

AMERICAN ARBITRATION ASSOCIATION
CASE No. 01-23-0003-6342

In the Matter of the Arbitration Between
AFSCME, DISTRICT COUNCIL 47, LOCAL 2187,

Union

and

OPINION AND AWARD

CITY OF PHILADELPHIA,

Employer.

Re: Grievant Richard Patitucci

BEFORE: Arbitrator Melinda G. Gordon, Esq.

APPEARANCES:

AFSCME, DC 47, LOCAL 2187
WILLIG, WILLIAMS & DAVIDSON
By: Felicia Carter, Esq.

CITY OF PHILADELPHIA
CITY OF PHILADELPHIA LAW DEPARTMENT
By: Christopher D'Amore, Esq.
Deputy City Solicitor

The City of Philadelphia (“City” or “Employer”) and AFSCME District Council 47, Local 2187 (“Union”) are parties to a Collective Bargaining Agreement (“CBA”).¹ The Grievant, Richard Patitucci (“Patitucci” or “Grievant”), a City employee since 2017, is a Construction Plan Review Specialist in the City’s Department of Licensing and Inspection (“L&I”). At L&I, Patitucci reviews contracts and related permit applications to ensure compliance with state and city regulations. Patitucci also served as a Union steward. He has no prior disciplinary history.

BACKGROUND

This arbitration concerns an alleged physical altercation on March 9, 2023, between Patitucci and another L&I employee, M█████ M█████ (“M█████”). The alleged physical altercation occurred within the L&I office. Two other L&I employees, K█████ T█████ (“T█████”) and Rob T█████ (“T█████”), witnessed the incident. Two supervisors, J█████ D█████ (“D█████”) and B█████ W█████ (“W█████”), were also in the L&I office that day.

The following day, March 10, 2023, L&I Human Resources Director K█████ C█████ (“C█████”) notified Patitucci that he was suspended without pay pending an investigation.² The City asserted that the suspension was issued in accordance with the L&I Workplace Violence Policy and the L&I Disciplinary Policy.³ G█████ L█████ (“L█████”), a Union representative, grieved the suspension, asserting that Patitucci’s suspension without pay violated the CBA.⁴ By letter dated March 16, 2023, Patitucci received notice of an administrative disciplinary hearing regarding his suspension.⁵

A disciplinary hearing occurred on March 20, 2023, regarding Patitucci’s suspension. L&I Director Spinks, C█████, and department supervisors W█████ and D█████ attended the hearing as did the Grievant. Before the close of the hearing, L&I Director Spinks allegedly addressed the parties stating, “Rich is a great employee, he’s a steward, and I expect the bar to be set higher because of that.”⁶ By Notice of Suspension dated March 24, 2023, Patitucci received a

¹ Joint Exhibits are designated as “J-” followed by the Exhibit number. J-1.

² City Exhibits are designated as “C-” followed by the Exhibit number. C-11. Mahoney was also suspended. C-8

³ *Id.*

⁴ Union Exhibits are referred to as “U-” followed by the Exhibit number. U-4, C-1.

⁵ C-12.

⁶ L&I Director Spinks did not testify in this proceeding. Transcript references are referred to as Tr. __ followed by the page number for the first day of hearing or TR2. __ followed by the page number for the second day of hearing. Tr. 166. The Union brought a PERA ULP charge regarding the statement. J-2.

twenty (20) day suspension without pay.⁷ The City backdated the suspension to include the ten (10) days between the immediate suspension on March 10, 2023, and the hearing date.⁸

On May 26, 2023, the Union advanced the grievance to Step IV.⁹ On July 6, 2023, the Union amended the grievance to include the twenty (20) day suspension period.¹⁰ On August 3, 2023, the City denied the Step IV grievance.¹¹ By letter dated August 16, 2023, the Union filed a Demand for Arbitration with the American Arbitration Association (“AAA”).¹² By letter dated August 29, 2023, the undersigned received notice from AAA of her selection as an arbitrator for this matter. On August 30, 2023, the City issued a second letter denying the Step IV grievance, adding that “Mr. Patitucci was suspended on March 20, 2023, the union did not file a grievance to Step 4 until May 26, 2023, which makes tis[sic] grievance untimely. Grievances must be filed within 10 days giving rise to the occurrence.”¹³

On the first hearing date, January 25, 2024, the City raised an arbitrability issue, arguing that the grievance was untimely. The Union countered that pursuant to AAA rules, the City waived any objection regarding arbitrability. The parties agreed to hold the arbitrability issues in abeyance and proceed on the merits of the case.

