

IN THE SUPREME COURT OF PENNSYLVANIA

No. 59 EAP 2024

THE CITY OF PHILADELPHIA,
Petitioner

v.

FRATERNAL ORDER OF POLICE LODGE NO. 5
Respondent

BRIEF OF AMICUS CURIAE
THE CITIZENS POLICE OVERSIGHT COMMISSION,
THE CENTER FOR POLICING EQUITY, AND MARK WYNN

In support of Petitioner, the City of Philadelphia

CITIZENS POLICE OVERSIGHT COMMISSION

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I. STATEMENT OF INTEREST

The Citizens Police Oversight Commission (CPOC) is an independent city agency, created to “increase[e] transparency and accountability of Police Department functions . . . and increase[e] communication and engagement between the community and the Police Department.”¹ CPOC brings light to the discipline process: to show what works, what doesn’t work, and bring community feedback to the police and city leadership. Significant damage is done to efforts to build police transparency and accountability when officers who have engaged in serious misconduct are reinstated through arbitration.

The Center for Policing Equity (CPE) is a racial justice non-profit that provides leaders with data, stories, and relationships to facilitate change that are bold, innovative, and lasting. CPE gathers and analyzes data on behaviors within public safety systems and uses those data to help communities achieve safer policing outcomes. This work is also the basis of CPE’s National Justice Database, the nation’s first database tracking national statistics on police behavior. This database allows CPE to provide others with a clearer picture of the approaches, measures, and methods that work best in redesigning public safety to better keep vulnerable communities safe.

¹ PHILADELPHIA CITY CODE, §§ 21-1200 to 1214.

Mark Wynn is an instructor, subject matter expert and independent consultant. Mr. Wynn is a member of the International Association of Chiefs of Police (IACP) National Strategic Partnership on Violence Against Women and an independent Domestic and Sexual Violence Prevention Trainer and Consultant. He has worked in the field of law enforcement for 47 years as an officer, detective, supervisor, instructor and policy maker. Over the past 30 years, he has worked as a subject matter expert for the IACP, the Civil Rights Division and Office of Violence Against Women at the US Department of Justice on the topic of officer-perpetrated domestic and sexual violence. In addition, he is a Fulbright Specialist for the U.S. Department of State on the topic of prevention of gender violence.

Amici curiae file this brief in support of Petitioner, the City of Philadelphia. We submit this brief to assist the Court in its analysis of the appropriate scope of review for police arbitration cases and, in particular, the public harm which has resulted from the narrow certiorari scope of review. This brief was not authored or paid for, in whole or in part, by any person or entity other than amici curiae.²

II. INTRODUCTION

² Thanks to James Dykman who first developed CPOC's arbitration database and contributed significantly to this work. Thanks to Nicholas Kato, Laila Khalil, Michael Tooley, and Janine Zajac from CPOC, who contributed indispensable drafting and research assistance to this brief.

*“The bottom line is this: The system doesn’t get results that the public has a right to expect ... That’s the third party that gets overlooked. They’re not even part of the conversation.”*³

Charles Ramsey, Philadelphia Police Department Commissioner, 2008-2016

This court should overturn *Pennsylvania State Police v. Pennsylvania State Troopers’ Ass’n (Betancourt)*, 656 A.2d 83 (Pa. 1995), and modify the narrow certiorari scope of review applicable to grievance arbitration cases under Act 111. For many years, this wrong and unworkable decision has produced unacceptable results.

Reinstating police officers who were fired by the Police Commissioner for serious misconduct undermines public trust in police. Police officers exercise significant power and discretion as the enforcers of the law. A police officer is authorized to act on behalf of the state. At a time of low community trust in police and widespread calls for reform, unchecked police abuse only deepens the public’s mistrust. *Betancourt* aggravates that mistrust even further: it is undisputed that reinstating police officers who were fired by the Police Commissioner for serious misconduct undermines public trust in police.

³ William Bender and David Gambacorta, *Police arbitration payouts have cost Philly taxpayers at least \$5 million over the last decade*, PHILADELPHIA INQUIRER, Sept. 30, 2019, <https://www.inquirer.com/news/police-arbitration-philadelphia-back-pay-millions-fop-20190930.html>.

If the judgment of an unelected arbitrator—who lacks police training, police experience and public accountability—is a poor substitute for the judgment of the Police Chief, it is an even poorer substitute for the judgment and review afforded by Pennsylvania’s judicial system. The public cannot abide the decisions of arbitrators who can be wrong on the facts and the law, and courts must be allowed to consider whether the most egregious arbitration decisions serve the public’s interest. In the instant case, and many others enumerated in this brief, arbitration has led to the reinstatement of officers who are unfit in any work environment, much less a position of power and public trust.

Police officers already have robust workplace protections, so the court should not worry about allowing a public policy exception or a more lenient test. In fact, police rights have accelerated over recent decades and must be curtailed where they harm society. “A labor arbitration process that prioritizes the [workplace] rights of individual officers over the community’s right to freedom from abusive police officers demands reform.”⁴

This Court is not bound to follow precedent like the *Betancourt* decision, which “cannot bear scrutiny.”⁵ Application of either the essence test or the j.n.o.v.

⁴ Editorial Board, *To Hold Police Accountable, Ax the Arbitrators*, NEW YORK TIMES (Oct. 3, 2020), <https://www.nytimes.com/2020/10/03/opinion/sunday/police-arbitration-reform-unions.html>.

⁵ *William Penn Sch. Dist. v. Pennsylvania Dep’t of Educ.*, 170 A.3d 414, 456–57 (Pa. 2017).

test as the scope of review for grievance arbitrations under Act 111 would simply allow the court to evaluate the reasonableness of the award.⁶ Incorporating a public policy exception would simply allow the court to ensure that an arbitrator's award does not violate the "well-defined, dominant" public policy of the Commonwealth.⁷

III. ARGUMENT

The *Betancourt* decision was wrong and has proven unworkable for nearly 30 years. The Court is "not bound to follow precedent when it cannot bear scrutiny, either on its own terms or in light of subsequent developments."⁸ The Court must revisit the scope of review applicable to grievance arbitration cases and apply the j.n.o.v or essence test. In the alternative, the Court should at minimum recognize a public policy exception to the narrow certiorari standard. While any of these changes would only slightly expand the scope of review, such an expansion would

⁶ The essence test asked whether "the issue before the arbitrator as properly defined ... was within the terms of the collective bargaining agreement" and "whether the award can rationally be derived from the collective bargaining agreement." *Westmoreland Intermediate Unit # 7 v. Westmoreland Intermediate Unit # 7 Classroom Assistants Educ. Support Pers. Ass'n, PSEA/NEA*, 939 A.2d 855, 866 (Pa. 2007). The j.n.o.v. test is standard is applied by statute. 42 Pa. C.S.A. § 7302(d)(2).

⁷ Public policy is defined as the "well-defined, dominant [and] ascertained by reference to the laws and legal precedents [] not from general considerations of supposed public interests." *Westmoreland Intermediate Unit #7*, 939 A.2d at 866.

⁸ *William Penn Sch. Dist. v. Pennsylvania Dep't of Educ.*, 170 A.3d 414, 456–57 (Pa. 2017).

ensure that the most egregious cases of police misconduct do not result in an unfit person returning to duty.

Public trust in policing does not just further the public interest, but rather, public trust is universally understood as *essential* to the function of policing and the entire criminal justice system.⁹ Accordingly, violations of the public's trust are relevant factors under a j.n.o.v. or essence test.¹⁰ Upholding public trust is an essential component of just and effective policing, a well-defined public policy in the Commonwealth.¹¹

⁹ “[O]nly when a given policy is so obviously for or against the public health, safety, morals or welfare that there is a virtual unanimity of opinion in regard to it, that a court may constitute itself the voice of the community in so declaring.” *Hall v. Amica Mut. Ins. Co.*, 648 A.2d 755, 760 (Pa. 1994).

¹⁰ See, e.g., *Pennsylvania State Police v. Pennsylvania State Troopers Ass’n*, 698 A.2d 688, 689 n.2 (Pa. Commw. Ct. 1997) (collecting cases and quoting *DePaulo v. City of Albany*, 49 N.Y.2d 994, 996–97, 406 N.E.2d 1064, 1066, 429 N.Y.S.2d 171, 172 (1980) (Wachtler, J., concurring) (“In view of the singular responsibility and trust necessarily reposed in our police it would seem essential that the determination as to whether an officer should remain on the force, at least in cases where the conduct in question concerns a violation of the officer’s oath, should be made only by those persons entrusted by the public with that responsibility. Only those persons ... are directly answerable to that community.”)).

¹¹ Only with the public trust can the Philadelphia Police Department carry out their primary duties of law enforcement: to “preserve the public peace, prevent and detect crime, police the streets and highways and enforce traffic statutes, ordinances and regulations relating thereto.” PHILADELPHIA CITY CODE §5-200(a)-(b) (“The Department shall train, equip, maintain, supervise and discipline the Philadelphia Police.”).

A. UNREASONABLE AND EGREGIOUS ARBITRATION DECISIONS UNDERMINE PUBLIC TRUST

More than most other jobs, reinstating a police officer who has engaged in serious misconduct and been fired by the police department undermines public trust. Police officers carry a badge and a gun. Police are among the few domestic actors legally empowered to deprive a person of their liberty; they are also among the few allowed to kill members of the public without lengthy due process. Police officers interact directly with people in distress. Unsurprisingly, the public expects police officers to perform their duties with sound judgment, tact, and discretion in the first instance.

In egregious cases of police misconduct, the public expects the officer to lose their employment. Frequently, the police department's internal investigation division agrees. And the disciplinary hearing board agrees. And the police commissioner agrees.

But a single, un-appealable arbitrator might not agree. In those cases—when an arbitrator unwinds the lengthy disciplinary process to return an abusive officer to the ranks—the public's trust in the police department is understandably corroded. This section explains why.

1. Police officer terminations always implicate public policy

Unlike private sector terminations, and more than most other public employees, reinstating a police officer implicates public policy. The reinstatement restores the officer to a significant amount of power and a position of public trust. Due to the significant power and responsibility that police officers exercise, great damage is done when officers who fail to maintain these standards are returned to patrol.

a) The public expects officers to meet high standards

Police officers are held to a higher standard than other public employees. This high standard is essential because of the power and personal interactions involved in their everyday work.

In order to be hired as an officer with the Philadelphia Police Department (“PPD” or “the Department”), an individual must pass a battery of tests, including reading ability, physical fitness, background check, medical examination and drug screening, polygraph exam, and a psychological exam.¹² Beyond these strict onboarding requirements, police officers must also display good character while meeting the requirements of a stressful job.

¹² Philadelphia Police Department, Qualifications and Requirements, <https://www.joinphillypd.com/qualifications/overview>. Minimum standards are set at the state level by the Municipal Police Officers’ Education and Training Commission (MPOETC). MPOETC, Basic Police Officer Training, <https://www.pa.gov/en/agencies/mpoetc/programs/training/basic-police-officer-training.html>.

“Honor. Integrity. Service.” Each word in the PPD’s motto speaks to the values and the character required of the individual officers, to be “morally and ethically above reproach all times”:

Honor - It is a privilege to serve as a member of the law enforcement community and especially as a member of Philadelphia Police Department. []

Service - Service with honor means providing police service respectfully and recognizing the dignity of every person. [] Every day we come into contact with crime victims, residents afraid to enjoy their neighborhoods, and young people scared to stand up and do the right thing. Our job is to help them and to do so with courtesy and compassion.

Integrity - Integrity is the bedrock of policing and the foundation for building a successful relationship with our partners. Integrity means reflecting our values through our actions. [] Serving with integrity builds trust between the community and the police.¹³

b) The public entrusts police with significant power

Police officers must meet these character requirements, particularly because of the power they exercise. Police are charged with intervening in stressful, dangerous and unpredictable situations to protect life and property.

Police are equipped with a badge, representing their power—to issue lawful commands, to restrain a person’s freedom, and to exercise discretion over resolving situations. A person can be arrested and charged with criminal penalties for

¹³ Philadelphia Police Department Disciplinary Code, September 2021, i.

violating a lawful order and obstructing a police officer's work. A person can lawfully be stopped, their person and possessions searched, and they can be arrested by police. Police are the first public officials determining who is at fault, how severe a charge to bring, and whether to give a warning, issue a citation, or effect an arrest.

Police are empowered to lawfully use force and sent into personal situations and spaces. PPD patrol officers generally carry handcuffs, an extendable baton, OC spray, a Taser, and a firearm. They respond to private homes, answer calls for distress, and investigate reports of serious crime. As the "service" paragraph above describes, police encounter people at their worst and their most vulnerable every day.

2. Reinstating an officer who was fired for serious misconduct damages community trust in the police

a) The police already have a public trust problem

In 2020, nationwide protests arose against police misconduct. The widespread demands reflected not just the response to one terrible incident, but a crisis in public trust stemming from decades of dissatisfaction with a lack of

accountability in policing.¹⁴ In recent years, confidence in police has been low.¹⁵

Black Americans continue to have less confidence and lower levels of trust in police, compared to White Americans.¹⁶

The widespread lack of trust in police is damaging to public safety and policing in several ways. In recent decades, despite increased professionalism in policing and significant reductions in crime, public trust in police has not improved.¹⁷ Low trust in police tends to undermine public safety.¹⁸ Without trust, police are not able to demonstrate legitimacy and may instead resort to the use of

¹⁴ James Craven, Jay Schweikert, and Clark Neily, *How Qualified Immunity Hurts Law Enforcement*, CATO INSTITUTE (Feb. 15, 2022), <https://www.cato.org/study/how-qualified-immunity-hurts-law-enforcement> (“The loss of public trust comes from a widespread perception that bad officers are not held accountable when things go wrong.”).

¹⁵ Megan Brenan, *U.S. Confidence in Institutions Mostly Flat, but Police Up*, GALLUP (July 15, 2024), <https://news.gallup.com/poll/647303/confidence-institutions-mostly-flat-police.aspx>.

¹⁶ *Confidence in Institutions*, Gallup, <https://news.gallup.com/poll/1597/confidence-institutions.aspx>. Disparities grew in recent years between Black respondents and White respondents concerning whether police are properly trained on use of force. Emily Washburn, *America Less Confident in Police Than Ever Before: A Look At The Numbers*, FORBES (Feb 3, 2023), <https://www.forbes.com/sites/emilywashburn/2023/02/03/america-less-confident-in-police-than-ever-before-a-look-at-the-numbers/>. *Trust in America: Do Americans trust the police?*, PEW RESEARCH (Jan. 5, 2022), <https://www.pewresearch.org/politics/2022/01/05/trust-in-america-do-americans-trust-the-police/> (describing the lower level of trust among Black and Brown communities, younger people, and democratic-leaning groups, and widespread support for reforms among all groups).

¹⁷ Tom Tyler and Caroline Nobo, *Legitimacy-Based Policing and the Promotion of Community Vitality* § 2.4 (2022), <https://www.cambridge.org/core/elements/legitimacybased-policing-and-the-promotion-of-community-vitality/150212E407548FF9A65DD901345C5429>.

