

AMERICAN ARBITRATION ASSOCIATION

In the Matter of Arbitration Between the

FOP LODGE 5,

"Union,"

-and-

CITY OF PHILADELPHIA,

"Employer."

**OPINION
AND
AWARD**

AAA Case No. 01-22-0001-7028
(P/O Andrew A. Humm (260654) – Discharge - PTAB)

**Before
Robert C. Gifford, Esq.
Arbitrator**

Appearances:

For the Union:

Jessica Caggiano, Esq.
Willig Williams & Davidson

For the Employer:

Karli Talmo, Esq.
Ballard Spahr

FOP Lodge 5 and the City of Philadelphia are parties to a collective bargaining agreement ["Agreement"]. [Ex. J-1]. On February 7, 2022, the Union filed a grievance alleging that the City violated the Agreement by terminating the employment of Police Officer Andrew Humm ["Grievant"] without just cause. [Ex. J-5]. After the City denied the grievance, the Union submitted the unresolved grievance for binding arbitration On February 15, 2022. On May 26, 2022, AAA notified me that I was chosen to serve as arbitrator.

On February 28, 2024, an arbitration hearing was held at AAA's Philadelphia offices at which time the parties were afforded the opportunity to argue orally, present witnesses and submit documentary evidence into the record. A stenographic recording of the proceedings was taken. Testifying on behalf of the City were Sergeant K [REDACTED] T [REDACTED], Officer B [REDACTED] C [REDACTED] Lieutenant Maria Harner, and Deputy Commissioner Francis Healy.¹ Testifying on behalf of the Union were Grievant Humm, FOP Vice-President J [REDACTED] M [REDACTED], and Detective R [REDACTED] M [REDACTED].² The parties provided oral closing arguments. The record was declared closed subsequent to the receipt of the transcript.

¹ Sgt. T [REDACTED]'s testimony is located from T:28-40. Officer C [REDACTED]'s is located from T:40-46. Lt. Harner's is located from T:46-82. DC Healy's is located from T:82-115.

² Grievant Humm's testimony is located from T:116-158. FOP VP M [REDACTED] is located from T:158-164. Detective M [REDACTED] is located from T:164-172.

ISSUE

The parties stipulated to the following issue:

Whether the City had just cause to discharge the Grievant? If not, what shall be the appropriate remedy? [T:5-6].

CITED CONTRACT PROVISIONS

ARTICLE XX. DISCIPLINE AND DISCHARGE

A. General

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

BACKGROUND

Prior to his dismissal, Grievant Andrew Humm had been employed by the City Police Department as a Police Officer since April 23, 2007. The Grievant was assigned to the 14th District. The Grievant received several official commendations and honors over his career. [Exs. U-2 & U-4]. His annual performance reports dating back to 2007 indicate that he was rated satisfactory.³ [Ex. U-1]. The Grievant's prior discipline includes an official reprimand for neglect of duty, a one-day suspension for neglect of duty, a one-day suspension for a motor vehicle violation, and a three-day suspension for neglect of duty. [See Exs. C-7 through C-10].

The basis for the Grievant's discharge is an incident that occurred on August 17, 2021. On August 17, 2021, at 7:54 a.m., A [REDACTED] W [REDACTED] filed a Citizen's Complaint with the PPD:

08/17/21

6:09 AM

Germantown Ave Phila PA 19119

Me ([REDACTED]) and another truck went around a bus that was parked. We went around the driver of the grey Truck stopped suddenly and jump out his Truck and said, "Why are you riding

³ In 2010, the Grievant received seven (7) satisfactory ratings, and only one (1) unsatisfactory rating in the performance factor of "Dependability" for being "an aggressive officer".

my ass". I said "We both went around the bus!" He continued to say "stop riding my ass, he's trying to go home. I said "We both went around the damn bus!" I thought he was getting in his car, but he reach in grab his badge which was in a black wallet and the badge was gold We exchanged more words and he pulled his black firearm and put it down by his leg in his right hand and said, "if I keep riding his ass he gone shoot me!" I say "That shit don't scare me!" had got back in his truck and speed off. And I call the Police to notify them of the situation that occurred and they came to my location and took a report and had to come to internal affairs.

[Ex. C-1].

On September 28, 2021, IAD Captain Daniel Angelucci wrote a memorandum to Tracey Tripp, Special Investigations Unit of the District Attorney's Office concerning the IA investigation. Attached to the memorandum is a summary of the investigation that was written by Lieutenant Maria Harner:

On [REDACTED], the Philadelphia Police, Internal Affairs Division was notified of a road rage incident that occurred at 7000 Germantown Avenue, involving A [REDACTED] W [REDACTED], and an off-duty officer (identified as P/O Andrew Humm).