By consent of the parties, hearings were held via Zoom on January 25, 2024, and March 5, 2024. Both parties were represented and afforded a full opportunity to present oral and written evidence, examine and cross-examine witnesses, and set forth their respective positions, arguments, and proof. W [REDACTED] G [REDACTED], M [REDACTED] M [REDACTED], K [REDACTED] T [REDACTED], R [REDACTED] T [REDACTED], K [REDACTED] C [REDACTED], J [REDACTED] D [REDACTED], and B [REDACTED] W [REDACTED] testified for the City. The Union presented Mr. Patitucci’s testimony. The record was closed after the submission of written closing statements on May 8, 2024. This Opinion and Award are based on the record presented before the undersigned.

ISSUE PRESENTED

⁷ C-2.

⁸ *Id.*, Tr.143.

⁹ U-4, C-3.

¹⁰ C-4.

¹¹ U-5.

¹² U-2.

¹³ U-6.

At the January 25, 2024, hearing, the parties could not agree upon the issues in dispute and gave the undersigned the authority to designate the issues to be determined. For this arbitration, the undersigned adopts the Union’s presentation of the issues:

(1) Whether the instant grievance is arbitrable?

(2) Whether the discipline of bargaining unit member Richard Patitucci is supported by just cause, and if not, what is the remedy? ¹⁴

POSITIONS OF THE PARTIES

City’s Position

Arbitrability

The City raises an affirmative defense that the grievance is not arbitrable because it is untimely and procedurally defective. Patitucci was immediately suspended on March 10, 2023. The City concedes that the Union filed a timely grievance on March 16, 2023, regarding Patitucci’s suspension.¹⁵ However, after the disciplinary hearing and Patitucci’s receipt of a twenty (20) day suspension on March 24, 2023, the Union waited fifty-one (51) days, until May 26, 2023, to advance the grievance to Step IV, skipping Steps II and III.¹⁶ Moreover, the City contends that the Union’s amendment of the grievance on July 6, 2023, was also untimely.¹⁷ For these reasons the City requests that the grievance be dismissed as untimely.

The City Proved Just Cause for Discipline

The City asserts that Patitucci’s workplace assault of M [REDACTED] on [REDACTED], violated the L&I Workplace Violence Policy (“Policy”) and the L&I Code of Ethics.¹⁸ After investigating the workplace violations, the City argues its only recourse was to immediately suspend Patitucci.¹⁹ At the administrative hearing, after Patitucci admitted his misconduct, a twenty (20) day suspension was imposed. The suspension was backdated to include the dates of Patitucci’s original suspension.²⁰ The City contends that the twenty (20) day suspension was in

¹⁴ Tr.12-16, Union Closing Brief p.2.

¹⁵ C-1.

¹⁶ C-3, The City excluded weekends and holidays in forming its calculations. J-1, Section 7.

¹⁷ C-4.

¹⁸ C-2, C-12, C-13, C-14.

¹⁹ C-2, C-14, Tr.133, 136, 152-154.

²⁰ C-2, Tr. 143, 158-160.

accord with the types of discipline imposed in other matters involving violations of the Policy.²¹ The City underscores that Patitucci's discipline was in accordance with his misconduct and not his status as a Union representative and complies with the principles of just cause.

Union's Position

Arbitrability

In contrast to the City's position, the Union submits that the City waived its right to object to the instant grievance on timeliness grounds. Pursuant to CBA Section 7, either party may refer a grievance to binding arbitration within fifteen (15) days of the Step IV answer in accordance with the *Voluntary Rules of Labor Arbitration of the American Arbitration Association*.²² The Union argues that it submitted the instant Demand for Arbitration well within this timeline.

On August 3, 2023, the City denied the Step IV grievance.²³ By letter dated August 16, 2023, the Union filed a Demand for Arbitration with the AAA.²⁴ By letter dated August 29, 2023, the undersigned received notice from AAA of her selection as an arbitrator for this matter. As a result, the Union contends it timely filed for arbitration.

The Union submits that AAA Labor Arbitration Rules 3 and 6 mandate that objections based on arbitrability grounds be made within ten (10) days after notice from AAA of the arbitration demand.²⁵ However, in this case, the City objected for the first time at the commencement of the hearing on January 25, 2024, five (5) months after receiving the Demand for Arbitration.