¹⁸ *Id.* Research indicates that improved trust in police and belief that the law is legitimate motivates a reduction in crime. Similarly, distrust in police dissuades community members from cooperating with law enforcement. “The problems associated with distrust include low clearance rates, unwillingness to testify in court, disinterest in joining a community watch or neighborhood patrol, and even supporting the acquittal of criminal defendants due to the belief that police officers lie when testifying or because of a desire to nullify laws.” *Id.*

force.¹⁹ Increased use of force further exacerbates the trust gap between police and civilians, which can easily become a self-perpetuating cycle.²⁰

b) Reinstatements hurt both the public and the police department

While this brief focuses on raising the community's concerns and the failures that have resulted from the current system, police departments and individual officers also raise similar concerns about reinstating officers who have committed serious misconduct.

For many years, Philadelphia's Police Commissioners have objected to grievance arbitration reinstating officers who were fired. Over 20 years ago, Police Commissioner John F. Timoney describe the "mind-boggling" appeals available to officers, which would require "an act of God" to reform.²¹ Charles Ramsey, PPD Commissioner from 2008-2016, said, "I think there has to be a higher standard for officers, and I don't have a problem holding them to it."²² Commissioner Richard Ross, who led PPD from 2016-2019, explained that after the proper investigative

¹⁹ *Id.* ("[I]f the police lack legitimacy in the eyes of the people they encounter, officers can always default to the use of force to direct public behavior.").

²⁰ *Id.*

²¹ Max Marin, *Philadelphia will fire some Facebook cops. Here's why they'll probably get their jobs back.*, PHILADELPHIA TRIBUNE (July 3, 2019), https://www.phillytrib.com/philadelphia-will-fire-some-facebook-cops-here-s-why-they-ll-probably-get-their-jobs/article_e255cb9-c01a-5e38-a37d-01e6810c3e95.html ("Under [the PPD discipline appeal process] tight mandates, Timoney himself had been forced to rehire a rogue's gallery of officers the department had fired for drug use, drunk driving and domestic violence.").

²² William Bender and David Gambacorta, *Police arbitration payouts*, *supra* note 3.

procedure is followed, “There are occasions that you are frustrated, not just the police commissioner but even sometimes rank and file as well as commanders, because you’ll get people who get their jobs back and you are completely baffled and dismayed by it.”²³

Finally, the reinstatements harm the many police officers who hold themselves to the high standards that their profession requires of them. Those standards are undermined, not only when their colleagues act out, but also when they evade consequences for their misconduct. Former Commissioner Ramsey called it “demoralizing” to police leadership and rank and file alike.²⁴ He further explained, “I owe it to the men and women of this department who are out there doing the job the right way to weed out those people that take advantage of their position and use their badge inappropriately.”²⁵

Reinstatement also provides the officer with another opportunity to reoffend, and thus aggravates the distrust sown by the officer’s initial misconduct inside the

²³ Theresa Vargas and Kimbriell Kelly, *Fired/Rehired: Three Shootings in Three Years*, WASHINGTON POST (Oct. 7, 2017), <https://www.washingtonpost.com/graphics/2017/investigations/fired-rehired-three-shootings-in-three-years/>.

²⁴ Kimbriell Kelly, Wesley Lowery and Steven Rich, *Fired/Rehired*, WASHINGTON POST (Aug. 3, 2017), <https://www.washingtonpost.com/graphics/2017/investigations/police-fired-rehired/>.

²⁵ David Gambacorta, *Quick on the trigger? Ramsey’s firings strain city coffers*, PHILADELPHIA INQUIRER (June 7, 2010), https://www.inquirer.com/philly/hp/news_update/20100607_Quick_on_the_trigger_Ramsey_s_firings_putting_a_strain_on_city_coffers.html.

department and in the wider community. CPOC reviewed 91 grievance arbitration decisions made public between 2011 and now,²⁶ which revealed three officers who were fired for misconduct, were reinstated by the arbitration, then *again* committed termination-worthy misconduct: Ernest Lawyer (who was reinstated both times), Jamie Miles (whose second termination was upheld at arbitration), and Gerald Smith (whose second termination was upheld at arbitration).²⁷ What makes these decisions more appalling is that each officer committed the same type of offense in both their first and second terminations. Mr. Lawyer assaulted people, including another officer; Mr. Miles filed false reports; and Mr. Smith engaged in domestic violence.²⁸ Again and again and again.

Such reinstatement signals to abusive officers that they can act with impunity and they are above the law. And it signals to responsible officers that the

²⁶ On file with CPOC. The data consists of 91 publicly available grievance arbitration awards related to PPD officers' whose employment was terminated, published between 2011 and 2023. William Bender and David Gambacorta, *Fired, then rehired*, PHILADELPHIA INQUIRER (Sept. 12, 2019), <https://www.inquirer.com/news/a/philadelphia-police-problem-union-misconduct-secret-20190912.html>; City of Philadelphia (<https://www.phila.gov/departments/departments-of-labor/grievance-arbitration-decisions/#fraternal-order-of-police-lodge-5>)

²⁷ On file with CPOC.

²⁸ *Id.* Outside of the data reviewed by CPOC, at least two additional officers were also fired, reinstated through arbitration, and then fired again for further misconduct in recent years, according to media reports: John McDevitt, *Former Philly cop pleads guilty to assaulting off-duty detective and woman in Roxborough bar*, KYW NEWSRADIO, (Mar. 20, 2024), <https://www.audacy.com/kywnnewsradio/news/local/former-philly-cop-pleads-guilty-assault-roxborough>; Victor Fiorillo, *Twice-Fired Philly Cop Sues Ramsey, City*, PHILADELPHIA MAGAZINE (Jan. 20, 2015), <https://www.phillymag.com/news/2015/01/20/fired-philly-cop-sues-ramsey-city-termination/>.

rules are arbitrarily enforced and will not protect law-abiding officers from being forced to work with coworkers who may have no respect for the rules.

c) *Arbitrators undermine public trust by substituting their judgment for the Police Commissioner's*

Despite PPD's thorough internal discipline processes, grievance arbitrators re-evaluate entire police misconduct cases through *de novo* review.²⁹ Arbitrators evaluate evidence, including witness and expert testimony and video, and then affirm, reduce, or overrule a police department's disciplinary decision.³⁰ More than half of police officer terminations are reversed by arbitrators who imposed lesser or no discipline.³¹ The cases below illustrate how the public's trust in police deteriorates when the police commissioner's judgment is overruled by an arbitrator.

²⁹ Stephen Rushin, *Police Arbitration*, 74 VAND. L. REV. 1023, 1043 (2021) (“[A]ppeals of internal disciplinary action against police officers operate, effectively, as an opportunity to re-adjudicate the matter in front of an arbitrator, with the disciplinary sentence issued by the police department as a ceiling for the possible punishment.”); Stephen Rushin, *Police Disciplinary Appeals*, 167 U. PA. L. REV. 545, 576-78 (2019) (explaining the significant review authority to rehear factual and/or legal determinations made by police supervisors, civilian review boards, or city officials).

³⁰ Mark Iris, *Unbinding Arbitration of Police Discipline: The Public Policy Exception*, 1 VA. J. CRIM. L. 540, 550 (2013) (“[I]n a typical police disciplinary arbitration, an arbitrator who determined after a hearing there was insufficient evidence to sustain the allegations, would be within the scope of authority to reverse the officer's discharge, order reinstatement to employment, and award back pay and benefits retroactive to the date of the officer's discharge.”).

³¹ According to CPOC's analysis of the dataset described *supra* Note 26.

Use of Force Cases

A bevy of use-of-force experts within PPD reviewed Officer Ryan Pownall's fatal shooting of David Jones.³² The Use of Force Review Board, a panel of PPD Deputy Commissioners and the Executive Director of CPOC, who review and make recommendations about the most serious use of force cases, had reviewed the incident and found that Officer Pownall's conduct fell well outside PPD policy because Mr. Jones did not possess a gun at the time he was shot and "no motion or threat [was] observed at the time of the discharge."³³ PPD Commissioner Kevin Bethel reviewed the evidence and testified in support of the former Commissioner's decision to fire Officer Pownall for his unjustified use of force.³⁴ Thus, no fewer than five PPD and civilian officials adept at analyzing and applying PPD's use-of-force policy agreed that Officer Pownall used excessive force to end a civilian's life, and that the consequence for his unjustified shooting should be his termination of employment.

Arbitrator David J. Reilly disagreed.

In his non-expert opinion, Arbitrator Reilly disregarded Commissioner Bethel's conclusions about the fatal shooting, disregarded the UFRB determination

³² Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia, Case No. 01-17-0005-9703 (2024) (Reilly, Arb.).

³³ *Id.* at 9, 18-22.

³⁴ *Id.* at 10-11, 18.

that it was improper, and reinterpreted PPD policy on the use of deadly force.³⁵

Sadly, Arbitrator Reilly's decision to unilaterally fashion his own use-of-force policy and recommendations was not isolated to Officer Pownall.

Arbitrator Reilly also overturned Officer James Yeager's termination for excessive use of force, which resulted in a man suffering a lacerated spleen, a cervical spine fracture, and facial abrasions.³⁶ Arbitrator Reilly disregarded testimony from PPD representatives who had investigated the case, reviewed the video, and opined that it showed excessive force.³⁷ Instead, Arbitrator Reilly determined from the videos that the force occurred, but was not excessive, instead crediting the officer's explanations about his intent.³⁸ In this matter, Arbitrator Reilly imposed his less experienced judgment to overturn the Police Commissioner's decision. Arbitrator Reilly failed to consider the applicable PPD

³⁵ *Id.* at 16-24.

³⁶ Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia, Case No. 01-17-0005-3380 (2023) (Reilly, Arb.), 4.

³⁷ *Id.* at 8. The head of the PPD Office of Professional Responsibility testified that Officer Yeager's actions were "egregious" and he had used "substantially more force than was warranted," against a handcuffed suspect, while other officers were present for support. The City also introduced evidence that the officer was charged with felony assault for this conduct, but ultimately pleaded guilty to a summary offense. *Id.* at 6.

³⁸ *Id.* at 15, (May 22, 2023) ("I cannot find that the City has met its burden. Simply put, on the record here, I cannot conclude that Yeager's conduct violated Department standards, as opposed to representing an objectively reasonable effort to overcome the suspect's resistance in seeking to crawl under the patrol car to stash illegal drugs, while safeguarding his fellow officer.")

directives, which do not hinge on the officer's intent, and disregarded the expertise of PPD leadership concerning use of force.³⁹

CPOC identified at least 16 cases since 2011 in which officers filed a grievance after they were terminated for improper violence or use of force (including the two described here). Arbitrators imposed their judgment on PPD and Philadelphians by reinstating the officers in 13 of those cases (over 80%).⁴⁰

Domestic Violence and Sexual Misconduct

From the data reviewed by CPOC, since 2011 there have been at least 24 cases since 2011 of officers who filed a grievance after they were terminated for domestic violence, sexual misconduct, or related offenses related to prostitution, child pornography, stalking or harassment. Arbitrators imposed their judgment on PPD and Philadelphians by reinstating the officers in more than half of those cases (13 cases; 54%).⁴¹

In a number of domestic violence cases, arbitrators did not credit the City's evidence of domestic violence because the victim did not testify at the arbitration hearing. Despite evidence from investigating law enforcement, despite video

³⁹ *Id.*

⁴⁰ On file with CPOC.

⁴¹ On file with CPOC.

statements, contemporaneous reports, and photos of injuries, documenting the abuse.

Arbitrator James Peck reinstated Officer McAdams who was terminated and criminally charged for an incident involving burglary, theft, and criminal mischief.⁴² Officer McAdams harassed his girlfriend, forced his way into her apartment by breaking a window in the middle of the night, and stole jewelry he had given her. Despite the underlying conduct and the officer's admission that the police had been called to their home four times for domestic disturbances since this incident, Arbitrator Peck reasoned that there was never "an allegation that McAdams physically abused [her] or that he threatened her in any way."

Arbitrator Peck substituted his own judgment and decided that firing Officer McAdams was "too extreme."⁴³ The arbitrator believed that he "only acted as he did because of his belief that the woman he considered to be his girlfriend was with another man."⁴⁴

Lying and Attempting to Deceive Cases

Despite video showing Sergeant David Chisolm using homophobic slurs, threatening protestors and encouraging officers to throw rocks at the crowd

⁴² Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia, Case No. 01-16-0002-3863 (2019) (Peck, Arb.).

⁴³ *Id.* at 17.

⁴⁴ *Id.*

throwing rocks, Arbitrator Walt De Treux reversed Sergeant Chisolm's dismissal.⁴⁵ During interviews that stemmed from a discipline investigation, the officer "consistently answered, 'I don't remember saying that' or 'not that I recall'" and would not identify himself when shown the video.⁴⁶ Due to his refusal to participate in the investigation, Sergeant Chisolm was charged with "lying or attempting to deceive during a departmental investigation," among other charges, and the Police Commissioner fired him.⁴⁷

Arbitrator De Treux disagreed. He found instead that the officer's conduct during the interview showed that he failed to take responsibility for his actions, not that he attempted to lie or deceive the investigation. The arbitrator imposed his own interpretation of the misconduct, overruling the investigation's findings, the PPD's charging determination, and ultimately, the Police Commissioner's decision that this conduct warranted dismissal.⁴⁸

⁴⁵ Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia, Case No. 01-21-0016-1595 (2023) (De Treux, Arb.), 2.

⁴⁶ *Id.* at 3.

⁴⁷ *Id.* The officer was also charged with using inappropriate language to the public and inappropriate communication based on sexual orientation. These charges carry a mandatory penalty of reprimand to 5 days and reprimand to 15 days respectively. Only the charge of lying or attempting to deceive can warrant discipline up to dismissal.

⁴⁸ *Id.* at 8. Inexplicably, the arbitrator found that Sergeant Chisolm has "no prior disciplinary record." *Id.* Sergeant Chisolm has previously faced discipline, including for lying, which has been publicly discussed by PPD. N'dea Yancey-Bragg, *She was beaten by Philadelphia police in front of her toddler. Now, the city is paying her \$2M.*, USA TODAY (Sept. 15, 2021), <https://www.usatoday.com/story/news/nation/2021/09/15/rickia-young-settlement-philadelphia-police/8346041002/>.

Out of 14 grievance arbitrations challenging termination for lying or deceiving, only 5 officers were reinstated (36%).⁴⁹ Although this is a lower proportion than other types of misconduct, it remains concerning since the need to be able to testify truthfully in court is a routine requirement of officers. In several of the reinstatement cases, the arbitrator did not find the evidence of dishonesty insufficient, but overturned the discipline for other reasons.

Biased, Violent Online Rhetoric Cases

Despite a social media policy, despite testimony from command staff about the damage to community relations and public trust, despite literally expressing their hatred, bias, and support for extra-judicial violence, arbitrators reinstated many officers who had been terminated due to an expose of their social posts.⁵⁰ Arbitrators reinstated terminated officers in 8 of the 9 cases (89%) which were grieved and where awards have been publicly posted.⁵¹ One such case is detailed here:

In 2022, Arbitrator Reilly reversed the Police Commissioner's dismissal of Corporal Thomas Young for his racist, xenophobic and homophobic social media posts which vilified Muslims and the LGBTQ+ community, and celebrated extra-

⁴⁹ On file with CPOC.

⁵⁰ Injustice Watch, The Plain View Project, <https://www.plainviewproject.org/>.