The complainant, A [REDACTED] W [REDACTED]s, was interviewed by Sgt. James Lane, on 08/17/21, at Internal Affairs Division, regarding the incident.

Ms. W [REDACTED] stated on [REDACTED], she was driving behind a grey Toyota Tacoma Pickup truck, [License plate intentionally omitted], Ms. W [REDACTED] stated that the truck went around the Septa bus, and Ms. W [REDACTED] followed the truck around the bus. After they both passed the bus, Ms. W [REDACTED] was still driving behind the pickup truck. The driver of the pickup stopped his truck on Germantown Avenue, and got out of the truck, reached into the truck, and came out with a badge and showed it to Ms. W [REDACTED]. Ms. W [REDACTED] stated that she and the

male started to argue. The male pulled out a gun with his right hand, and was holding the gun by his side. (Ms. W [REDACTED] indicated that his arm was down on his right leg, with the gun in his right hand, with his finger outside the trigger.) The male told Ms. W [REDACTED] "If you keep riding my ass, I'm going to shoot you." Ms. W [REDACTED] stated she told him that shit does not bother her nor does it scare her. The male got back into his truck and drove away. Ms. W [REDACTED] called 9-1-1, and 14th District officers responded.

Responding officers were equipped with Body Worn Cameras, which show Ms. W [REDACTED] demonstrate how the incident occurred. A review of P/O C [REDACTED]'s BWC, shows at the 4:55 marker, Ms. W [REDACTED] stepped out of her car and showed that the officer got out of his vehicle, removed his gun from his holster with his right hand, and placed his gun to the side of his right leg, saying, "You keep riding my ass."

Septa bus driver N [REDACTED] K [REDACTED], 47, B/F, was interviewed by Lt. Maria L. Harner on 08/19/21. Ms. K [REDACTED] did not recall the incident.

Additional interviews were conducted with responding officers, and are included in this package, as well as police paperwork.

While responding officers were on location, P/O Andrew Humm [REDACTED], 14th District, pulled over to the side in his Toyota Tacoma pickup truck. Sgt. T [REDACTED] conversation is captured on his Body Worn Camera (at the 6:31 marker). P/O Humm told Sgt. T [REDACTED] that he was driving up Germantown Avenue, and the car behind him was on his ass, and was following him so closely that he could barely see her windshield from his rear view mirror. P/O Humm went around the bus, and she continued following him closely up Germantown Avenue. P/O Humm said that he stopped in the middle of the street and told her to get off his ass, and she yelled at him that he was driving too slow. P/O Humm said that the speed limit was 25 and that she needed to back off. P/O Humm said that he got back into his truck and drove North on Germantown Avenue. Sgt. T [REDACTED] asked P/O Humm if he took out his gun, and P/O Humm said that he did not, and that there was no way that she could have seen his gun because it was not visible.

Septa Video was retrieved from the Route #23 bus, which is 3:38 minutes long, shows the bus pull over to the side to pick up passengers at Germantown and Sedgewick, at 6:05 and 30 seconds, and the truck and car going around the bus. Approximately a half a block up at the 6:05 and 45 seconds mark, the video shows a male getting out of his car and approaching another vehicle in the 7000 block of Germantown Avenue, but the video does not show a clear view of the incident. At the 6:06, and 10 seconds mark, the car and the truck are seen traveling North on Germantown Avenue.

* * *

Investigation is ongoing.

[Ex. C-1].

On February 1, 2022, Police Commissioner Daniel Outlaw took Direct Action to dismiss the Grievant. [Ex. J-2]. On February 2, 2022, the Grievant was provided with Criminal Gniotek Warnings and notified he would be suspended for a period of 30 days with the intent to dismiss. [Ex. J-2]. On the advice of counsel, the Grievant chose not to provide a statement. [Id.].

On February 7, 2022, the Union filed a grievance alleging that the City violated the Agreement by terminating the Grievant's employment without just cause. [Ex. J-5]. On February 15, 2022, the Union submitted the unresolved grievance for binding arbitration. [Ex. J-6].

