a basis to terminate Grievant and to make credibility determinations that the Department did not make when it terminated Grievant. In preparation for the arbitration, the City's legal team did a thorough job of interviewing the responding police officers and gathering all the evidence it could, including securing the body cam footage through the enforcement of a subpoena. It set out to prove that Grievant engaged in an act of domestic violence. By contrast, the Internal Affairs investigation consisted primarily of obtaining paperwork, including the police incident report (with a written statement from N [REDACTED] T [REDACTED]), the criminal complaint, the affidavit of probable cause, and other arrest and court-related documents. It did not conduct any interviews nor attempt to conduct such interviews. Commissioner Outlaw presumably reviewed the paperwork and decided to suspend Grievant for 30 days with intent to dismiss based solely on that paperwork. Unlike the legal team preparing for arbitration, the Department and Commissioner Outlaw did not attempt to prove, before issuing discipline, that Grievant actually engaged in an act of domestic violence.

The City terminated Grievant on April 21, 2022. At that time, former Commissioner Outlaw had the police report that recounts the allegations made by N [REDACTED] T [REDACTED] and confirmed by C [REDACTED] T [REDACTED]. The same police report includes a supplemental report taken the same day as Grievant's arrest, in which N [REDACTED] T [REDACTED] "advised that at this time she didn't want to pursue this matter and refuses to cooperate going forward." It also includes a report from another officer who called N [REDACTED] one day after the arrest. He wrote, "She reported that she believes that Tim was not trying to strangle her but simply restrain her. She believes that when she reported she lost her breath that it was due to her being upset and crying and not due to

Tim grabbing her around the throat and neck. She stated that this occurred once and was only for a few seconds to simply calm her down until they both got up.”

Internal Affairs sustained allegations against Grievant based on a police report that had conflicting statements from N [REDACTED] T [REDACTED]. Former Commissioner Outlaw took direct action to terminate Grievant without any attempt to reconcile those conflicting statements. The City now argues that N [REDACTED] likely recanted her incriminating statement in an effort to protect her husband, his job, and his role as the primary breadwinner in the family. That may be true. It may also be true, as the Union suggests, that N [REDACTED] made the initial allegations out of anger while in an intoxicated state. The fact is Internal Affairs and the former Commissioner never attempted to reconcile the conflicting accounts or the reasons that N [REDACTED] backtracked on her allegation of domestic violence. The City has not offer any testimony or evidence explaining why the Department accepted N [REDACTED]’s initial allegation and dismissed or ignored her retraction.

At the time of termination, the City did not have definitive proof that Grievant engaged in an act of domestic violence against his wife. Rather, it had an allegation of domestic violence withdrawn the next day and the fact of Grievant’s arrest. Sgt. Reid, the IA investigator, admitted that the finding of an act of domestic violence was “[b]ased on the incident report and the fact he was arrested.” She explained, “...there was an incident report that stated that the incident happened and the officer was arrested, and based on that, this investigation was sustained.” But the incident report also included statements from N [REDACTED] T [REDACTED] retracting her allegations. Sgt. Reid did not explain how she assessed the credibility of N [REDACTED]’s initial statements against her retraction a day later. Former Commissioner Outlaw did not testify, so the parties and this

Arbitrator do not have the necessary benefit of knowing how she reconciled the conflicting statements. She did not have the body cam footage, which the City so strongly relies on to justify the former Commissioner's decision to terminate. She did not have the benefit of interviews with N [REDACTED] or C [REDACTED] T [REDACTED] or the responding police officers. And she gave no written reasons in the Notice of Intention to Dismiss or the Notice of Dismissal for crediting N [REDACTED]'s initial allegations. Those Notices simply repeated the allegations in the Northampton Police incident report.

A question arises as to why the Department and the former Commissioner rushed to judgment in this case before IA had the opportunity to gather further evidence, and possibly, to resolve conflicting statements. Former Commissioner Outlaw took Direct Action on March 22, 2022, two days before Sgt. Reid had the chance to administer Gniotek warnings and give Grievant the chance to explain why he should not be terminated. Grievant did not take the opportunity to do so because he had pending criminal charges. Sgt. Reid also stated that she did not pursue interviews so as not to interfere with the Northampton Police and Bucks County District Attorney criminal investigation, a policy and practice seconded by Capt. Gregory Malkowski of the Labor Relations office. Once those criminal charges were resolved in early December 2022, the Department faced no obstacles in pursuing the investigation further to determine if, the criminal outcome notwithstanding, Grievant engaged in the conduct alleged. Yet the Department took no steps to interview witnesses or the Grievant or to obtain the body cam footage. Sgt. Reid dismissed the Department's failure to further investigate, observing that Grievant "was already fired."