⁵¹ On file with CPOC.

judicial violence and excessive use of force by police.⁵² The Arbitrator found that the termination was “unjustifiable disparate treatment” and instead imposed a thirty-day suspension.⁵³

During the grievance arbitration hearing, the City argued Corporal Young’s off duty posts/comments inflamed external community relations and exacerbated tension with the Department.⁵⁴ The City presented evidence from PPD’s head of Internal Affairs that the release of the Plain View Project database provoked a public outcry” where “members of the community demanded swift discipline of the offending officers.”⁵⁵ Additionally, she stated, “the matter produced substantial negative media coverage of the Department” and also “adversely affected morale among the Department’s officers, who are representative of a high degree of diversity.”⁵⁶ The Police Department concluded the misconduct “demonstrates how

⁵² Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia, Case No. 01-19-0003-1624 (2022) (Reilly, Arb.), 43. Corporal Young was charged with violating the Department Disciplinary Code – (1) Section 1-§021-10 - Conduct Unbecoming; and (2) Section 5-§011-10 – Neglect of Duty for 13 Facebook posts from 2012-2018, identified by the Plain View Project. On October 28, 2024, a U.S. District Court granted summary judgment in favor of the City in response to a first amendment retaliation claim brought by Corporal Young, along with other PPD officers disciplined for offensive social media posts. *Fenico v. City of Philadelphia*, No. 20-CV-3336, 2024 WL 4591798 (E.D. Pa. Oct. 28, 2024).

⁵³ *Id.* at 44.

⁵⁴ *Id.* at 8; Mitch Smith, *72 Philadelphia Officers Benched After Offensive Social Media Posts*, NEW YORK TIMES (June 20, 2019), <https://www.nytimes.com/2019/06/20/us/philly-cops-plain-view-project.html> (discussing the harm to police community relations, “undermined faith in police would make it difficult for officers to do their jobs.”).

⁵⁵ *Id.* at 8.

⁵⁶ *Id.*

little regard Young has for the communities and individuals he has sworn to protect and serve.”⁵⁷

Despite the response to the public outcry and discipline determination from PPD leadership, the arbitrator superimposed his own standards and reinstated the officer. Arbitrator Reilly cited proportionality, and mitigating factors, such as Corporal Young’s length of service and good work record, in his finding that the officer “is capable of reforming his conduct and complying with the requirements of the Department’s Social Media Policy.”⁵⁸

B. OVERRULING *BETANCOURT* WILL NOT IMPACT POLICE OFFICERS’ ROBUST WORKPLACE PROTECTIONS

Police officers enjoy ample employment protections, which ensure that they are afforded robust due process throughout the investigation and discipline process. Should the Court decide to grant the City’s request to overrule *Betancourt*, this change will not undermine the important and expansive employment rights afforded to police under Pennsylvania law.

As public employees and members of collective bargaining units, police officers are afforded robust due process. Officers are given notice of allegations against them, afforded the right to counsel at all stages of the discipline process,

⁵⁷ *Id.* at 19-20.

⁵⁸ *Id.* at 43 (reinstating the officer, despite “by his offending posts/comments, [Corporal Young] breached the public trust” and displayed bias).

and given the right to be heard at a hearing. Indeed, in Philadelphia, misconduct allegations are plunged into a lengthy process, designed in large part to protect the accused officer's interests. For starters, a misconduct investigation must gather all relevant facts and witness statements, including those helpful to the officer, before it may be finalized. The officer subject to the investigation is given notice that they are being interviewed. They are provided legal representation, and their lawyer is permitted to attend and participate in the officer's interview. All investigatory outcomes, including those that may damage the subject officer, are documented. Officers are given *Miranda* and *Gniotek* warnings prior to giving any statement that may be used in a criminal proceeding.⁵⁹

If an investigation sustains misconduct allegations, the officer is provided an opportunity to challenge formal misconduct charges at a Police Board of Inquiry (PBI) hearing. PBI resembles a familiar administrative setting: legal advocates, including an attorney hired by the FOP to represent the accused officer, introduce evidence and argument before a three-person panel, which in turn deliberates and renders a written recommendation to the Police Commissioner. Only those charges that end in a guilty plea or verdicts are forwarded to the Police Commissioner for final action. By the time a complaint results in discipline, the investigative findings

⁵⁹ *Id.* at 2. *Miranda v. Arizona*, 384 U.S. 436 (1966); *Gniotek v. City of Philadelphia*, 808 F.2d 241 (3d Cir. 1986), *aff'd*, 481 U.S. 1050 (1987).

have been reviewed and approved by all levels of PPD leadership: an IAD inspector, an IAD Chief Inspector, 2 deputy commissioners, the PBI captain, the PBI panel, the Department Advocate, and the Police Commissioner.

This due-process-heavy procedure is not used in every allegation: before an investigation begins, IAD may route the matter to a commanding officer to resolve the matter without resorting to discipline.

Moreover, misconduct findings are time-limited in favor of the officer.

Some types of discipline expire during certain “reckoning periods.”⁶⁰ If an officer does not commit the same type of misconduct during the reckoning period, then any subsequent offenses are considered first offenses. Only if an officer commits and is found responsible for the same type of misconduct within the reckoning period, and the employee was provided formal notice of the first violation can they be disciplined for a second or subsequent offense. For many charges, the reckoning period is only one or two years. Since reckoning periods start on the date of the offense,⁶¹ and discipline frequently takes several years to reach an outcome, officers can evade the higher levels of discipline for second or third offenses.

⁶⁰ Disciplinary Code, *supra* note 13, at 2-3.

⁶¹ *Id.*

C. A REVISED TEST OR A PUBLIC POLICY EXCEPTION IS AN IMPORTANT CHECK ON GRIEVANCE ARBITRATION, A FREQUENTLY UNREASONABLE AND INHERENTLY UNDEMOCRATIC PROCESS

Bentancourt's narrow certiorari standard permits unreasonable and undemocratic arbitration awards to stand unchecked. This Court should add a public policy exception to that standard to address the most unreasonable and unjustified arbitration awards. Such an exception would not flood the courts with litigation. Indeed, correcting the most egregious failures of the arbitration system is precisely *why* limited judicial review is needed.

1. Courts should review arbitration awards that violate public policy

The blanket prohibition against reviewing arbitrator awards that violate public policy should end. A public policy exception would permit a reviewing court to exercise jurisdiction over the most egregiously unreasonable awards. Unreasonable arbitration awards violate public policy because they undermine the police department's ability to enforce the very standards of conduct that protect the public from dangerous officers, as discussed here.

For instance, arbitration awards can be divided into three basic categories of reasons arbitrators cite for reducing and overruling discipline: procedural

justifications, proportionality justifications, and evidentiary justifications.⁶²

Reinstatements based on procedural mistakes that do not result in *prejudice* also violate public policy. If a fired officer cannot show that the procedural mistake caused/significantly contributed to his termination, then reinstating the officer on that basis elevates procedural details over the public's interest in not being revictimized by the officer.

When arbitrators overturn discipline based on non-prejudicial procedural technicalities, they fundamentally undermine the public's interest in accountability and safety. Even when an arbitrator explicitly acknowledges that an officer engaged in serious misconduct, they may still reinstate that officer simply because of minor procedural missteps in the disciplinary process, even when the officer fails to show that the misstep prejudiced him and was a significant contributing factor to his discipline. This creates a dangerous disconnect—the arbitrator agrees the misconduct occurred but returns the officer to a position of power and authority merely due to procedural mistakes. Such reinstatements stymie meaningful

⁶² Stephen Rushin, *Police Arbitration*, 74 VAND. L. REV. 1023, 1061-63 (2021). Procedural justifications include the arbitrator's determination that the discipline was time-limited because the complaint was delayed or the investigation took too long, lack of notice, and improper consideration of prior discipline. Proportionality justifications include the punishment being disproportionate, because it failed to properly consider mitigating factors in an officer's record, because it was harsher than the punishments given to other similarly situated officers or the arbitrator simply exercised independent judgment. Evidentiary justifications include the arbitrator's finding that the strength of the evidence presented at a hearing or in the underlying investigation was insufficient.

oversight and elevate bureaucratic compliance over public protection. The fact that an officer who admittedly committed misconduct may return to patrol, armed and empowered to use force, simply due to a non-prejudicial procedural flaw in their discipline case, represents a serious threat to community trust and safety. This elevation of process over substance in arbitration effectively nullifies police departments' ability to remove problematic officers and enforce standards of conduct. Such decisions violate public policy and should be reviewed by a court.

Additionally, arbitrators use the *Daugherty* Seven Factor test for determining whether there is just cause for the termination in PPD grievance arbitration cases.⁶³ The factors are: 1. Reasonable rule/work order; 2. Notice of rule; 3. Sufficient investigation; 4. Fair investigation; 5. Proof; 6. Equal treatment; 7. Proportional punishment.

Often, the reflexive application of “equal treatment” in arbitration decisions actively perpetuates cycles of misconduct. While this factor originated with the noble purpose of protecting Black workers from discrimination, its modern application has perversely become a tool to entrench problematic behaviors. When arbitrators rigidly apply the “equal treatment” standard, they effectively force

⁶³ This test was developed by Arbitrator Carroll Daugherty in 1966. 1 Jay E. Grenig, *Alt. Disp. Resol.* § 21:28 (4th ed. 2024). *City of Philadelphia Police Board of Inquiry Training*, City of Philadelphia Law Department (2021); *Police Arbitration Termination Board: Arbitrator Training*, City of Philadelphia, Law Department, Labor & Employment Unit (2022).

departments to maintain outdated and harmful disciplinary practices simply because similar misconduct was inadequately addressed in the past. This creates an absurd catch-22: departments cannot strengthen accountability for serious misconduct like domestic violence, substance abuse, or racist behavior because previous administrations failed to properly discipline such conduct.

Mechanical adherence to past precedent directly conflicts with society's growing recognition that certain behaviors—particularly those rooted in racism or abuse—are fundamentally incompatible with public service. Rather than protecting workers from discrimination as originally intended, the “equal treatment” factor now serves as a shield for misconduct, preventing departments from implementing more rigorous standards that reflect contemporary values and expectations. This undermines both public safety and the broader social interest in building more equitable and professional workplaces. Arbitration awards that unduly rely on the “equal treatment” factor may violate public policy and require judicial review.

2. A public policy exception would encourage consideration of the public interest in arbitration awards

While arbitrators are trained to use the just cause factors and tend to cite procedural, proportional, and/or evidentiary justifications for their awards, there is currently no requirement for them to consider the public interest.

CPOC’s review of data identified several awards in which arbitrators discussed the public interest.

In denying the grievance of Officer Novice Sloan, Arbitrator Thomas P. Leonard pointed to the core values of the police department and the testimony of police leadership that the officer’s conduct “erodes public trust” and reinstatement would “be an absolute danger.”⁶⁴ Arbitrator Leonard wrote that “If the Department had not discharged the grievant under the facts of this case, then it would have allowed the grievant to make a mockery of the core values of the Department as set forth in the Introduction to the Disciplinary Code: Honor, Service and Integrity.”⁶⁵

Arbitrator Alan Symonette reinstated Lieutenant Anthony McFadden and ordered him to apologize and explain his actions to the Police Commissioner, the complainant, and the Citizens Police Oversight Commission.⁶⁶ Arbitrator Symonette explained this order, saying “[t]o restore some semblance of trust between the Grievant and other members of the Department and community, he

⁶⁴ Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia, Case No. 01-19-0004-1595 (2023) (Leonard, Arb.). Officer Sloan was terminated for sexually assaulting a woman.

⁶⁵ *Id.* at 14.

⁶⁶ Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia, Case No. 01-22-0003-6608 (2023) (Symonette, Arb.). Lieutenant McFadden was terminated for using a racial slur while on a recorded phone line with a 911 dispatcher.

must understand the impact of his use of such language on the listener regardless of the context.⁶⁷

IV. **CONCLUSION**

For these reasons, this Court should find in favor of Petitioner and overrule *Betancourt*, which was wrongly decided and has been disastrous in effect. The Court should instead apply the essence test or j.n.o.v. test to grievance arbitrations under Act 111, or, in the alternative, recognize a public policy exception as part of the narrow certiorari scope of review.

⁶⁷ *Id.* at 14.

V. EXHIBITS

Before

James C. Peck, Jr.
Arbitrator

In the Matter of Arbitration Between:

**FRATERNAL ORDER OF POLICE,
LODGE NO. 5**

V.

**AAA Case No. 01-16-0002-3863
P/O Alex McAdams (Terminated)**

THE CITY OF PHILADELPHIA

Hearing Date: November 28, 2018

Decision Date: January 22, 2019

Appearances:

For the Union - Thomas M. Gribbin, Jr., Esq., Willig, Williams & Davidson

For the City of Philadelphia - Lisa Swiatek, Esq., City of Philadelphia, Law
Department

Procedural Background

This arbitration was conducted pursuant to a collective bargaining agreement between the City of Philadelphia, Pennsylvania and Fraternal Order of Police Lodge, No. 5, which is the recognized exclusive collective bargaining representative for a unit of police officers employed by the City of Philadelphia.

The City of Philadelphia and FOP Lodge 5 are parties to a collective bargaining agreement which contains, among other things, a Grievance-Arbitration procedure (Article XXI) culminating in final and binding arbitration under the auspices of the American Arbitration Association.

The instant matter arises from a grievance filed by the Union on behalf of terminated Police Officer Alex McAdams, alleging that Officer McAdams had been terminated without just cause.¹ Officer McAdams received a Notice of Dismissal effective May 26, 2016, which alleged that Officer McAdams had engaged in Conduct Unbecoming of an Officer, Section 1-026-10, specifically, “engaging in any action that constitutes the commission of a felony or misdemeanor which carries a potential sentence of more than a year.”

This grievance was subsequently denied by the City, and when the issues of this dispute could not be resolved under the terms of the contractual grievance-arbitration procedure, the underlying grievance was referred to the American Arbitration Association for selection of a neutral arbitrator. Subsequently, by letter dated July 31, 2016, the undersigned was appointed arbitrator in this matter.

An evidentiary hearing was conducted on November 28, 2018, at the offices of the American Arbitration Association, 230 South Broad Street, 12th Floor, Philadelphia, PA 19102 pursuant to a Notice of Hearing which issued on June 15, 2018. Both parties were represented by counsel, and at hearing were afforded the opportunity to examine and cross-examine witnesses, and to introduce relevant exhibits. The Grievant, former Police Officer Alex McAdams, was present and participated fully in the proceeding. Both parties made oral arguments on the record.

Issues

Did the City of Philadelphia violate the express terms of the collective bargaining agreement by discharging Police Officer Alex McAdams without just cause?

If the City is found to have violated the terms of the collective bargaining agreement, what is the appropriate remedy?

Background

The Grievant in this matter, Police Officer Alex McAdams, Badge Number 9588, was hired by the Philadelphia Police Department in December 2011, and worked as a patrol officer in the 15th Police District until his termination. Officer McAdams' work history, prior to the incident which gave rise to his termination, is unremarkable, and his annual performance reviews for the years 2013, 2014, and 2015 indicate that his work performance was entirely satisfactory, with no prior discipline.