The Union also notes that the City objected to the timeliness of the Step IV grievance by letter dated August 30, 2023, twelve (12) days after the City received the arbitration demand.²⁶ W█████ G█████ ("G█████"), Program Administrator, Employee and Labor Relations Unit, conceded that he was aware of the Demand for Arbitration. However, the City never raised an objection regarding arbitrability to AAA.²⁷

The City failed to prove Just Cause for Discipline

²¹ *Id.*

²² J-1, Section 7.

²³ U-5.

²⁴ U-2.

²⁵ U-3

²⁶ U-6. Tr.27, 59.

²⁷ *Id.*

Notwithstanding Patitucci's apologies and concession that he was the aggressor in the physical altercation between himself and M [REDACTED], the Union argues that the City failed to prove that Patitucci engaged in the misconduct charged. According to the Union, the City cannot demonstrate that Patitucci violated the Policy or the L&I Code of Ethics.²⁸ The Union submits that Patitucci's actions on [REDACTED], do not conform to the definition of violence defined within the Policy. The Policy states that "[w]orkplace violence is any intentional verbal or physical conduct affecting the workplace that causes any individual to reasonably fear for his or her personal safety, the safety of his or her family, friends, co-workers and/or property."²⁹ The evidence demonstrates, the Union contends, that none of the L&I witnesses felt "fear" at the time of the incident. As a result, Patitucci's actions did not violate the Policy.

The Union also asserts that the City failed to prove that Patitucci violated the L&I Code of Ethics or that his conduct impacted department morale. According to the Union, because only Patitucci was disciplined, L&I failed to apply its policies uniformly.³⁰ Moreover, Patitucci's discipline was excessive and failed to comply with the principles of progressive discipline.

DISCUSSION AND FINDINGS

Arbitrability

The City, by delaying approximately five (5) months to object to arbitrability, waived its right to contest this issue. AAA Labor Arbitration Rules 3 and 6 mandate that objections based on arbitrability grounds be made within ten (10) days after notice from AAA of the arbitration demand.³¹ AAA Rule 3(c) provides that [a] party *must* object to the ... arbitrability of a claim ... no later than the filing of the answering statement to the claim ... that gives rise to the objection."³² AAA Rule 6 provides that the "party upon whom the demand for arbitration is made may file an answering statement with the AAA within 10 days after notice from the AAA..."³³

The Union filed its Demand for Arbitration pursuant to the fifteen (15) day timeline

²⁸ C-14, C-15.

²⁹ C-14.

³⁰ Similar to Patitucci, M [REDACTED] was almost immediately suspended for his alleged misconduct. However, after his disciplinary hearing, the City reinstated M [REDACTED] and provided him with back pay for the days of his suspension. Tr. 92, 142.

³¹ U-3.

³² *Id.*

³³ *Id.*

provided in CBA Section 7. On August 3, 2023, the City denied the Step IV grievance, finding that the City had just cause to issue Patitucci a twenty (20) day suspension.³⁴ By letter dated August 16, 2023, the Union timely filed a Demand for Arbitration with the AAA.³⁵

The City failed to object to the arbitrability of this matter until the first day of the hearing, January 25, 2024, approximately five (5) months after receipt of the Demand for Arbitration. The City also never contested the timeliness of the Union grievance until *after* the Demand for Arbitration was filed.³⁶ Moreover, the City failed to present any evidence that it was prejudiced by the Union's actions. Based on the foregoing the grievance is deemed arbitrable.

Just Cause for Discipline

The City sustained its burden of proving just cause in this matter.³⁷ Patitucci's apologies and concession that he was the aggressor in the physical altercation between himself and M [REDACTED] conforms with eyewitness testimony.³⁸ On the day of the incident, Patitucci questioned information on an inspection performed by T [REDACTED], a novice inspector.³⁹ T [REDACTED] suggestion to Patitucci that he "read the notes" was parroted by M [REDACTED].⁴⁰ Patitucci told M [REDACTED] to either "shut the fuck up" or "fuck you."⁴¹ The two exchanged comments of "fuck you," and Patitucci got up from his seat and "rushed" or "charged" at M [REDACTED], chest bumping him.⁴²

M [REDACTED] testified that when he saw Patitucci coming towards him, he stood up and tried to push Patitucci away from him. He described Patitucci as "bumping up" on him and "in his face" and trying to grab his shirt.⁴³ Eyewitness testimony reported that Patitucci "blew up" after M [REDACTED] comment and described Patitucci's reaction as "completely over the top."⁴⁴ Supervisor D [REDACTED] confirmed he ran out of his office because he heard screaming.⁴⁵ To

³⁴ U-5.