Just cause demands that the City have proof of dischargeable conduct before it imposes the disciplinary penalty. If the City believed it could not fully investigate the incident pending the criminal proceedings, it could have withheld its decision to terminate until it had the opportunity to investigate further and attempt to obtain the necessary proof. Testimony from the City's own witness established that the City had options to defer termination for domestic violence pending the outcome of the criminal proceedings.

Capt. Malkowski offered unrefuted testimony that Grievant could not serve, as a matter of Department policy and practice, as a police officer while the criminal charges were pending. He related that the Department had an informal agreement with the FOP that officers charged with DUI and/or domestic violence could be demoted to civilian positions and reinstated depending on the outcome of the criminal proceedings and the completion of court-imposed requirements.

Capt. Malkowski emphasized that each Commissioner had the authority and discretion to impose the discipline he or she deems appropriate and is not bound in any way by the Department's informal agreement with the FOP. But the Captain also agreed that "consistency [in the administration of discipline] is a priority." Former Commissioner Outlaw inarguably had the right to terminate Grievant if she had sufficient proof that he engaged in an act of domestic violence. To conform with the just cause standard, however, the former Commissioner also has the obligation to explain why Grievant's conduct on March [REDACTED] 2022 warranted termination rather than a demotion to a civilian position pending the outcome of his criminal proceedings, placement on restricted duty, an indefinite suspension pending the outcome of the criminal

proceedings, or any other option short of termination prior to the City being able to establish that Grievant did engage in domestic violence.

Similarly, the parties' Disciplinary Code, incorporated into the collective bargaining agreement, provides a list of offenses and a range of disciplinary sanctions. The City charged Grievant with Conduct Unbecoming 1-§001 and 1-§021. The former carries a penalty of reprimand to dismissal. The latter carries a penalty of 30 days' suspension to dismissal. While the City at hearing offered testimony from Capt. Malkowski and persuasive reasons for terminating an officer who engages in domestic violence, it could not, without the former Commissioner's testimony (or the testimony of a designee familiar with the Commissioner's reasoning at the time of discharge), offer any evidence for the reasons she decided Grievant's conduct warranted termination, rather than a lesser penalty.

The Department terminated Grievant before it conducted a thorough investigation into the veracity of the allegations initially made by N [REDACTED] T [REDACTED] on the night of his arrest. At the time of termination, the Department did not have sufficient proof that Grievant engaged in an act of domestic violence. It based its decision on police and court records that included conflicting statements from N [REDACTED]. It made no effort to reconcile the conflicting statements prior to termination or conduct further investigation after Grievant's criminal proceedings concluded. The former Commissioner (or a designee who could speak specifically to Grievant's case)¹ offered no explanation for her decision to terminate rather than impose an interim sanction (e.g., restricted duty, indefinite suspension, demotion to a civilian position) pending

¹ Capt. Malkowski testified that he was "read into" the case, but he did not have any firsthand knowledge of the former Commissioner's decision-making process.

the outcome of Grievant's criminal proceedings and the resumption of the administrative investigation. The former Commissioner offered no explanation for the reasons she determined that Grievant's conduct warranted termination rather than a lesser penalty within the Disciplinary Code's range of penalties.

Had the Department conducted as thorough and complete an investigation as the City's legal team in the weeks leading up to arbitration, this case may have had a different result. But the just cause standard has to be applied to the facts and circumstances known at the time the City terminated the Grievant. The City cannot expect an arbitrator to rely on evidence or make credibility determinations to sustain a discharge when the Department did not rely on that evidence or make those credibility determinations when it made the decision to terminate. The Department and former Commissioner Outlaw took disciplinary action without sufficient proof that Grievant engaged in the conduct alleged, and it declined to further investigate and confirm (or rebut) the allegations of domestic violence when it had the ability to do so after Grievant's criminal proceedings ended.

For these reasons, I find that the City did not have just cause to terminate Officer Timothy Taylor.

Award and Remedy

The grievance is sustained. To remedy the just cause violation, the City is directed to reinstate Officer Timothy Taylor to his previous position without loss of seniority as soon as practicable after issuance of this Award. 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 December 12, 2022² 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

WALT De TREUX

² The date the FOP requested Grievant's reinstatement based on the outcome of the criminal proceedings.