The 911 Calls:

The precipitating incident which lead to McAdams discharge occurred on March 5, 2016 when K [REDACTED] W [REDACTED], a 24-year old female, phoned the police 911 emergency number at about 2:40 AM. Ms. W [REDACTED] reported that her boyfriend, Police Officer Alex McAdams, had come to her apartment at [REDACTED], and had broken the bedroom window to gain entry. Officer McAdams was off-duty at the time of this alleged break-in. According to Ms. W [REDACTED], after breaking in, McAdams took a white gold chain with a replica police badge #9588 from her jewelry box.

Police dispatch records indicate that at 3:08 AM at least four police officers from the 7th Police District responded to this 911 call of, "Someone Breaking In".

¹ See Joint Exhibit J-2, in evidence.

Specifically, Sgt. D [REDACTED], along with Police Officers Z [REDACTED], R [REDACTED], and F [REDACTED] were all dispatched to the [REDACTED] address where the break-in had allegedly occurred, and all subsequently provided statements with regard to the incident.

Within two hours, as soon as it became evident that the incident involved potential misconduct by a Philadelphia Police Officer, the Internal Affairs Division (IAD) was notified. IAD Sgt. Kelly McGuire was assigned to coordinate the IAD investigation.

The complainant, K [REDACTED] W [REDACTED], was interviewed by Internal Affairs on the same morning at about 7:30 AM. It is important to note that Ms. W [REDACTED] did not appear as a witness at the instant arbitration proceeding and did not appear as a witness at grievant McAdams preliminary hearing in Municipal Court. She did however provide a six-page statement under oath as part of an Internal Affairs Division investigation of this matter.

The *American Arbitration Association, Labor Arbitration Rules*, amended and effective July 1, 2013, address the situation of evidence provided by affidavit. The Rules specifically hold, at Rule 28, "...*The arbitrator may receive and consider the evidence of witnesses by affidavit, giving it only such weight as the arbitrator deems proper after consideration of any objection made to its admission.*" I have carefully considered the Union's request to bar hearsay evidence in this matter, and decline to do so. It is from W [REDACTED] sworn statement that I have ascertained her version of the events in question.

In her sworn statement W [REDACTED] asserted that she had been in a relationship with Officer McAdams for about two months, but had told PO McAdams on the day prior that she needed to take a break from the relationship due to personal problems. She claimed that McAdams was initially supportive of her decision.

However, at 2:07 AM on March 5, 2016, PO McAdams texted W [REDACTED] to ask if she was still awake. W [REDACTED] did not respond. Shortly thereafter, McAdams sent a second

text, asking W [REDACTED] if she was still awake, and asking her to open her door. Again, W [REDACTED] did not respond.

At about 2:30 AM, W [REDACTED] heard her doorbell ringing, but ignored it, assuming that it was McAdams. She then heard the doorbell of her upstairs neighbor, H [REDACTED] B [REDACTED], and heard B [REDACTED] and McAdams having a conversation in the vestibule of the apartment building. Officer McAdams then began banging on W [REDACTED]'s door, but she continued to refuse to answer.

Shortly after this, W [REDACTED] heard McAdams pounding on the glass outside her bedroom window. W [REDACTED] stated that she was alone and cowered in her kitchen, because she was uncertain of McAdams' intentions. She stated that she then heard her bedroom window shatter and McAdams yell an expletive. Ms. W [REDACTED] then ran out the front door of her apartment and called 911. Upstairs neighbor H [REDACTED] B [REDACTED] also heard the glass breaking, and phoned 911.

According to W [REDACTED]'s account, Officer McAdams evidently followed her and approached her on the street, crying, "How could you do this to me?" W [REDACTED] says she did not respond, and McAdams left the scene.

After McAdams had departed, Ms. W [REDACTED] returned to her apartment and observed that there was blood on the doors, door handles, light switches, and carpet. There also were bloody fingerprints on her jewelry box. She noticed that the white gold necklace and police badge charm, which McAdams had given her previously, were missing from the jewelry box.

Significantly, W [REDACTED] asserted that when PO McAdams broke the bedroom window and entered she was alone in her apartment, and not with another man. Further, she specifically denied giving McAdams permission at any point that evening to enter her apartment or to "reclaim" the gold necklace and charm that he had gifted to her.

The Initial Investigation:

After the Patrol Officers from the 7th Police District arrived and concluded their initial survey of the neighborhood, they quickly determined that the perpetrator had left the scene. IAD Officers, who also arrived at the scene, interviewed both Ms. W [REDACTED] and her upstairs neighbor, H [REDACTED] B [REDACTED], who informed them about the doorbell ringing at 2:30 AM, and about her hallway conversation with PO McAdams, whom she had met previously.² B [REDACTED] reported in her sworn statement to IAD that McAdams told her that he thought W [REDACTED] had another man in her apartment.

While police were present, Ms. W [REDACTED] looked at her phone and noticed a notification that McAdams had posted a comment to Facebook, specifically:

"Glad I stuck with my gut feeling. Caught my girlfriend cheating. Both ran like cowards. Glad I got my badge neckless (sic) back. No dirty slut ho cunt is wearing my badge on their chest. I knew it!!!"

Ms. W [REDACTED] showed this Facebook post to the responding officers, and later allowed Internal Affairs investigators to copy the post from her phone.

After a brief discussion with Ms. W [REDACTED], Sgt. A [REDACTED] D [REDACTED], who was the supervisor in charge of the initial police response, determined that Officer McAdams had left the scene but was likely injured, due to the copious amounts of blood spread around the apartment. D [REDACTED] directed his fellow officers to canvas the local hospitals to see if McAdams had sought medical treatment.

Police Officer T [REDACTED] F [REDACTED] located McAdams at [REDACTED]

[REDACTED]. McAdams [REDACTED]

[REDACTED]. McAdams told Officer

² H [REDACTED] B [REDACTED], who also gave a detailed statement to IAD, asserted that she saw nobody exit the building other than the Grievant.

F [REDACTED] that he had broken glass to get his badge charm from his girlfriend who was cheating on him.

Sgt. D [REDACTED] arrived at [REDACTED] shortly after this, and instructed Officer F [REDACTED] to search the parking lot for McAdams' vehicle. PO F [REDACTED] found McAdams' black Dodge Charger, observed blood on both the interior and exterior, and arranged for the vehicle to be impounded as evidence. A subsequent search of the Dodge Charger, conducted by the Crime Scene Unit pursuant to a warrant issued by Bail Commissioner R [REDACTED], resulted in photos and blood swabs being taken, as well as the discovery of a white gold necklace and police badge charm in the trunk of the vehicle.

A search warrant was also obtained for Officer McAdams' cell phone, and the contents of the phone were downloaded by IAD. An additional search warrant was obtained for the [REDACTED] apartment, where photographs were taken and blood samples were swabbed of both the interior and exterior of the building by the Crime Scene Unit. Pursuant to a search warrant, a DNA swab was taken of Officer McAdams' inner cheek. McAdams' bloody clothing was confiscated as evidence.

The Philadelphia Police Criminalistics Unit subsequently performed a DNA analysis on this blood evidence. This analysis determined that the blood samples found at the [REDACTED] address on the sidewalk outside the bedroom window, and inside the bedroom, and the blood smears found on both the inside and outside of Officer McAdams' Dodge Charger, were all a match to the buccal swab provided by Officer McAdams, *"...to a reasonable degree of scientific certainty, and excluding an identical twin."*

The Referral to the District Attorney's Office:

On April 27, 2016, the Internal Affairs final investigation report was sent to District Attorney's Office, where it was assigned to James Carpenter, Chief District

Attorney, Family Violence and Sexual Assault Unit. After reviewing the IAD investigatory files, DA Carpenter requested the preparation of four arrest warrants for PO McAdams, charging him with Burglary, Criminal Trespass, Theft-Unlawful Taking, and Criminal Mischief.

PO McAdams Investigatory Interview, Arrest, and Discharge:

On April 28, 2016, PO McAdams was summoned to Internal Affairs where he was informed of his Gniotek warnings and rights. McAdams, who was accompanied by his Union representative, declined to answer questions or provide a statement. IAD then provided PO McAdams with a Statement of Charges Filed and Action Taken, notifying him that he was being placed on 30-day suspension with intent to dismiss.

The Municipal Court Hearing:

On October 12, 2016, in the matter of Commonwealth v. Alex McAdams, MC-51-0012201-2016, the criminal charges against PO McAdams were heard in Philadelphia Municipal Court, Criminal Division by the Hon. James M. DeLeon, in a non-jury preliminary hearing. For reasons that will be discussed more fully *infra*, the Court dismissed the charges against PO McAdams.

Thus, the criminal proceeding against Grievant McAdams was concluded, but McAdams remained terminated from the Police Department, for allegedly violating the Police Department's Code of Conduct, which bring us to the instant arbitration case.

The Testimony at Hearing

At the arbitration hearing, both parties provided witnesses who testified under oath. What follows is a brief summary of the relevant testimony of certain witnesses. To the extent that the testimony of witnesses is not referenced, it was viewed as either

irrelevant or duplicative. All witness testimony is considered credible, unless otherwise noted.

Police Sgt. A [REDACTED] D [REDACTED] testified about responding to a report of someone breaking into a residence at [REDACTED] in the early hours of March 5, 2016. D [REDACTED] spoke with both the Complainant, Ms. W [REDACTED], and with the upstairs neighbor, and secured the crime scene. He noted the broken window at the scene, and the blood that was smeared around the apartment. D [REDACTED] later went to [REDACTED] where he helped secure the vehicle owned by PO McAdams, since it also had blood smears inside and out.

Police Officer T [REDACTED] F [REDACTED] also responded to the [REDACTED] address, and was dispatched first to [REDACTED], and later to [REDACTED] where he located PO Alex McAdams. [REDACTED] During this encounter, McAdams remarked to PO F [REDACTED] that he had broken into his girlfriend's apartment to get his badge back. McAdams described it as a gold chain with a charm replica of his police badge. F [REDACTED] later searched the parking lot for McAdams' Dodge Charger, which he found and secured. There were blood smears visible inside and outside of the car.

Internal Affairs Sgt. Kelly McGuire, Badge #277 has been with Internal Affairs for 5 years and testified that she was called at about 4 AM on March 5, 2016 to commence an investigation of alleged misconduct by PO Alex McAdams. Sgt. McGuire interviewed Patrol Sgt. A [REDACTED] D [REDACTED], and also wrote up search warrants for PO McAdams' car, phone, home, and for the alleged crime scene.

She described how the Crime Scene team found the allegedly stolen gold charm in the trunk of McAdams car. Additionally, McGuire obtained the [REDACTED] records related to PO McAdams [REDACTED], and documented the Facebook post allegedly made by PO McAdams on the morning of the incident. Primarily, Sgt. McGuire's job was to compile and coordinate the paperwork generated

by the Internal Affairs investigation, and to forward it to the District Attorney's office for prosecution.

Richard Ross, Philadelphia's Police Commissioner since January 2016, testified as to the various considerations leading to the decision to discharge of Grievant McAdams. Ross testified that McAdams' conduct, namely engaging in actions which resulted in him being charged criminally with a "laundry list" of charges including burglary, criminal trespass, theft-unlawful taking, and criminal mischief, was "troubling" and "problematic".

Ross characterized this as misconduct which fell short of the expectations of a Philadelphia Police Officer, and rose to the level of "conduct unbecoming of a police officer". Ross specifically noted the fact that PO McAdams had unlawfully entered a home, and had taken items without permission, was unacceptable for a sworn police officer.

Finally, Commissioner Ross testified that although the instant case may not involve domestic violence, it did involve misconduct for which the Philadelphia Police arrest people every day.

Former Officer Alex McAdams, the Grievant herein, testified before me on his own behalf, about his relationship with C [REDACTED] W [REDACTED]. He asserted that he had attended a party alone that evening because Ms. W [REDACTED] was ill and had begged off attending. McAdams decided to check on Ms. W [REDACTED] on his way home, because Ms. W [REDACTED] assertedly had a [REDACTED]. Also because Ms. W [REDACTED] which had caused problems in the past.

McAdams asserted that he rang W [REDACTED]'s doorbell, but received no response, and then rang the doorbell of the upstairs neighbor and spoke briefly with her. McAdams claimed that there were lights on in W [REDACTED]'s apartment, so he decided to knock on the bedroom window, which immediately broke.

McAdams asserts that immediately, Ms. W [REDACTED] and an unknown male fled the apartment via the front door. McAdams followed, and briefly spoke with W [REDACTED] who didn't wish to talk to him. McAdams remarked to her, "I'm here to talk to you, but if you don't want to talk, that's OK. I'm just here to collect my belongings, and I'm going to leave." W [REDACTED] allegedly replied, "OK", and McAdams then went into the apartment accompanied by W [REDACTED] and retrieved his tool set and the necklace with his badge number, and then left.

PO McAdams claims that he had cut himself when the window had broken, and therefore decided to [REDACTED]. He asserted that he hadn't intended to break the bedroom window. McAdams reiterated that he had been granted permission by W [REDACTED] to take back the two items he removed from W [REDACTED]'s apartment.

McAdams asserts that he had no idea that there was another man in W [REDACTED]'s apartment prior to seeing the man flee, and that he made no attempt to chase this unknown male. He further claims that at that point, he believed that his relationship with W [REDACTED] was over, which is why he asked for permission to retrieve his possessions from her apartment.

McAdams asserted that since this incident, he and Ms. W [REDACTED] have reconciled, and are currently engaged. However, under cross-examination, McAdams admitted that over the past several years there have been four calls to the police regarding domestic disturbances at their shared address, but that neither he nor Ms. W [REDACTED] have been arrested.

Analysis and Discussion

As stated in the introduction of this Award, the issue to be decided herein is whether the City violated the terms of the collective bargaining agreement by discharging Police Officer McAdams.

The burden of proof in discharge cases is the subject of considerable debate. Typically, and certainly under the terms of the labor agreement between the Fraternal Order of Police and the City of Philadelphia, the employer is required to prove the elements of the offense for which the employee has been discharged by a **“preponderance of the evidence”**.

Black’s Law Dictionary defines this as, *“the greater weight of the evidence required in a civil (non-criminal) lawsuit for the trier of fact (jury or judge without a jury) to decide in favor of one side or the other. This **preponderance** is based on the more convincing evidence and its probable truth or accuracy, and not on the amount of evidence.”*³ Thus, the testimony and exhibits would be placed upon the “scales of justice” and if the scales tip ever so slightly in favor of one party or the other, so must the award which follows.

This quantum of proof, however, may be inappropriate for considering cases involving discharge, particularly the termination of an otherwise satisfactory, even a short-term employee, and would appear to inadequately consider aggravating and mitigating factors, should they exist.

Some Arbitrators such as Thomas G. McConnell, Jr. and Alan Symonette have argued that discharge cases should be held to a **“beyond a reasonable doubt”** standard. *FOP, Lodge 5 and the City of Philadelphia (Clarke)*, AAA Case No. 14 390 1611 06; *FOP, Lodge 5 and the City of Philadelphia (Kurowski)*, AAA Case No. 14 390 1372 98.

This standard was first adopted in England during the “Age of Enlightenment” in the 1790s, where it was believed that, *“it is better that 99 offenders shall escape than that one innocent man be condemned.”*

Black’s Law Dictionary 161 (6th ed. 1990) defines **“beyond a reasonable doubt”** as *“...fully satisfied, entirely convinced, satisfied to a moral certainty. This*

phrase is the equivalent of the words clear, precise, and indubitable.” In the past, I have utilized this “reasonable doubt” standard, and I may continue to use the “***beyond a reasonable doubt***” standard in future cases where it is appropriate.