On February 18, 2022, the Grievant was served with a Notice of Intention to

Dismiss:

On Tuesday, 8/17/21, Internal Affairs Division (IAD) was notified of a road rage incident that occurred at 7000 Germantown Ave, involving you and A [REDACTED] W [REDACTED]. Ms. W [REDACTED] stated that she was driving on Germantown Ave. behind while you were operating a grey Toyota pickup truck with PA Tag [REDACTED]. Ms. W [REDACTED] followed your vehicle as you drove around a SEPTA bus, and alleged you suddenly stopped, exited your vehicle, and approached her saying "Why you keep riding my ass?" Ms. W [REDACTED] stated you returned to your vehicle, and then returned to her vehicle, showing her a badge, and began to argue with her. Ms. W [REDACTED] alleged that you pulled a gun and held it by your right leg, and stated "If you keep riding my ass, I am going to shoot you." You got back in your vehicle and drove away, and Ms. W [REDACTED] called 911. A review of available BWC footage showed you pulled over nearby, in a grey [REDACTED] pickup truck with PA Tag [REDACTED], sitting in the vehicle. Ms. W [REDACTED] identified you as the individual involved to responding police personnel.

* * *

You acknowledged to Sgt. T [REDACTED] that you were involved in a verbal altercation with Ms. W [REDACTED], and that you were in possession of a gun, but that you did not pull it, and the gun was not visible because you were wearing a baggy sweatshirt. On 1/31/22, an arrest warrant was approved charging you with Official Oppression (M2) and Terroristic Threats (M1).

As a result of the aforementioned incident, you are being charged with the following violations of the Philadelphia Police Department's Disciplinary Code:

CONDUCT UNBECOMING, SECTION 1-§026-10: (Engaging in any action that constitutes the commission of a felony or a 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 (relating to Theft and Related Offenses). Also includes 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.

You are being arrested and charged with the following criminal offenses: Official Oppression (M2) and Terroristic Threats (M1).

CONDUCT UNBECOMING, SECTION 1-§001-10: (Unspecified)

Your actions as described are conduct unbecoming of a member of the Philadelphia Police Department.

CONDUCT UNBECOMING, SECTION 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.)

Your actions and behavior as described, which resulted in an arrest warrant being approved for your arrest, indicates that you have little or no regard for your responsibility as a member of the Police Department.

On 2/2/22 in the presence of Captain Daniel Angelucci #4, Internal Affairs Division, Lieutenant D [REDACTED] P [REDACTED] #405, 14th District, [REDACTED], Esq. Attorney, Fraternal Order of Police and [REDACTED], Representative, Fraternal Order of Police, you were given your criminal Griotek Warning with an opportunity to respond to the charge against you. You declined to respond. You were placed on a thirty (30) day suspension with intent to dismiss.

[Ex. J-3].

On March 1, 2022, the Grievant was served with a Notice of Dismissal effective as of February 28, 2022. [Ex. J-4]. The details of this notice were substantially similar, if not identical, to the information provided in the Notice of Intention to Dismiss.

Lieutenant Maria Harner has been employed by the PPD for approximately 35 years. Harner has been assigned to the City of Philadelphia Police Department's Internal Affairs Division for the past seven (7) years. Harner conducted the internal affairs investigation into the matter. Harner compiled an internal investigation report and drafted a memorandum to the Police Commissioner on July 29, 2022. [Ex. C-1]. Harner's report was reviewed and approved by her chain of command in August of 2022. The report included the conclusion drawn by IAD Inspector Kevin Hall:

The investigation into the **Criminal Allegation of Terroristic Threats** against **P/O Andrew Humm #4939, PR#260654, 14th District**, as documented under DC# [REDACTED], is **SUSTAINED**.

Ms. W [REDACTED] stated that she was driving on Germantown Avenue, behind a Toyota Tacoma pickup truck, and the driver of the truck stopped in the middle of the street and got out. The male, later identified as P/O Andrew Humm, told Ms. W [REDACTED], "Why do you keep riding my ass?" He went back to his truck and came back to Ms. W [REDACTED] showing her a badge. P/O Humm then reached with his right hand and pulled his gun, holding the gun by his side. Ms. W [REDACTED] indicated that his arm was down on his right leg, with the gun in his right hand, with his finger outside the trigger. P/O Humm told Ms. W [REDACTED] "If you keep riding my ass, I'm going to shoot you." While officers were on location, P/O Humm came and parked his truck across the street, Ms. W [REDACTED] identified P/O Humm as the male involved in the incident.