³⁵ U-2.

³⁶ U-6.

³⁷ *Enterprise Wire Co.* 46 LA (BNA) 359, 363-64 (Daugherty, 1966); *AFSCME Dist. Council 88 v. City of Reading*, 568 A.D.2d 1352, 1355-56, & n.3 (1990).

³⁸ Tr. 141, 158, Tr2. 25.

³⁹ C-7, Tr2. 25, 108. T [REDACTED] testified that he was not assigned to his own area and worked as a floater filling in for other inspectors when they were unavailable. Tr.102.

⁴⁰ Tr.103.

⁴¹ Tr.77.

⁴² Tr. 77-79, 115-116.

⁴³ *Id.*, C-7.

⁴⁴ Tr. 103, 118-119.

⁴⁵ Tr. 175.

break up the physical altercation, he placed himself between Patitucci and M [REDACTED].⁴⁶ Another supervisor, W [REDACTED], suggested to Patitucci that he take a walk.⁴⁷ After the incident, W [REDACTED] emailed L&I Director Joseph Spinks.⁴⁸ Following an investigation, the City suspended both Patitucci and M [REDACTED].⁴⁹

The Union submits that the Policy was not violated because none of the eyewitnesses testified that they feared for their personal safety during the incident. Although the Policy provides “[w]orkplace violence is any intentional verbal or physical conduct affecting the workplace that causes any individual to reasonably fear for his or her personal safety, the safety of his or her family, friends, co-workers and/or property” the Policy also proscribes other forms of violence.⁵⁰

Included in the Policy’s definition of violence is “physically or verbally threatening another individual, or the use or threat of physical force.”⁵¹ Employees are admonished that they “must not engage in any form of workplace violence as described above and will face severe disciplinary action should they do so.”⁵² In keeping with this Policy, the City held Patitucci accountable for his misconduct on [REDACTED], and demonstrated it had just cause to discipline him.⁵³ Similarly, Patitucci’s conduct impacted the morale of L&I in violation of the L&I Code of Ethics, which provides:

All employees of the Department of Licenses and Inspections are held to a high standard and are required to comply with all rules, regulations, policies and procedures of the department and shall not engage in any conduct that negatively affects morale, public confidence in the operation of government, public respect for municipal employees or governmental efficiency...⁵⁴

The evidence demonstrated that Patitucci’s act of physical aggression negatively affected morale.

⁴⁶ Tr. 176.

⁴⁷ Tr2. 26

⁴⁸ Tr2. 11, C-9.

⁴⁹ C-8, C-10, C-11, Tr. 129-136.

⁵⁰ C-14.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Enterprise Wire Co., supra.*

⁵⁴ C-13.

Patitucci concedes notice of the City policies, underscoring that this case hinges on the appropriate penalty.⁵⁵ The record is devoid of evidence that Patitucci received a greater suspension based on his role in the Union or because of L&I Director Spark's comment. Patitucci expressed remorse almost immediately after his actions. It appears that he is a well-respected employee who snapped on the day of the incident. Both City and Union witnesses expressed surprise that Patitucci acted out in such a manner.⁵⁶ Although it is understandable given the amount of pressure and grief Patitucci was coping with in his personal life, the City had a duty to react to his misconduct. Despite Patitucci's lack of a disciplinary record, the Policy provides that "employees must not engage in any form of workplace violence" as described in the Policy "and will face *severe* disciplinary action should they do so." Given these parameters juxtaposed with the CBA provision regarding progressive discipline, the undersigned finds the twenty (20) day suspension imposed by the City appropriate. For all the foregoing reasons, the grievance is denied.

AWARD

For all the foregoing reasons, the grievance is:

1. Deemed arbitrable.
2. Denied.

Dated: June 7, 2023



Melinda G. Gordon

AFFIRMATION

State of New York } }
County of Westchester}

I, Melinda G. Gordon, do hereby affirm upon my oath as an Arbitrator that I am the individual described in and who executed this instrument which is my Opinion and Award.



Melinda G. Gordon

Dated: June 7, 2023

⁵⁵ Tr2. 33.

⁵⁶ Tr. 110, 119-120, 180, Tr2. 15.