Discharge is a penalty which has been referred to as “industrial capital punishment”, or more recently as the equivalent of “permanent exile”.⁴ Discharge has the effect of severing an employee where there is no longer any hope of rehabilitation. The sole purpose of discharge is to unburden the Employer from an individual whose conduct has become intolerable. Discharge abolishes the employment relationship, whereas a disciplinary suspension is designed to improve it.⁵

There is, however, a third standard somewhere between the “***beyond a reasonable doubt***” standard. This third standard makes it exceedingly difficult for an employer to rid itself of a problematic employee, and the “***preponderance of the evidence***” standard, which has the potential to provide insufficient protection to employees from arbitrary discharge.

Some arbitrators utilize the “***clear and convincing evidence***” standard, particularly where the employee has been accused of criminal conduct, or conduct of an especially opprobrious nature.⁶ Black’s Law Dictionary defines this standard as, “...*Clear and convincing proof will be shown where the truth of the facts asserted is highly probable.*”

The application of this intermediate standard serves to protect an employee from removal for comparatively flimsy reasons, but would also allow an employer to exercise its prerogative to remove a demonstrably unacceptable employee, without having to prove misconduct to a mathematical certainty. This is the standard which I intend to use in the instant case.

³ See *Bemis Co.*, 127 L.A. 499 (Ross, 2010).

⁴ Schroeder, “*Discharge: Is it Industrial Capital Punishment?*” 37 Arb. J. No. 4, 65 (1982).

⁵ *Red Cross Blood Serv.*, 90 LA 393, 397 (Dworkin, 1988).

⁶ See *Consulate Healthcare of Cheswick*, 127 L.A. 1336 (Franckiewicz, 2010).

The use of this standard seems particularly appropriate in situations, such as this, involving a public employee who is charged with inappropriate off-duty conduct. As Commissioner Ross noted in his testimony, public officials, such as sworn police officers, are held to a higher standard than other employees in light of the employer's interest in maintaining the "public trust". Some Arbitrators considering "conduct unbecoming" allegations against law enforcement officials have adopted the "higher standard" analysis.⁷

The Employer in the instant case is the Philadelphia Police Department which daily investigates allegations of felonies such as burglary and criminal trespass; and misdemeanors such as theft and criminal mischief. Therefore, the Employer has an interest in requiring its employees to hold themselves to a "higher standard" with regard to their personal lives. This is so that members of the public can have confidence that any complaints that they bring to the police concerning incidents of this sort will be treated fairly and in accordance with the law.

Upon evaluating all of the documentary evidence, and the witness testimony at hearing, a brief summation of the evidence against PO McAdams is warranted.

I have concluded that the Grievant entered into Ms. W [REDACTED]'s residence in the wee hours of the morning, apparently without permission, resulting in at least two calls to 911 to report a break-in in progress, and the deployment of multiple patrol officers in response. The Grievant's claim that the bedroom window glass was precariously glazed, and that the window breakage was accidental, is of dubious credibility.

The Grievant's assertion that his purpose for entering Ms. W [REDACTED] residence was to check on her wellbeing, due to concerns about her health seems contrived. Indeed, without her testimony, McAdams' claim that W [REDACTED] [REDACTED], his asserted justification for seeking to enter W [REDACTED] apartment, is also hearsay. While police departments routinely conduct "welfare checks" on individuals with health concerns, I do not believe that PO McAdams was merely conducting a

⁷ See eg. City of Bremerton, 121 L.A. 915 (Reeves, 2005).

welfare check when he broke into Ms. W[REDACTED] bedroom. In this regard, the Grievant's Facebook posting seems to indicate that he had an entirely different motive for the intrusion, namely that he went to W[REDACTED] home to confirm his suspicion that W[REDACTED] was with another man. His comments to upstairs neighbor B[REDACTED] were consistent with this. The Grievant also made an admission against interest to PO F[REDACTED] at [REDACTED], spontaneously informing PO F[REDACTED] that he, "...broke glass to get his badge charm and chain from his girlfriend who was cheating on him."

The fact that the Grievant took the time to search for the necklace and charm which he had previously given Ms. W[REDACTED], and that he removed these items from W[REDACTED] home and placed them in the trunk of his car, indicates that his reasons for entering Ms. W[REDACTED] residence were not altruistic.

The analysis of this case must necessarily address the Municipal Court proceeding which resulted in dismissal in the criminal case against Officer McAdams. There are significant differences between the arbitral process and the criminal justice system.

Just as the Employer may not rely solely on the findings where a Court concludes that there was credible evidence to warrant a criminal conviction, the Union may not rely upon a Court dismissal as proof that a grievant was innocent of misconduct. The two proceedings are separate and distinct, with different standards of proof.

The Municipal Court hearing resulted in a dismissal on procedural grounds, namely that the Commonwealth attempted to rely upon hearsay statements of the complaining witness, Ms. W[REDACTED] instead of summoning her to present in-person testimony.

The Court's rationale for dismissal was that the Commonwealth should have given the Defense advance notice of its intent to rely upon hearsay evidence, so that the Defense could have exercised its right to summon Ms. W[REDACTED] to refute the

Commonwealth's *prima facie* case. This disposition of the criminal case amounted to neither a conviction nor an exoneration of PO McAdams. Rather, it is a dismissal based on a narrow legal technicality.

In situations where an Employer has conducted its own investigation, and is able to demonstrate linkage between the offending off-duty conduct and the workplace, the Employer can still establish that there is just cause for termination, even if there has been no finding of criminal culpability.

Section 1-026-10 of the Police Disciplinary Code holds that Conduct Unbecoming is, "...any action that constitutes the commission of a felony or a misdemeanor which carries a potential sentence of more than (1) year." The Code specifically notes that neither the pendency of criminal charges nor a criminal conviction are necessary for the disciplinary action to be sustained.

There is no question that PO McAdams was arrested and charged with four counts of criminal conduct, two of which were felonies. I further note that these charges were the result of an extensive internal investigation by the Internal Affairs Division, and were vetted by the Office of the Philadelphia District Attorney, which was responsible for bringing these charges to trial.

The Union appropriately points out that at the arbitration before me the City has once again failed to produce the Complainant, Ms. W■■■■, and urges that I find for the Grievant on that basis. While I would prefer that the City present first-person witness testimony in support of its personnel action in this matter, sometimes it is not possible for the City to locate crime victims, or to bring them to testify at arbitration proceedings.

There was testimony by the Grievant that he and his accuser, Ms. W■■■■, have for the moment resolved their interpersonal relationship issues. For this reason Ms. W■■■■ may be a reluctant witness. However, that does not diminish the quality of the testimony that Ms. W■■■■ provided previously to Internal Affairs.

For the purposes of this arbitration, it is sufficient that the City, which has the burden of proof, established that the Grievant was charged with felonies and misdemeanors which carried a potential for imprisonment of more than one year imprisonment. The City has clearly met this burden. However, as an observer of the criminal proceeding, I believe that McAdams was over charged, especially in light of the fact that the District Attorney did not subsequently attempt to correct the shortcomings relied upon in Municipal Court to dismiss the criminal case. In my eyes, the failure of the District Attorney to even proceed to a verdict lessens the case against McAdams.

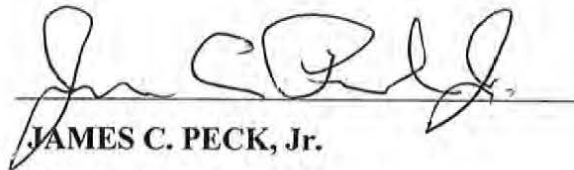
Examination of the evidence in this matter is problematic. I do not think that either McAdams or W [REDACTED] have been completely honest. I am not impressed by Officer McAdams strained attempt to justify his uninvited intrusion into his girlfriend's apartment. I am convinced that McAdams only acted as he did because of his belief that the woman he considered to be his girlfriend was with another man. Despite W [REDACTED]'s denials, I think McAdams was correct in that belief. However, I also note that there has never been an allegation that McAdams physically abused W [REDACTED] or that he threatened her in any way. Also, there is no indication that W [REDACTED] has ever sought a Protection From Abuse Order.

After thorough consideration of all testimony and Exhibits, I find that there is "clear and convincing evidence" to support the administrative charges brought against Police Officer McAdams.. A police officer needs to behave better than this. McAdams actions on the night in question clearly amounted to "conduct unbecoming" a police officer. However, while significant discipline is warranted, I believe that in all of the circumstances of this case, termination is too extreme.

AWARD

Based on the evidence, and the discussion as set forth above, the undersigned makes the following award:

1. The grievance alleging that the Police Department violated the collective bargaining agreement by discharging Police Officer Alex McAdams is hereby SUSTAINED, accept as otherwise provided.
2. The City of Philadelphia is hereby directed to reinstate Officer McAdams to his prior position.
3. Officer McAdams' entire time off is to be treated as a disciplinary suspension without pay.
4. This order directing reinstatement is subject to the application of all usual and customary re-employment requirements and testing procedures, such as fitness for duty physical examinations, screening for drug and alcohol abuse, or screening for anger issues.
5. Finally, within six months of the beginning of his reinstatement, Officer McAdams is to avail himself of and complete an anger management course. That deadline may be extended by agreement of the contractual parties.



Arbitrator

Wallingford, Pennsylvania

January 22, 2019

In the Matter of the Arbitration	:	AAA Case No.
	:	01-17-0005-3380
between	:	
	:	Opinion & Award
FRATERNAL ORDER OF POLICE, LODGE NO. 5,	:	
	:	Re: James Yeager -
“Union”	:	Discharge
	:	
- and -	:	Hearing: April 20, 2023
	:	
CITY OF PHILADELPHIA,	:	
	:	
“City”	:	

For the Union

For the City

BEFORE: David J. Reilly, Esq., Arbitrator

BACKGROUND

The City discharged Police Officer James Yeager, effective August 31, 2017. It took this action upon finding that he had violated Section 1-§012-10 of the Police Department's Disciplinary Code, by using excessive force in arresting a suspect. (Joint Exhibits 1 & 3.)

The Union contends the City lacked just cause to discharge Yeager. It asks that he be reinstated to his former position with the Department and be made whole for all pay and benefits lost as a consequence of his discharge. It also requests that the City be directed to revise his personnel records to expunge all reference to his discharge to the extent consistent with governing law.

The basic facts of this case, including the areas of dispute, may be set forth succinctly.

Yeager's Employment History

At the time of his discharge, Yeager had been employed by the Department for four years. He testified that his annual evaluations had always been positive. Further, he confirmed having no prior discipline.

From 2015 – 2017, he was assigned to the 24th District. This District encompasses the Kensington neighborhood, an extremely high crime area of the City and a known center for illegal drug sales. In 2017, the City experienced a spike in fatal drug overdoses, which were predominantly opioid related, with a high percentage coming from Kensington. (Union Exhibit 1.)¹

In 2017, Yeager worked the “drop back” shift (i.e., 8:00 p.m. – 4:00 a.m.),

¹ In 2017, fatal drug overdoses in the City totaled 1,217, a 34% increase over 2016. (Union Exhibit 1.) A heat map of opioid-related overdose deaths in 2017, by location, showed Kensington at the epicenter. (Union Exhibit 2.)

assisting the officers assigned to last out (i.e., 12:00 a.m. – 8:00 a.m.) During that time, he was frequently assigned to bike patrol, and always partnered with [REDACTED]

Internal Affairs Division (“IAD”) Investigation

In testifying, [REDACTED] gieda, a member of the Department’s Internal Affairs Division (“IAD”), averred being assigned on July 10, 2017, to investigate a possible excessive use of force incident. The matter, he stated, stemmed from the actions of Yeager and three other officers in affecting the arrest of a suspect that night on drug charges. According to [REDACTED] the Department’s receipt of a video from a local television station depicting the officers’ conduct triggered the investigation. (City Exhibits 1 & 2.)²

[REDACTED] related beginning his work on this matter by visiting the location of the arrest, taking photographs and attempting to secure additional video recordings of the incident. In doing so, he reported obtaining a second cell phone video from a civilian witness. (City Exhibits 1 & 4.)

Next, he attempted to interview the suspect, who declined his request. Subsequent efforts to do so, he said, also proved unsuccessful.³

He recounted that his investigation continued with gathering additional materials (e.g., Yeager’ Use of Force Report) and conducting witness interviews, as well as interviewing twenty officers that had been at the location of the arrest. (City Exhibits 1

² A civilian witness to the incident recorded the video, using her cellphone. She subsequently uploaded the video to her social media account. The local television station apparently obtained the video from there and then transmitted it to the Department. (City Exhibit 1 at 7.)

³ The suspect ultimately consented to an interview by the District Attorney’s office in December 2017. (City Exhibit 1.)

& 3.)

From his review of the first video received, █████ confirmed that the scene depicted comported with his knowledge of the area. Recounting, in order of occurrence, the relevant portions of the video, he noted:

(1) Yeager, his partner █████ and █████ █████ attempt to handcuff the suspect, ultimately, after a struggle, securing his hands in front of his body;

(2) Yeager places his right hand on the suspect's face, and then lifts him up by his arms, and, in turn twice forces him back toward the ground;⁴

(3) A crowd of citizens gathers near the officers, with persons yelling and throwing items at them, resulting in one officer being struck by a computer monitor; Yeager and other officers give chase, leaving the suspect with █████, who had joined the scene;

(4) █████ attempts to place suspect into rear of a patrol car, but he appears to push off the vehicle and then falls to the ground, after which he attempts to crawl under the vehicle;

(5) Yeager returns to the area, where he can be seen placing his baton underneath the suspect's midsection and then lifting and swinging the suspect to his right, resulting in the suspect striking the side of a pool that had been erected in the street; and

(6) █████ places the suspect into the rear of the patrol car.

(City Exhibits 1 & 2.)⁵

█████ related that following the arrest, the suspect was taken to an area hospital, where he received treatment for facial abrasions, a cervical spine fracture, rib fractures, and a lacerated spleen. (City Exhibit 1.) As a result, he reported securing a

⁴ On cross-examination, █████ acknowledged that it appeared the suspect had concealed narcotics in his mouth and Yeager was attempting to extract them. He also averred that the suspect grabbed Yeager's wrist, as he engaged in this effort, which was then followed by Yeager pulling away, raising his arms and thrusting down twice, before suspect released his grip.

⁵ The actions described occurred over the course of 1 minute, 29 seconds. (City Exhibits 1 & 2.) █████ reported that when visiting the scene, the pool was still present and was dented consistent with what he had observed on the video. █████ testified that the second video depicted the same actions by Yeager and the other officers. (City Exhibit 4.)

consultation report from the City's Chief Medical Examiner, [REDACTED], regarding the possible causes of those injuries. (City Exhibit 5.)

[REDACTED] opined: (1) the abrasions to the suspects face likely resulted from his scraping the pavement while struggling against the officers; (2) the cervical fracture resulted from the suspect's neck/back impacting with a solid object or surface and could have occurred from Yeager forcing him back to the ground twice, but not from striking the pool; (3) the rib fractures were healing and did not result from this incident; and (4) the lacerated spleen was consistent with "a blow where the force is concentrated in a small area, such as by a fist or other object, as opposed to contact with a surface such as the ground where the force is more spread out." (City Exhibit 5.)