Based on this investigation, on 09/28/21, a package was submitted to the District Attorney's Office for review and criminal charging considerations. On 01/21/22, ADA F [REDACTED] S [REDACTED] approved criminal charges of Terroristic Threats and Official Oppression. On 02/02/22, Arrest Warrant [REDACTED] was issued to Lt. Maria L. Harner [REDACTED], charging P/O Humm with

(2706) Terroristic Threats (M1) and (5301) Official Oppression (M2).

The investigation was forwarded to the District Attorney's Office (DAO) on 09/28/21. On 01/21/22, ADA F [REDACTED] S [REDACTED] requested an Affidavit be submitted for arrest, with charges of Official Oppression and Terroristic Threats. On 02/02/22, a Warrant of Arrest [REDACTED] was obtained by the assigned.

As a result of the pending criminal charges against him, the Police Board of Inquiry (PBI) Charging Unit filed the following charges against Police Officer Andrew Humm for violating the Philadelphia Police Department Disciplinary Code:

Article I, Conduct Unbecoming, Section 1-§026-10

Article I, Conduct Unbecoming, Section 1-§001-10

Article I, Conduct Unbecoming, Section 1-§021-10

On 02/09/22, a Gniotek interview was conducted with P/O Humm. Lt. D [REDACTED] P [REDACTED] [REDACTED] 14th District, on behalf of the Commanding Officer, served P/O Humm with a Statement of Charges Filed and Action taken (75-18). Police Officer Andrew Humm was given his Gniotek warnings and declined to make a statement to Internal Affairs. Captain Angelucci notified P/O Humm was subsequently arrested and transported to the East Police Division for processing.

A copy of this investigation will be sent to the Commanding Officer, Police Board of Inquiry for action.

[Ex. C-1].

Harner testified that the IAD investigation included, among other things, interviews of Complainant W [REDACTED], SEPTA Bus Operator N [REDACTED] K [REDACTED] [REDACTED], Police Officer J [REDACTED] W [REDACTED] Police Officer B [REDACTED] C [REDACTED] Police Officers K [REDACTED] S [REDACTED] and Sergeant K [REDACTED] T [REDACTED]. IAD also retrieved and reviewed video from body-worn cameras of W [REDACTED] [Ex. C-6], C [REDACTED] S [REDACTED], and

T■■■■, as well as video from the SEPTA bus. The Grievant was not interviewed given the potential criminal nature of the incident.

Harner testified that the charges of conduct unbecoming were sustained "based on the officer being charged with Commissioner's Direct Action." [T:67, lines 11-12]. Harner did not interview Ms. W■■■■ and never spoke to the Grievant.

During cross-examination, Harner confirmed that Ms. W■■■■ had previously sued the Department and made this known to the Department at the time of the incident.

On September 20, 2023, the M1 charge of Terroristic Threats was withdrawn ["Nolle Prossed"] by the District Attorney's Office. [Ex. U-5]. The M2 charge of Official Oppression was previously dismissed on March 23, 2022 for lack of evidence. [I/d.].

On September 25, 2023, FOP Vice-President J■■■■ M■■■■ wrote the following letter to Police Commissioner John Stanford in which he requested the Grievant's reinstatement:

The FOP seeks the reinstatement of P/O Andrew Humm PR# 260654, 14th District. P/O Humm was discharged on February 2, 2022 after his arrest pursuant to an arrest warrant.

The matter was disposed of via a Nolle Pros ordered by the Honorable Monica Gibbs on September 20, 2023.

The FOP seeks the immediate reinstatement of P/O Andrew Humm to avoid the costs of litigation in this matter.

[Ex. U-3].

Sergeant K [REDACTED] T [REDACTED] has been employed by the PPD for approximately 35 years. T [REDACTED] was the Grievant's direct supervisor in the 14th District at the time of the incident. T [REDACTED] responded to the scene after the incident occurred. His body-worn camera was activated. T [REDACTED] spoke to W [REDACTED] and the Grievant at the scene. T [REDACTED] prepared an incident report and was interviewed by Internal Affairs. [Ex. C-1]. Video from T [REDACTED] body-worn camera was played during the arbitration proceedings and admitted into evidence over the Union's hearsay objection. [See Ex. C-4]. T [REDACTED] did not have any negative experiences with the Grievant while serving as his supervisor.

Officer B [REDACTED] C [REDACTED] has been employed by the PPD for approximately four and one-half years and is assigned to the 14th District. C [REDACTED] responded to the scene after receiving a 9-1-1 radio call. His body-worn camera was activated. T [REDACTED] spoke to W [REDACTED] at the scene. C [REDACTED] was interviewed by Internal Affairs later that day. Video from T [REDACTED] body-worn camera was played during the arbitration proceedings and admitted into evidence over the Union's hearsay objection. [See Ex. C-5].