Upon completing his investigation, [REDACTED] reported sustaining two violations of the Department's Use of Force Policy by Yeager. These consisted of: (1) his lifting and slamming the suspect two times to the ground; and (2) lifting the suspect off his feet and swinging him into the pool. In both instances, he determined the suspect was not resisting.

On cross-examination, however, he acknowledged that a failure to comply with a directive to enter the patrol car could possibly constitute resisting. The same characterization, he said, could be given to the suspect's efforts to stash drugs under the patrol car.⁶ The act of resisting, he said, generally involves evading a police officer's efforts to control a suspect during an arrest.

In connection with his investigation, he also reported providing a submission to the District Attorney's Office for its consideration in deciding whether to bring criminal

⁶ [REDACTED] confirmed that packets of heroin were subsequently recovered from under the patrol car.

charges against Yeager. The District Attorney initially charged Yeager with felony assault, but subsequently reduced the charges to a summary offense.⁷

Yeager's Testimony Regarding July 10, 2017

In testifying regarding the events of July 10, 2017, Yeager related being on bike patrol in the area of Hope Park, along with [REDACTED].

While there, he observed a hand-to-hand drug transaction by a male, Hispanic suspect. He recalled that upon approaching, the suspect placed narcotic packets in his mouth and then fled.

According to Yeager, he and his fellow officers pursued the suspect, with [REDACTED] and [REDACTED] being the first to reach him. The suspect, he said, resisted their efforts to restrain and arrest him, ultimately requiring them to handcuff him in front of his body. Doing so, he said, was not the best alternative because it left the suspect free to grab them or reach for a weapon.

At this point, he reported attempting to extract the illegal drugs from the suspect's mouth. When he placed his hand on the suspect's chin, he recalled the suspect grabbing his wrists. In effort to get free of the suspect's grasp, he described pulling his arms straight up and thrusting down, repeating this movement a second time before the suspect let go of his wrists and possibly made contact with the ground. He averred having no intent to harm the suspect by taking these actions.

Following this interaction, he recalled, a crowd had begun to gather around the officers, with persons yelling and throwing items at the officers. When a computer monitor struck [REDACTED] he reported chasing the person who threw it, but was unable to

⁷ Yeager testified to pleading guilty to the reduced charge, which was neither a felony nor a misdemeanor. The plea to this charge, he said, in no way restricts or impedes his ability to work as a police officer in the City of Philadelphia or the Commonwealth of Pennsylvania.

apprehend him.

Upon returning to the location where the suspect had been stopped, he observed [REDACTED] [REDACTED] attempting to place him into a patrol car that had arrived. As [REDACTED] did so, he saw the suspect push off the vehicle, go to his knees and then attempt to crawl under the vehicle in an apparent attempt to stash the illegal drugs.⁸

Considering these actions to be resisting, he intervened by placing his asp under the suspect's arms and lifted him off the ground. In order to not place the suspect in a position where he could possibly grab [REDACTED] he chose not to lift him straight up, but swung him to his right. This movement resulted in the suspect hitting the pool located behind them, which was not his intention.⁹

According to Yeager, he then returned the suspect to a standing position and he and [REDACTED] attempted to place him into the rear of the patrol car. Once they had done so, he recalled, the suspect attempted to escape through the opposite door.

Termination of Yeager's Employment

On August 21, 2017, the Department issued Yeager a Notice of Intention to Dismiss, charging him with violating Department Disciplinary Code Section 1-§012-10, Conduct Unbecoming (Unauthorized and/or excessive use of force in your official capacity) based upon his actions on July 10, 2017. (Joint Exhibit 2.) In particular, the Notice cited Yeager's actions in: (1) slamming the suspect's upper body to the ground while handcuffed; and (2) using his asp to lift the suspect off his feet and then swinging him, which caused the suspect to strike the side of a pool. (Joint Exhibit 2.) These actions, the Notice stated, violated departmental policy in that they involved using more

⁸ Subsequently, 24 packets of heroin mixed with fentanyl were retrieved from under the patrol car.

⁹ On cross-examination, Yeager acknowledged that using his asp in this manner represented a control hold, which constitutes a use of force.

force than was necessary to overcome the suspect's resistance to being arrested. (Joint Exhibit 2.)

Subsequently, by a Commissioner's Direct Action approved by then [REDACTED] [REDACTED] [REDACTED] the Department discharged Yeager, effective August 31, 2017. (Joint Exhibit 3.)

In testifying regarding this action, [REDACTED], who has responsibility for the Department's Office of Responsibility, including IAD, related that under Department policy, in effecting an arrest, officers are permitted to use only such level of force as is necessary to overcome the resistance being exerted by the subject.¹⁰ The force used by Yeager on July 10, 2017, she said, was clearly excessive. In reaching this conclusion, she explained that while the suspect was not fully compliant, Yeager employed substantially more force than was warranted, taking into consideration that the suspect was handcuffed at the time.

From her review of the video, she labeled Yeager's actions as "egregious." This description, she said, reflected that the suspect was not resisting and unable to protect himself from injury in response to Yeager's actions. She noted that with the other officers present, Yeager had safer alternatives to the use of such force.

Procedural History

In response to Yeager's discharge, the Union filed the instant grievance contesting that action. (Joint Exhibit 4.) When the parties were unable to resolve the matter at the lower stages of the grievance procedure, the Union demanded arbitration. (Joint Exhibit 4.) Pursuant to their contractual procedures, the parties selected me to hear and decide

¹⁰ The Department, she confirmed, trains all police officers on the permissible use of force upon hire while attending the Academy and provides periodic refresher training.

the case. (Joint Exhibit 1.)

I held a hearing on April 20, 2023, at the offices of American Arbitration Association in Philadelphia. At the hearing, the parties each had full opportunity to present evidence and argument in support of their respective positions. They did so. Upon the conclusion of the hearing, I declared the record closed as of that date.

DISCUSSION AND FINDINGS

The Issue:

The parties have stipulated that the issues to be decided are as follows:

1. Did the City have just cause to discharge the grievant, Police Officer James Yeager, effective August 31, 2017?
2. If not, what shall be the remedy?

Positions of the Parties

At the conclusion of the April 20, 2023 hearing, both parties made closing arguments. Their respective positions are summarized below.

The City's Position

The City contends that its discharge of Yeager was for just cause. It maintains that the evidence conclusively demonstrates his guilt on the Section 1-§012-10 charge of excessive use of force.

The video evidence, it submits, speaks for itself. The conducted depicted there, it maintains, shows Yeager using excessive force in arresting and attempting to restrain the suspect on July 10, 2017. In particular, it highlights, Yeager can be seen on the video twice slamming the suspect against the ground. A minute later, the video depicts him lifting the suspect off his feet and striking him against the pool.

These actions by Yeager, it argues, fell well below the Department's reasonable expectations for its officers. In fact, it points out, they led the District Attorney to bring criminal charges against him.

In sum, it concludes, Yeager's conduct undercut the public's trust in the Department and his fellow officers, and thereby, demonstrated that his continued employment by the Department poses an undue risk. As such, the City had just cause to discharge him.

Accordingly, for all these reasons, it asks that the discharge be sustained and the grievance be denied.

The Union's Position

The Union, on the other hand, maintains that the City lacked just cause to discharge Yeager based on the events of July 10, 2017. It submits that the City has failed to meet its burden of demonstrating that Yeager committed the charged offense; namely the unauthorized and/or excessive use of force against the suspect.¹¹

In establishing just cause, it states, the City's required showing is two-fold. Namely, the evidence presented must substantiate: (1) Yeager committed the offending conduct; and (2) the level of discipline imposed must be justified, giving consideration to the relevant circumstances.

As to the former, it states, the City must prove Yeager acted contrary to the governing policy. However, it stresses, the record does not include the Department's use of force policy. In any event, it maintains, the evidence does not show a violation of that

¹¹ It submits that in view of the nature and gravity of the alleged misconduct here, the City should be held to the clear and convincing evidence standard of proof. *Champion Spark Plug Co.*, 93 L.A. 1277 (Dobry 1989).

policy, per the standards articulated by witness testimony.

The City's case, it points out, consists of hearsay and circumstantial evidence. The record does not include testimony from any City witnesses with first-hand knowledge of the relevant events. Instead, the City relies solely on the IAD report and cell phone videos.

The only first-hand witness testimony, it notes, came from Yeager and was exculpatory. As to the first instance of excessive force, he confirmed that his thrusting the suspect to the ground represented an effort to free himself from the suspect's grasp with no intention of causing physical harm. In reference to the second, he averred lifting the suspect off the ground to prevent his stashing drugs and then swinging him away from the patrol car to safeguard [REDACTED], who was looking away.

Turning to the issue of penalty, it avers that here, too, the City failed to meet its burden. It reasons that even if the City had established a use of excessive force by Yeager, discharge was a disproportionate response. In support, it cites: (1) Yeager's absence of any prior discipline; and (2) the established penalty range for a first offense of an excessive use of force is reprimand to dismissal.

Accordingly, for these reasons, the Union submits that its grievance should be granted, and the requested relief be awarded.

Opinion

There can be no question that the City's Police Department has a right and a duty to ensure that its officers adhere to certain standards of conduct when acting in their official capacity. The appropriate use of force is undoubtedly one area in which the enforcement of such standards is of paramount importance. The Department's obligation

to safeguard the public, while also shielding itself from civil claims, demands as much. To this end, the Department has the indisputable right to discipline an officer who engages in the use of unauthorized and/or excessive force.

The City, of course, carries the burden of proof here. It must demonstrate by a preponderance of the credible evidence that Yeager committed the charged offense. It must also establish that the level of discipline imposed is appropriate.

The Union, on the other hand, has no corresponding burden. It need not disprove the charges against Yeager. Indeed, he is entitled to the presumption of innocence.

After a careful review of the record and thorough consideration of the parties' respective arguments, I am convinced that the City has not met its burden.¹² My reasons for this conclusion follow.

The City's proof of Yeager's misconduct rests heavily, if not entirely, on the two videos presented. City witnesses, [REDACTED] and [REDACTED], did not possess any first-hand knowledge of the events of July 10, 2017. Instead, their stated conclusions regarding Yeager's purported use of excessive force come from their review of the two videos.

When viewed at normal speed and without any other context, the videos do appear to depict two instances in which Yeager used more force than was necessary in response to the resistance of a suspect who had been handcuffed.¹³ The record, however, does contain more. Namely, there is Yeager's testimony explaining his actions.

¹² As detailed above, the Union argues for the application of heightened standard of proof here; namely, the clear and convincing evidence standard. I find that it is unnecessary to resolve this issue, as I conclude that on the record established, the City has failed to demonstrate Yeager's guilt by the lesser preponderance of the relevant evidence standard.

¹³ The quality of the second video is far inferior to the first in depicting the second instance in which Yeager is alleged to have used excessive force. The angle and distance from which this portion of the video was recorded renders it difficult to discern the exact actions in question.

In watching the videos frame-by-frame, while giving consideration to Yeager's account, I find that the conclusions drawn by the Department cannot be sustained. Simply put, the videos do not depict that Yeager's actions violated Department standards.

The two acts of excessive use force with which Yeager stands accused represent part of a continuum of events by which he, together with his fellow officers, sought to effect the suspect's arrest, prevent his concealment of evidence and ultimately place him into a patrol car for transport. However, for purposes of determining whether he breached Department standards, each instance must be analyzed separately, applying the standard of whether he exceeded the force reasonably necessary to overcome the suspect's resistance or an immediate threat of harm.

Turning first to Yeager's actions in twice thrusting the suspect to the ground, I take note of his testimony, stating that these movements represented his reaction to the suspect grabbing his wrists, as he attempted to extract the drugs the suspect had secreted in his mouth. In weighing his account in this regard, I do not accept it at face value. Instead, as must be done, I have tested its veracity.

In doing so, I take note that his testimony, in this respect, was clear and consistent. He did not waiver. Moreover, the videos corroborate his account. When reviewed in slow motion, the suspect can be seen on both videos clutching Yeager's wrists immediately before Yeager pulls his arms up and then twice thrusts down. As such, I am satisfied that Yeager's account of these actions should be credited.

On this basis, I am persuaded that Yeager's movements in this regard, while, no doubt, a use of force, did not represent an intentional act to cause harm to the suspect. Rather, I find that he acted to free himself from the suspect's grip. More importantly,

when judged in view of the totality of the circumstances, I am compelled to conclude that his split-second response in this instance constituted an objectively reasonable effort to overcome the suspect's resistance and, as such, did not represent an excessive use of force.

Moving on to the second alleged act of excessive force, I again find that the videos corroborate Yeager's explanation of his conduct. Further, here too, he was unequivocal in recounting his actions. His testimony, in this regard, withstood vigorous cross-examination without alteration. In sum, it had the ring of truth.

As such, I am convinced: (1) the suspect was not compliant, as shown by his efforts to crawl under the patrol car in apparent effort to stash the illegal drugs in his possession;¹⁴ (2) Yeager, by using his asp to lift the suspect, acted to overcome this resistance;¹⁵ and (3) in moving the suspect to his right and away from the patrol car, as opposed to raising him straight up, Yeager endeavored to safeguard [REDACTED], who, at that moment, had his back to the suspect and was at risk of being grabbed.

If Yeager's actions had stopped here, I suspect there would not have been a second allegation of his using excessive force against the suspect. However, such was not the case. Instead, as the first video shows, in swinging the suspect away from [REDACTED] and the patrol car, Yeager caused the suspect's body to strike the pool, which was situated behind them.¹⁶

The question then is whether the culmination of Yeager's actions, which involved

¹⁴ It stands undisputed that packets of heroin were recovered from underneath the patrol car. (City Exhibit 1.)

¹⁵ On cross-examination, [REDACTED] acknowledged that the suspect's non-compliance in attempting to stash drugs under the patrol car could be deemed resistance warranting the use of force to prevent him from doing so.

¹⁶ See note 13, *supra*.

the suspect hitting the pool, causes his conduct to rise to an excessive use of force. I conclude that it does not.

In making this determination, I have weighed Yeager's testimony, while carefully examining both videos frame-by-frame. From this analysis, two things stand out. First, as Yeager lifts and begins to rotate the suspect away from the patrol car, the pool is behind him; it is not in his line of sight. Second, I see nothing in the video that contradicts or conflicts with Yeager's claim that in swinging the suspect away from the patrol car, he acted solely to safeguard Foley; he did not intend for the suspect to strike the pool or any other object.

Therefore, judging Yeager's actions, with consideration to the totality of the circumstances, I cannot find that the City has met its burden. Simply put, on the record here, I cannot conclude that Yeager's conduct violated Department standards, as opposed to representing an objectively reasonable effort to overcome the suspect's resistance in seeking to crawl under the patrol car to stash illegal drugs, while safeguarding his fellow officer.

In sum, as to both charged acts, the City has failed to substantiate that on July 10, 2017, Yeager engaged in an excessive use of force in interacting with the suspect.¹⁷

Therefore, it follows that it lacked just cause to discharge him.

Accordingly, for all these reasons, the Union's grievance is granted. In regard to

¹⁷ In reaching this result, two final comments are in order. First, the injuries that the suspect sustained during his arrest on July 10, 2017, are indeed regrettable. (City Exhibit 5.) However, even assuming the injuries to his spine and spleen stemmed from Yeager's actions, it does not cause me to reach a different conclusion as to the charged misconduct. Stated otherwise, based on my review of the totality of the circumstances, my conclusion remains that the City has not substantiated his actions constituted an excessive use of force. Second, I am mindful of the challenges the City faced here in presenting its case, including the apparent unavailability or unwillingness of the suspect and other witnesses with first-hand knowledge to testify to the events of July 10, 2017. However, neither those circumstances nor the gravity of the charges brought against Yeager can substitute for the required evidence of his guilt or justify a lowering of the required standard of proof.

remedy, I direct the City to promptly reinstate Yeager to his former position within the Department without loss of seniority. In addition, I instruct the Department to revise his personnel record to delete all references to his discharge to the maximum extent permitted under the governing law.

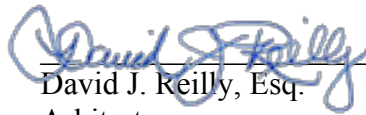
As to the matter of make whole relief, the City is directed to make payment to Yeager for all wages and benefits lost, including overtime, as a consequence of his discharge, through the date of his reinstatement, but excluding the period during which the felony charges filed in connection with his conduct on July 10, 2017 were pending and any subsequent period when he was not available for duty relative to the disposition of those charges.¹⁸ In declining to award Yeager back pay for this period, I am persuaded by the City's assertion that while subject to felony charges, Yeager could not function as a police officer.

¹⁸ The record does not include evidence of Yeager's actual damages. As such, the parties will need to meet and confer to determine the amount due him or return to me for a ruling in the event they are unable to do so. In addressing the matter of lost overtime, I note that the make whole award requires proof that is more than speculative. Instead, it necessitates showing to a reasonable degree of certainty that but for Yeager's discharge, overtime would have been offered to him and he would have worked such overtime.

AWARD

1. The grievance is granted.
2. The City did not have just cause to discharge James Yeager, effective August 31, 2017.
3. The City will promptly reinstate James Yeager to his former position with the Department without loss of seniority, and revise his personnel records, to the maximum extent permitted under governing law, to expunge all references to his August 31, 2017 discharge. In addition, the City will make him whole for all wages and benefits lost as a consequence of his discharge, including overtime, through the date of his reinstatement, but excluding the period during which the felony charges filed in connection with his conduct on July 10, 2017 were pending and any subsequent period when he was not available for duty due to the disposition of those charges. Such make whole relief will also be reduced by all outside wages and other earnings received by him as to the back pay period. I will retain jurisdiction of this matter to resolve any dispute as to the monies to be paid to James Yeager based on this award, including the issue of whether he satisfied his obligation to mitigate his damages.

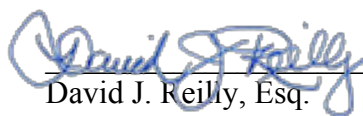
May 22, 2023


David J. Reilly, Esq.
Arbitrator

STATE OF NEW YORK)
)
COUNTY OF NEW YORK) ss.:

I, DAVID J. REILLY, ESQ., do hereby affirm upon my oath as Arbitrator that I am the individual described herein and who executed this instrument, which is my Award.

May 22, 2023


David J. Reilly, Esq.
Arbitrator

AMERICAN ARBITRATION ASSOCIATION

-----X
In the Matter of the Arbitration

between

FRATERNAL ORDER OF POLICE, LODGE NO. 5,

“Union”

- and -

CITY OF PHILADELPHIA,

“City”
-----X

AAA Case No.

01-17-0005-9703

Opinion & Award

Re

Discharge

Hearing: February 8, 2024

APPEARANCES

For the Union

WILLIG, WILLIAMS & DAVIDSON

Richard G. Poulson, Esq.

For the City

CITY OF PHILADELPHIA LAW DEPARTMENT

Lisa A. Swiatek, Esq., Deputy City Solicitor

BEFORE: David J. Reilly, Esq., Arbitrator

BACKGROUND

The City discharged Police Officer _____, effective October 5, 2017. It took this action upon finding that he had violated Section 6-§008-10 of the Police Department's Disciplinary Code, by discharging his firearm in a manner contrary to Department policy. (Joint Exhibits 1, 1A & 3.)¹

The Union contends the City lacked just cause to discharge _____. It asks that he be reinstated to his former position with the Department and be made whole for all pay and benefits lost due to his discharge. It also requests that the City be directed to revise his personnel records to expunge all reference to his discharge to the extent consistent with governing law.

The basic facts of this case, including the areas of dispute, may be set forth succinctly.

Employment History

At the time of his discharge _____ I had been employed by the Department for approximately ten years. His annual evaluations consistently rate his performance as satisfactory and include positive comments from his supervisors. (Joint Exhibit 5.) During his tenure, the Department issued him multiple commendations, including ten for merit and one for bravery. (Joint Exhibit 5.) Further, his record reflects no prior

¹ The Department's Disciplinary Code, which is annexed to the parties' collective bargaining agreement, defines the charged offense as: Article VI – Disobedience, “6-§008-10 – Discharging, using, displaying or improper handling of a firearm while not in accordance to Departmental Policy.” (Joint Exhibits 1 & 1A.) As of the date of the incident for which the Department charged Pownall with violating Disciplinary Code 6-§008-10 (i.e., June 8, 2017), the collective bargaining agreement then in effect was the 2014 – 2017 agreement. (Joint Exhibit 1.) Four months later when the Department discharged Pownall, the 2014- 2017 agreement had been superseded by the parties' 2017 – 2020 agreement. It is acknowledged, however, that the relevant section of the Disciplinary Code and the applicable standard for disciplining or discharging an officer (i.e., just cause) remained unchanged from the 2014 – 2017 to the 2017 – 2020 agreement. (Joint Exhibits 1 & 1A.)

discipline.

In testifying, Sergeant Robert Auman, Pownall's immediate supervisor from 2016-2017, described him as "a very active officer." (Tr. 116.)² He noted further, "If I had ten more like him or a million more I would really appreciate that in my squad.... He was an exceptional officer, always on the ball." (Tr. 116.)³

Firearms Training

Captain Nicholas Brown, the Commanding Officer of the Department's Training Bureau since on or about mid-2020, testified that all officers receive regular firearms training. According to Captain Brown, the Department provides officers with their first such training while assigned to the Police Academy as recruits. (Tr. 87.) After completing the Academy and becoming sworn members of the Department, all officers, he said, attend an annual in-service training, which addresses proper use of firearms, through both classroom instruction and in field exercises. (Tr. 87-88.)

Referencing lesson plans for recruit and in-service training, Captain Brown averred that officers are instructed on various techniques for remedying the malfunctioning or stoppage of their firearm and perform related drills. (Tr. 88-89; City Exhibits 3 – 4.) One such method for removing or clearing a jammed round from the weapon's magazine, he said, is referred to as "tap – tilt – rack – ready." (Tr. 89; City Exhibits 3 – 4.) This process, he related, can typically be completed in two – five

² References to the transcript of the February 8, 2024 hearing in this case will be identified as "Tr." followed by the applicable page number(s).

³ In Pownall's Annual Evaluation, dated June 1, 2017, Sergeant Auman, as the rating officer, commented, "You have a very good work ethic. Your knowledge and experience on the job make your peers look up to you and you are always willing to help your fellow officers on difficult assignments. Your constant heads up on assignments keeps you alert and you are a valuable asset to 1 Squad. You maintain a professional demeanor and appearance when you are on duty. Keep up the good work." (Joint Exhibit 5.)

seconds. (Tr. 89.)

He continued that officers are instructed that when taking such corrective action, to seek cover and concealment, if feasible, and maintain eye contact with the suspect. (Tr. 89-90.) Once the stoppage is cleared, he said, officers are trained to return to the ready position and scan to see if a threat to life remains imminent. (Tr. 90.) If so, they may engage the threat; if not, they must "stand down." (Tr. 90; City Exhibits 3 – 4.)⁴ In layman's terms, he related, this instruction means that "officers are supposed to reassess the situation before they fire their weapon." (Tr. 92.)

He confirmed that prior to June 8, 2017, Pownall completed his most recent annual firearms in-service training on June 3, 2017. (Tr. 92-93; City Exhibit 5.)

Internal Affairs Division ("IAD") Investigation of June 8, 2017 Shooting

Lieutenant Thomas McDonald, a member of the Department's Internal Affairs Division ("IAD"), testified to being assigned to IAD's shooting team since approximately 2007. (Tr. 65.) According to McDonald, in that capacity, he has responsibility for investigating all officer involved shootings from an administrative standpoint; namely, whether the officer violated any Department directives or policies. (Tr. 65-66.)

This work, he related, is bifurcated from the investigation performed by the Department's Officer Involved Shooting Investigation Unit ("OISI"), which focuses on

⁴ The relevant portion of the 2016 training lesson plan reads, "With the old out and a new round in the chamber, 'cover' (demonstrate 'cover') the suspect and scan the environment for threats, unless it is necessary to shoot (i.e. - threat to life is still imminent)." (City Exhibit 4.) According to Captain Brown, during training, the instructor demonstrates verbatim this stated directive, which includes the example, "The threat to life is still imminent." (Tr. 92; City Exhibits 3 – 4.) On cross-examination, he explained, the example refers to a threat to life that is "pending." (Tr. 94, 101-102.) Presented with a scenario in which an armed suspect evades an officer's attempt to subdue him/her, he responded, "There's a possibility of imminent threat to life" being present there. (Tr. 94.) Captain Brown also confirmed having no involvement with the investigation or decision to discharge Pownall; nor personally providing firearms training to Pownall. (Tr. 95.)

whether the officer committed a crime. (Tr. 66.) He stated further that all results of the OISI investigation are shared with IAD, but the reverse does not occur. The reason for this one-way information sharing, he explained, stems from IAD's gathering of compelled statements, which potentially conflicts with the subject officer's constitutional rights. (Tr. 67.)

On June 8, 2017, he reported being assigned to investigate an officer involved shooting, in which [redacted] discharged his weapon, resulting in a suspect's death. (Tr. 67.) In response, he recounted visiting and processing the scene with the Crime Scene Unit and the OISI investigator. (Tr. 68.)

The next step, he said, was to interview [redacted]. (Tr. 68-69.) After doing so, he explained, the investigation continued with gathering reports (i.e., crime scene; ballistics; medical examiner) and receiving witness interview statements and other evidence taken or collected by OISI. (Tr. 69.)

In addition, he related interviewing Captain Charles Green, then the Commanding Officer of the Department's Firearms Training Unit. He averred doing so to address a possible inconsistency between a statement made by Powell and his understanding of Department firearms training. (Tr. 71.) [redacted] e said, reported being trained that after clearing a weapon jam, to reengage and continue shooting without reevaluating the situation. (Tr. 71-72.) Captain Green, he recounted, disagreed with that assertion. (Tr. 71.)

Upon the concluding his investigation, he confirmed preparing a report, which summarized his factual findings and was accompanied by all the interview statements and

other evidence gathered. The report, he stated, was submitted through his chain of command and then transmitted to the Police Commissioner. (Tr. 69.)

IAD Interview

Lieutenant McDonald's interview of _____, which was conducted on June 12, 2017, reflects the following as to the June 8, 2017 incident, during which Pownall discharged his weapon⁵:

- (1) During his shift that day (i.e., 3:45 p.m. – 12:00 a.m.), _____ was tasked with transporting _____ and his two children to the Department's SVU office, as one of the children had been the victim of an attempted abduction.
- (2) While stopped at a traffic light at the intersection of Whitaker and East Hunting Park Avenues, _____ observed an individual operating a dirt bike recklessly, crossing from the east to the west side of Whitaker, and then entering a restaurant parking lot, where the dirt bike stalled.
- (3) _____ decided to approach the dirt bike operator, who has since been identified as David Jones, to direct him to take the bike home and stop driving recklessly and endangering persons. In doing so, he drove his vehicle into the restaurant parking lot and stopped next to Jones, without notifying Police Radio.⁶ Upon exiting his vehicle, he observed that Jones appeared extremely nervous, turning away from him and placing his right hand at his waist. As a result, _____ concluded Jones possessed a weapon, causing him to be concerned for his safety and that of _____ and his children.
- (4) In response, he stepped toward Jones, placed his hand at Jones's waist, where he felt a gun. A struggle then ensued, during which Jones attempted to pull the gun out from under his clothes, while _____ restrained him and gave commands not to withdraw the weapon. Failing to comply, Jones was able to escape _____ grasp, pull out the gun and aim it at _____, who had drawn his gun, responded by attempting to fire a shot at Jones, but the weapon jammed.

⁵ At the outset of the interview, Lieutenant McDonald informed Pownall that he was compelled to give a statement, explaining, "Pursuant to Philadelphia Police Department Disciplinary Code, Article 1-008-10 and 1-009-10, you as a police officer are required to cooperate and provide a truthful statement to the Internal Affairs Division in order to avoid job sanctions or dismissal." (Joint Exhibit 4A.)

⁶ Explaining this failure to notify Police Radio, Pownall stated he does not do so for "mere encounters," as opposed to a vehicle stop. (Joint Exhibit 4A.)

- (5) Following his training to get the gun operational, he employed the “tap-tilt-rack-ready” method to clear the jam. As soon as he had done so, he fired at Jones approximately three times, as he ran towards a parked car in front of the restaurant. Explaining this action, he stated, “I thought he was going to take cover and try to fire shots at me. I needed to eliminate the threat for my sake and the civilians.” When Jones fell next to the parked car, he immediately approached and reported by Police Radio shots fired and requested medics be dispatched to his location.
- (6) Upon searching Jones, he did not find the gun. A short time later, after other officers had arrived, Jones’s gun was discovered on the ground approximately twenty feet from his dirt bike.

(Joint Exhibit 4A.)

Testimony

In testifying at the hearing in this case recounted his observations of the June 8, 2017 incident. Similar to ; interview statement, he also recalled observing Jones driving his dirt bike across traffic on Whitaker Avenue and entering the restaurant parking lot, to which responded by following him there. (Tr. 51-52.) After exiting the vehicle and approaching Jones, Pownall, he related, placed his hand on Jones, who, in turn, attempted to break loose, while fidgeting with the front of his “hoody.” (Tr. 52-53.)

At this point, he described and Jones as being in a “tussle.” As it continued, Jones, he averred, looked at him, to which he reacted by stating, “Don’t do it, don’t do it.” (Tr. 53.)

According to Jones broke free and fired his taser, at which time he ducked down with his children. (Tr. 54.)⁷ Upon looking up again, he observed Jones running and pulling out his weapon. (Tr. 54.) He and his children then once

⁷ Contrary to ’s account, the IAD investigation confirmed that Pownall did not possess a taser at the time of the June 8, 2017 incident. (City Exhibit 4.)

more dropped down in the vehicle, whereupon he heard several shots fired. (Tr. 54.) On the cessation of the shooting, he raised himself again and noticed Jones's weapon on the ground. (Tr. 54.)⁸

Security Camera Video of June 8, 2017 Incident

The City introduced at the hearing in this case a video of the June 8, 2017 shooting at issue, which was recorded by one of the external security cameras at the restaurant where the incident occurred. (City Exhibit 2.)⁹ The video, which captures only a portion of the encounter between Jones and _____, depicts, in relevant part:

- (1) Jones enters the parking lot at the north side of the restaurant and then walks his dirt bike out of camera view.
- (2) _____ drives his patrol car to the edge of the parking lot, exits the vehicle and then proceeds off camera in the direction that Jones had walked.
- (3) Jones returns to camera view from the north side of the restaurant and then runs south bound on the sidewalk alongside Whitaker Avenue.
- (4) _____ reappears from the same side of the restaurant and facing Jones fires his weapon, after which Jones falls to the ground.
- (5) _____ approaches Jones, pats his clothing and then utilizes his police radio

(City Exhibit 2.)