Deputy Commissioner Francis Healy is the Chief of Staff for the Police Commissioner. DC Healy also serves as legal counsel for the Police Department, and he is in charge of Internal Affairs. Healy has been employed by the Department since 1990.

Healy was not involved in the investigation of the Grievant's conduct, or the decision to discharge him, but he was designated by the Department to testify during the arbitration proceedings. Healy testified that after reviewing the IA investigative package he concluded it was appropriate for the Department to forward the matter to the District Attorney's Office because he believed the facts and circumstances supported probable cause for a criminal offense:

[DC Healy, On Direct]

Q. [By City Counsel Talmo] And what facts and circumstances do you believe support probable cause?

A. It's the totality of the circumstances, looking at all the facts and circumstances of this case, the intense itemization that the complainant put forth. She identified things in complete detail.

In addition to that, some of the - - like I said, the overall testimony - - or not testimony at that point. It was the statements were incredibly precise and accurate, and they were mentioned several times to different people during the investigation and remained consistent, and this was actually documented on body camera. So it wasn't just hearsay or speculation, but they were actually identical to multiple people.

The details were intense, but also - - like I said, when we do these investigations, you have to evaluate the credibility of the witnesses, because oftentimes a lot of these things

will be a he said/she said when it gets to the bottom line. So decisions have to be made based on credibility.

Based on that and the actions of the police officer in this case led me to believe that the complainant was more credible than the officer in the facts and circumstances that I reviewed. The officer's actions were inconsistent. It was odd that, number one, he did in fact jump out of the car, which no one objected to or no one denied that happened. Everybody agreed to the basic facts but for one issue, which is the pulling of the firearm. Everything else was corroborated.

But what I found most telling is when the officer returned to the scene, he made no effort to call 9-1-1, made no effort to contact the officers that were on the scene. These are officers that I believe he worked with in the 14th District, so he knew them, they weren't strangers. So it wasn't as if he's in plain clothes and didn't want to endanger anybody walking up to them. So I found it very odd that he did not reach out to the officer even through 9-1-1.

So that combination of factors led me to believe that the allegations made by the complainant were in fact true.

[T:92, line 6 to T:94, line 8].

After reviewing the video from Sergeant T [REDACTED] body-worn camera, Healy testified that he concluded that W [REDACTED] was credible and the Grievant was not credible based upon "his overall actions and conduct...." [T:96, lines 10-11]. Healy testified:

[Healy, On Direct]

A. He left the scene. He came back to the scene, made no calls to 9-1-1, sat in the car until he was approached by police, made no effort to make contact with the police.

Q. [By City Counsel Talmo]. And what's the significance of that?

A. Well, first and foremost, it leads me to believe that something is not right. I mean, that's honestly from what I'm looking at, why wouldn't he identify himself. It's an off-duty incident that happened. He needs to report that off-duty incident. When the supervisors are there and he's making no effort -- I understand if he wants to sit in the car for safety reasons. I can give him that but the issue is, I would have called 9-1-1 if you don't have police radio and say, I'm sitting here, blah-blah-blah, let the officers on scene know. He was spotted. He didn't identify himself voluntarily.

[T:96, line 13 to T:97, line 9].

Healy testified that the lack of a conviction of the criminal charges does not change his view of the Grievant's discharge. Healy indicated that the Grievant's actions were violative of the departmental charges. Healy testified that the Grievant displayed a "callous disregard" and for everyone's personal safety and "showed very poor judgment" by jumping out of his vehicle with a firearm. [See T:102-103]. Healy stated that the Grievant "should have just gone home and none of this would have happened, just continued driving home." [T:103, lines 10-12].

During cross-examination, Healy confirmed that he was not part of the decision-making to discharge the Grievant. He also acknowledged that he never spoke to Ms. W [REDACTED] or the Grievant. Healy indicated he is aware that the criminal charges against the Grievant were withdrawn by the District Attorney's Office. Healy testified that the Department has a practice of discharging officers who are arrested and criminally charged in domestic incidents if "there was a

preponderance of the evidence to support dismissal." [T:114, lines 9-11]. Healy was not aware if the Grievant's personnel file was reviewed before he was discharged.

The Grievant testified he was initially assigned to the 18th District upon his hire in 2007, and that he transferred to the 14th District in 2016. The Grievant indicated that over his career he has never received a complaint or disciplinary action concerning his interactions with the public.

The Grievant testified that at the time of the incident on [REDACTED], he was wearing his police trousers and a black hooded sweatshirt. The Grievant indicated that his police badge is silver. The Grievant stated that he had no previous interactions with Ms. W [REDACTED] prior to the incident.

The Grievant testified that on August 17, 2021, he was traveling North on Germantown Road. The Grievant indicated that Ms. W [REDACTED] was traveling behind him for approximately one mile, and they were both behind a SEPTA bus. The Grievant testified that he noticed in his rearview mirror that Ms. W [REDACTED] crossed the double yellow lines in the street. The Grievant stated, "...in my opinion, I felt she was in a rush and that she was wanting to get around the bus...." [T:129, lines 5-7]. The Grievant indicated that Ms. W [REDACTED]' was so close to him that he could not see the hood of her car.

The Grievant testified that he safely passed the SEPTA bus after it pulled off the travel lane to pick up passengers. The Grievant stated that Ms. W [REDACTED] also passed the bus. The Grievant indicated that once they passed the bus, he tried to speed up a bit to create some distance between himself and Ms. W [REDACTED] but she stayed immediately behind him. The Grievant proceeded to stop his vehicle, opened his door, "stood in the A-frame of my door and asked the driver if she was done riding my ass and that I was just trying to get home." [T:131, line 24 to T:132, line 2]. The Grievant indicated that Ms. W [REDACTED] told him that he was driving too slowly. The Grievant testified that he remained at his vehicle, pulled his badge from his wallet located in his left pants pocket, showed his badge to Ms. W [REDACTED], and stated to her that he was driving the speed limit and she needed to slow down. The Grievant indicated that in response to him showing his badge, Ms. W [REDACTED] stated, "I got something for this." [T:133, line 2].

The Grievant testified that he got back in his truck and drove away. The Grievant testified that approximately 25 seconds elapsed between the time that he stopped his truck and when he started driving again. The Grievant indicated that Ms. W [REDACTED] followed right behind him for approximately three (3) miles. At this point, a co-worker called his cell phone and informed him that Ms. W [REDACTED] had called 9-1-1. The Grievant pulled over because he "knew that police were going to need to talk to me." [T:134, lines 6-7]. The Grievant stated that he did not

call 9-1-1 because he "didn't think that it would raise to any escalation just telling her to slow down." [T:134, lines 20-22].

The Grievant testified that he never showed his gun to Ms. W[REDACTED]. The Grievant indicated that his gun was always underneath his oversized hooded sweatshirt and never took it out. The Grievant also testified that he never threatened to shoot Ms. W[REDACTED]. The Grievant denied approaching Ms. W[REDACTED] in her vehicle.

The Grievant confirmed that he was placed on restricted duty approximately two (2) days after the incident. He stated he was never interviewed by Lieutenant Harner.

The Grievant stated that the criminal charges against him were withdrawn. The Grievant indicated as part of the withdrawal of the charges he completed an anger management course at the request of the District Attorney's Office. The Grievant testified that he "was angry about the whole [criminal] process, that I was fired for something I didn't do." [T:145, lines 23-24].

The Grievant testified that he would like his job back and has faced personal and fiscal challenges as the result of being discharged. The Grievant

stated that he would not do anything differently with respect to how he interacted with Ms. W[REDACTED].

FOP Vice-President J[REDACTED] M[REDACTED] testified on behalf of the Union. M[REDACTED] confirmed that Department Directive 10.10 addresses off-duty police action. [See Ex. C-3].

Detective R[REDACTED] M[REDACTED] testified on behalf of the Union. M[REDACTED] and the Grievant were on patrol together in the 18th District in 2008-2009 and continued to interact professionally thereafter but less frequently than when they were partners. M[REDACTED] indicated that he and the Grievant are good friends, they live in the same neighborhood, their families have traveled together, and their kids play together. M[REDACTED] described the Grievant as "very professional" and "a very good cop". [T:147]. M[REDACTED] indicated that he was not aware of any complaints against the Grievant regarding his interactions with the public. M[REDACTED] testified he would have no problem working with the Grievant if he is reinstated.

SUMMARY OF THE ARGUMENTS

The City's Position

The City contends that it had just cause to terminate the Grievant. The City maintains that Ms. W[REDACTED], the complainant, voluntarily provided the officers who responded to the scene of the incident with a credible, detailed account of the events that led to the Grievant's discharge. The City emphasizes that Ms. W[REDACTED] voluntarily filed a complaint against the Grievant, and reiterated a substantially similar account to Internal Affairs. The City submits that Ms. W[REDACTED]' prior lawsuit against the Department and the minor discrepancies in her recollection of the incident, such as the color of the Grievant's badge or whether the Grievant returned to his car, do not impact her credibility. The City emphasizes that DC Healy believed Ms. W[REDACTED] and found the Grievant not to be credible.

The City contends that the Grievant was not a credible witness:

Today he testified that he wouldn't change anything, he would do the same thing again, even though he admitted that he could have continued driving home, he could have called 9-1-1 if he felt her conduct rose to a level requiring police intervention or he could have pulled to the side of the road and let her pass. Instead of doing any of that, Officer Humm stopped in the middle of the road, got out of his car, and flashed his badge. He also testified that he wasn't angry during this interaction, but I would submit that that's not a credible statement in at least because of the language he used, that he admitted using and that Ms. W[REDACTED] stated he used during

the altercation, and his demeanor when Sergeant T [REDACTED] spoke with him at the scene.

It also defies credibility that he would agree to an anger management course despite not feeling any anger in this moment.

[T:176, line 2 to T:177, line 2].

Based upon the foregoing and the entire record, the City contends that it had just cause to discharge the Grievant. The City requests that the Grievant's discharge be sustained and the grievance denied. The City submits that the Union's request to have the arbitrator apply a higher standard of proof must also be denied. Further, in the event the arbitrator reinstates the Grievant, "any time he spent facing criminal charges should be deducted from any backpay award."

[T:178, lines 8-11].

The Union's Position

The Union contends that the City has not met its burden to prove that it had just cause to discharge the Grievant, a 15 year veteran of the Department. The Union maintains "there is no credible evidence that the officer threatened anyone or that he impliedly threatened anyone by showing his service weapon." [T:178, lines 21-24]. The Union also submits the Grievant was discharged on the basis that he was criminally charged and arrested. The Union emphasizes that the Grievant was not found guilty of the criminal charges that were withdrawn by the District Attorney. The Union stresses "that a mere arrest for unproven conduct is not enough to justify discharging someone...they need to prove the underlying conduct here to be able to discipline him at all, and they have not done that." [T:180, lines 12-17].

The Union submits a higher standard of proof (reasonable doubt) is required given that this matter "involve(s) allegations of what would amount to serious crimes or other egregious type of misconduct...." [T:180, lines 22-24].

The Union points out that the Department, through DC Healy, addressed the issue of credibility. The Union contends that an assessment of credibility can only occur when there is firsthand testimony. The Union emphasizes that Ms. W[REDACTED] did not appear to testify despite being subpoenaed. The Union stresses that W[REDACTED]' absence deprives the Grievant of the ability to cross-examine her.

Considering her failure to appear, W[REDACTED]' statements on the body-worn camera footage and during her IA interview are hearsay. The Union points out that the Grievant is the only one who testified and was present during their interaction, and the evidence shows that he credibly and consistently denied making any threats towards the Grievant or that he showed her his gun.

The Union contends there are other issues aside from the hearsay nature of Ms. W[REDACTED]' statements given that they show her bias against members of the police department and include some inconsistencies. With respect to bias, the Union points out that Ms. W[REDACTED] has previously filed a lawsuit against 15 City police officers and readily admitted to the officers who responded to the scene at 6 a.m. in the morning that she already contacted her attorney. The Union contends that "whether she is not comfortable with the police, right or wrong, because of what happened in the past or whether she's simply litigious, there are real concerns about the reliability of her hearsay statements at this point in time. [T:185, line 21 to T:186, line 3].

As to the inconsistencies in W[REDACTED]' statements, the Union points out there were discrepancies in her description of the color of the Grievant's badge and on how the Grievant pulled out his badge and gun. The Union submits that W[REDACTED] also provided varying accounts about how she reacted to the Grievant's threat to shoot her.

The Union emphasizes that Lieutenant Harner, the investigating officer, never testified that she found W [REDACTED] more credible than the Grievant. Moreover, Harner indicated the Grievant was discharged once he was criminally charged and the Commissioner's Direct Action occurred. The Union also submits there is no evidence to show that the City considered the Grievant's personnel file.

For these reasons, and based upon the entire record, the Union requests that the Arbitrator "sustain the grievance, reinstate the grievant, make him whole for all losses, including lost overtime, lost costs associated with him losing his medical coverage, having to purchase replacement coverage...[and] reinstate him to the position and assignment he was in before he was discharged and that his records, his personnel records, be corrected to reflect these changes." [T:27, line 23 to T:28, line 9].

DISCUSSION

I have carefully considered the arguments and evidence submitted into the record. The City has the burden to prove that it had just cause to terminate the Grievant's employment. The Grievant is charged with conduct unbecoming:

CONDUCT UNBECOMING, SECTION 1-§026-10: (Engaging in any action that constitutes the commission of a felony or a 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 (relating to Theft and Related Offenses). Also includes 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.)

CONDUCT UNBECOMING, SECTION 1-§001-10: (Unspecified)

CONDUCT UNBECOMING, SECTION 1-§021-10: (Any incident, conduct, or course of conduct which indicates that an employee has little or no regard for your responsibility as a member of the Police Department.)

The basis for the Grievant's termination is the incident that occurred on August 17, 2021.

I have independently reviewed the evidence in this matter, including the body-worn camera video of the police officers who responded to the 9-1-1 call. The responding officers were not present at the time of the interactions between

the Grievant and Ms. W[REDACTED] on August 17, 2021. The City subpoenaed Ms. W[REDACTED] but she did not appear to testify during the arbitration proceedings. There were no other eyewitnesses of the incident, other than the Grievant, who testified. Put simply, the City lacks an eyewitness who could offer direct testimony concerning the interactions between the Grievant and Ms. W[REDACTED]. Although there is video footage from the body-worn cameras that captured Ms. W[REDACTED]'s recount of her interactions with the Grievant, this alone is insufficient to serve as the basis for the Grievant's dismissal because neither Ms. W[REDACTED] nor the video can be subject to cross-examination. The record also does not include testimony from Commissioner Outlaw who was the ultimate decision-maker in this termination. Deputy Commissioner John Healy testified, but he was not involved in the decision to dismiss the Grievant, he had no first-hand knowledge of the incident, and did not speak directly to the Grievant or Ms. W[REDACTED]. Given these circumstances, DC Healy's testimony, while offered in good faith, cannot substitute for Commissioner Outlaw's.

The Grievant admitted that he stopped his truck and asked Ms. W[REDACTED] why she was "riding his ass", but he denied Ms. W[REDACTED] claims that he approached her from his truck, drew his service weapon, and threatened to shoot her. I conclude that Ms. W[REDACTED] claims have not been corroborated by any direct, credible evidence.

The Grievant testified that in hindsight he would not have done anything differently on [REDACTED], but I am persuaded that the interactions the Grievant admitted to having with Ms. W [REDACTED] support the City's claim that his conduct violated the Department's Off-Duty Policy that provides, in pertinent part:

- A. The safety of sworn members and others in the immediate area shall be the paramount concern when deciding to take any off-duty police action. Also, any action taken off-duty must always be consistent with federal and state law and departmental policies and procedures. All off-duty police actions, regardless of the jurisdiction of occurrence, or subject to review, investigation and disciplinary action, if warranted.
- B. All off-duty police actions reflect upon the integrity of the individual sworn member as well as the entire Philadelphia Police Department. Therefore, all off-duty police actions must be beyond reproach and avoid even the appearance of any improprieties. As such, sworn members shall not take any off-duty police action in any minor family or neighborhood disputes, summary offenses or traffic violations, unless such action is necessary to prevent bodily injury, serious bodily injury or death. Sworn members shall call Emergency 9-1-1 in these situations.
- C. In most off-duty situations, the safest and tactically superior action is to simply call Emergency 9-1-1 and provide detailed information for the responding on-duty officers. There is no cowardice in not taking off-duty police action when not properly prepared or equipped. It is simply proper officer safety tactics to protect yourself as well as your family.


[Ex. C-3].

Although I conclude that the Grievant committed a disciplinable infraction of the Department's policy, the Grievant's admitted conduct does not rise to the level of a terminable offense. Instead, I conclude that the evidence supports a level of discipline that will serve to be corrective in nature. For these reasons, and the entire record, I conclude that the City had just cause to discipline, but not terminate the Grievant. The charge of **CONDUCT UNBECOMING, SECTION 1-§001-10: (Unspecified)** is sustained, and the remaining charges are dismissed. The Grievant's termination shall be reduced to a five (5) day suspension without pay. The Grievant shall be reinstated to his position as a police officer and made whole in all other respects.

AWARD

The City had just cause to discipline but not terminate the Grievant. The Grievant's termination shall be reduced to a five (5) day suspension without pay. The Grievant shall be reinstated to his position as a police officer and made whole in all other respects.

Dated: May 20, 2024



Robert C. Gifford