The video reflects that the elapsed time from when _____ exited his vehicle and approached Jones until he patted down Jones after he fell near the parked car was forty seconds. It also indicates that four seconds elapsed from when Jones reappeared from the parking lot until he fell to the ground. (City Exhibit 2.)

⁸ On cross-examination, _____ confirmed that he did not see Jones toss or discard the weapon. Instead, he saw it on the ground for the first time after the incident concluded. (Tr. 61.)

⁹ The video does not contain an audio track. (City Exhibit 2.)

Use of Force Review Board Decision

Under Department Policy, all police involved shootings are reviewed by a five-member Use of Force Review Board ("UFRB"). (City Exhibit 6.)¹⁰ The UFRB functions to evaluate objectively the appropriateness or reasonableness of the force used. It does so by deliberating on the evidence presented and issuing one of five findings, by majority vote: (1) Administrative Approval; (2) Improve Tactics and/or Decision Making; (3) No Use of Force Violations, but Other Departmental Violations Discovered; (4) Policy or Departmental Training Issues; and (5) Administrative Disapproval/Policy Violations. (City Exhibit 6.) In the case of (3) and (5), the UFRB notifies the Police Commissioner in writing of its finding and forwards the case to the Charging Unit for appropriate disciplinary charges to be filed against the officer. (City Exhibit 6.)

In this instance, Lieutenant McDonald averred presenting the evidence regarding the June 8, 2017 incident to the UFRB at an August 7, 2017 hearing. (Tr. 70; City Exhibit 1.)

On August 17, 2017, the UFRB issued a finding of "Administrative Disapproval/Policy Violation – Not within Departmental Policy – Referred to Charging Unit." (City Exhibit 1.) In its related report to the Commissioner, the UFRB explained the departmental violations stemming from shooting of Jones concerned:

Final shot not justified. No motion or threat observed at time of discharge. Officer violated policy making vehicle stop with people in car. Failed to notify radio. Did not scan and reassess as required by training.

(City Exhibit 1.)¹¹

¹⁰ UFRB members include the Deputy Commissioners of Organization Services, Office of Professional Responsibility, Patrol Operations and Investigations and Homeland Security, and the Executive Director of the Police Advisory Committee. (City Exhibit 6.)

¹¹ None of the members of the UFRB who rendered this finding testified at the hearing in this case.

Termination of Pownall's Employment

On September 7, 2017, the Department issued a Notice of Intention to Dismiss, charging him with violating Department Disciplinary Code Section 6-§008-10 (Discharging, using, displaying or improper handling of a firearm while not in accordance to Departmental Policy), based upon his actions on June 8, 2017. (Joint Exhibit 3.) In particular, the Notice cited the UFRB's determination that committed several violations of Department policy and training, including: (1) Directive 9.7, Safe Operation of Police Vehicles, by stopping to engage with Jones while transporting civilians to SVU; (2) Directive 12.8, Vehicle or Pedestrian Investigations, by neglecting to report his engagement with Jones to Police Radio; (3) Firearms Training, by failing, after clearing his weapon stoppage, to scan and reassess the threat; and (4) final shot not justified as there was no motion or threat observed at the time of discharge. (Joint Exhibit 3; City Exhibits 7 & 9.)

Subsequently, by a Commissioner's Direct Action approved by then Commissioner Richard Ross, the Department discharged effective October 5, 2017. (Joint Exhibit 3.)¹²

In testifying regarding this action, current Commissioner Kevin Bethel, related that upon reviewing the IAD investigation report and UFRB's findings, he concurred with the decision of former Commissioner Ross to discharge (Tr. 39-40.) He explained basing this conclusion on the relevant circumstances, including "

¹² Subsequently, the District Attorney for the City of Philadelphia brought criminal charges against Pownall based upon the June 8, 2017 shooting, including murder and criminal homicide. Following a July 20, 2022 decision of the Pennsylvania Supreme Court denying the District Attorney's appeal of suggested jury instructions, the charges were dismissed. However, as the parties have stipulated, notwithstanding the dismissal of those charges, the District Attorney's Office has stated that it reserves the right to reinstate such charges and is contemplating doing so. (Tr. 32.)

violations of Department Directives 9.7 and 12.8, as well as his review of the video depicting the shooting. (Tr. 40.) Further, based upon the video, he considered all shots fired by be unjustified, not just the final shot as found by the UFRB. (Tr. 40-41.)¹³

Procedural History

In response to s discharge, the Union filed the instant grievance contesting that action. (Joint Exhibit 2.) When the parties were unable to resolve the matter at the lower stages of the grievance procedure, the Union demanded arbitration. (Joint Exhibit 3.) Pursuant to their contractual procedures, the parties selected me to hear and decide the case. (Joint Exhibit 1.)

I held a hearing on February 8, 2024, at the offices of American Arbitration Association in Philadelphia, Pennsylvania. At the hearing, the parties each had full opportunity to present evidence and argument in support of their respective positions. They did so. With the receipt of the hearing transcript on March 12, 2024, I declared the record closed as of that date.

DISCUSSION AND FINDINGS

The Issue:

The parties have stipulated that the issues to be decided are as follows:

1. Did the City have just cause to discharge the grievant, Police Officer effective October 5, 2017?
2. If not, what shall be the remedy?

¹³ In support, Commissioner Bethel testified, "I thought that ... all the shots were not appropriate. I'm not sure what the final shot meant as it relates to their determination. My decision was based on the shooting in its entirety from the first one to the last." (Tr. 40-41.)

Positions of the Parties

At the conclusion of the February 8, 2024 hearing, both parties made closing arguments. Their respective positions are summarized below.

The City's Position

The City contends that its discharge of [REDACTED] was for just cause. It maintains that the evidence conclusively demonstrates his guilt on the Section 6-§008-10 charge of discharging a firearm contrary to Department Policy.

In support, it stresses that [REDACTED] encounter with Jones on June 8, 2017 should never have occurred. Having been tasked with transporting a civilian and his two minor children to SVU that day, [REDACTED] officers, should not have stopped to engage with Jones, notwithstanding his reckless operation of a dirt bike. By doing so, it points out, he violated Department Directive 9.7, Safe Operation of Police Vehicles, and placed the civilians being transported in harm's way.

It asserts further that he compounded matters by disregarding Department Directive 12.8, Vehicle or Pedestrian Investigations. In particular, it cites his failure to report the stop on Police Radio and await for the arrival of backup.

Both Directives 9.7 and 12.8, it notes, serve to protect officers, and in the case of Directive 9.7, the civilians they are transporting. Simply put, it concludes, if [REDACTED] had complied with these directives, he and the civilians riding with him on June 8, 2017 would never have been placed in a situation where they were at risk of being shot.

Turning to the circumstances of the shooting, it highlights, no dispute exists as to two critical facts: (1) when [REDACTED] first attempted to fire his weapon at Jones, he experienced a firearms stoppage; and (2) after clearing the jam, [REDACTED] failed to reassess

the threat before firing his weapon at Jones, as he ran toward the front of the restaurant.

By these actions, it maintains, _____ disregarded his Department training on the proper use of a firearm, which is conducted annually, with the most recent refresher having been received by _____ just days earlier.

In sum, it concludes, _____ by his actions on June 8, 2017, exhibited an extreme lack of judgment that disqualifies him from continued employment with the Department. Indeed, it notes, current Commissioner Bethel confirmed that none of the shots fired by _____ that day were justified, and an officer who reacts in that manner must be excluded from the Department.

Accordingly, for all these reasons, it submits that the City had just cause to discharge _____, and, as such, the grievance should be denied.

Alternatively, it argues, if the grievance is sustained, any back pay award should be limited to the period from the dismissal of the criminal charges filed against _____ through his reinstatement.

In support, it cites the testimony of Captain Gregory Malkowski, explaining that the Department cannot retain an officer charged with murder or homicide due to the obvious conflicts arising from an officer's access to sensitive information and his/her need to testify in criminal trials. Further, it stresses, the District Attorney's Office is a separate entity over which the City does not exercise any control. As such, it states, for purposes of any remedial relief granted here, the City should not be held accountable for the effect of the District Attorney's decision to bring charges against _____ or the time required to prosecute.

The Union's Position

The Union, on the other hand, maintains that the City lacked just cause to discharge [REDACTED] based on the events of June 8, 2017. It submits that the City has failed to meet its burden of demonstrating that [REDACTED] committed the charged offense; namely discharging his firearm contrary to Department Policy.

To the contrary, it argues, [REDACTED] properly performed his duties on June 8, 2017. More specifically, it notes, with Jones having drawn a weapon, [REDACTED] was in a "fight for his life" and acted appropriately to eliminate an imminent threat of death or grievous bodily harm faced by both him and the civilians he was transporting. As such, it concludes, he did not engage in any conduct warranting discipline, let alone discharge.

In examining the established record here, it posits that the District Attorney's actions have had a material effect on this proceeding. In particular, it notes, the now dismissed prosecution of [REDACTED] delayed a hearing on his October 2017 discharge until February 2024. As a result, decision makers, such as former Commissioner Ross were not available to testify and be confronted on cross-examination. The testimony given by current Commissioner Bethel, who was not a member of the Department in 2017, it argues, cannot substitute for Ross's, and, as such, cannot serve to establish just cause for [REDACTED] discharge.

Likewise, it stresses, while the UFRB found the final shot fired by [REDACTED] was not justified, no member of the UFRB testified to explain that decision. The need for such an account, it states, was made all the more important by the implication of this finding; namely that the first two shots fired by [REDACTED] were justified.

This defect in the City's case, it contends, was not remedied by Lieutenant

McDonald's testimony. Although his IAD investigation report identifies possible policy violations by [REDACTED] warranting further review, it points out, he did not determine whether such violations actually occurred.

As such, it avers, given the absence of testimony from any of the decision makers relative to the charge proffered against [REDACTED], the record cannot support a finding that the City had just cause to discharge him.

Moreover, it argues, [REDACTED] statement refutes the central allegation underlying the alleged violation of the Department's firearms training, as well as the other cited violations of Department Directives.

Contrary to the City's claim, it states, the requirement that [REDACTED] allegedly disregarded (i.e., reassessing the scene after clearing the weapons stoppage) did not apply here. [REDACTED] it notes, confirmed that upon restoring his weapon to the ready state, the imminent threat to life remained. Further, it stresses, nothing in the video presented contradicts [REDACTED] stated belief in this regard. As such, it concludes, per Department training, he was authorized to discharge his weapon in response to that threat.

As for the alleged violations of Directives 9.7 and 12.8, it maintains, uncontradicted statement demonstrates they were inapplicable or were not triggered.

[REDACTED] it notes, explained that his engagement with Jones did not constitute a vehicle or pedestrian stop, but a "mere encounter." As such, it maintains, his actions did not violate Directive 9.7's prohibition against conducting a stop when transporting civilians; nor trigger Directive 12.8's obligation to notify Police Radio.¹⁴

¹⁴ Alternatively, it states, if Pownall's "mere encounter" characterization of his engagement with Jones is incorrect, the City has established, at most, technical violations of Directives 9.7 and 12.8. It stresses further that such infractions are tangential to Pownall's charged misconduct (i.e., discharging a firearm contrary to Department Policy) and are more appropriately charged as a violation of Disciplinary Code

In sum, it concludes, upon the record presented, the City has failed proved the charged misconduct as stated in the Notice of Discipline.¹⁵

Accordingly for all these reasons, it asks that the grievance be sustained and the requested relief awarded.

Opinion

There can be no question that the City's Police Department has a right and a duty to ensure that its officers adhere to certain standards of conduct when acting in their official capacity. The appropriate use of force, including, in particular, lethal force in the form of a firearm, is undoubtedly one area in which the enforcement of such requirements is of paramount importance. The Department's obligation to safeguard both citizens and its officers, while also maintaining the public trust that is essential to its mission, demands as much. To this end, the Department has the indisputable right to discipline an officer who discharges a firearm contrary to Department policy.

The authority granted members of law enforcement to use lethal force within specified parameters is a necessity of the job in which a police officer may be called upon to respond in instant to a threat of imminent death or grievous physical injury to a member of the public, him/herself and/or a fellow officer. Of course, with such great

Section 5-§011-10 – Failure to Comply with any Police Commissioner Order, Directive, Miranda regulation or any oral or written orders of Superiors. Further, under any circumstances, it avers, they cannot justify Pownall's discharge given that they carry a prescribed penalty range of reprimand to a five-day suspension for a first offense and a five day to ten-day suspension for a second offense.

¹⁵ The Union also posits that even if the City had established the principal violation of discharging a firearm contrary to Department Policy, it would not have established just cause for his dismissal. To the contrary, citing Union Vice President John McGrody's testimony and the documentary evidence, it highlights that the Department's response to this same infraction committed by other officers under similar circumstances reflects a penalty range of reprimand to a thirty-day suspension, with one discharge that was rescinded pursuant to an arbitrator's award. (Tr. 121-124; Union Exhibit 1.) On this basis, it reasons, Pownall's discharge necessarily represents disparate treatment, and thus, cannot satisfy the just cause standard, a conclusion that is further confirmed when Pownall's exemplary and distinguished record of service is weighed appropriately.

authority comes equally great responsibility. In support of that obligation, the Department maintains a policy governing the permissible use of firearms and provides regular firearms training to each of its officers, beginning with their entrance into the Academy as recruits and continuing with an annual in-service refresher course once they become a sworn officer. In doing so, the Department instructs its officers in detail as to how and when they may safely deploy their firearms consistent with Department policy.

When, despite these efforts, an officer involved shooting results in a loss of life, it is an unquestionable tragedy. This holds true regardless of the underlying circumstances.

For this reason, the Department maintains a process by which it investigates and evaluates the appropriateness of any officer involved shooting. On the administrative side, this work begins with an IAD investigation by a member of its shooting team and concludes with the UFRB reviewing the evidence gathered by IAD and determining whether to administratively approve or disapprove the shooting, as well as to identify training issues and violations of other Department policies.

Where the UFRB disapproves a shooting and/or finds other policy violations, any resulting discipline issued to the officer involved remains subject to challenge through the grievance and arbitration procedure of the parties' Agreement. In the event such a grievance is advanced to arbitration, as has occurred here, the City carries the burden of proof. As such, it must demonstrate by a preponderance of the credible evidence that

committed the charged offense. It must also establish that the level of discipline imposed is appropriate.

The Union, on the other hand, has no corresponding burden. It need not disprove the charges against . Indeed, he is entitled to the presumption of innocence.

After a careful review of the record and thorough consideration of the parties' respective arguments, I am convinced that the City has not met its burden. My reasons for this conclusion follow.

The City's proof that [redacted] use of his firearm violated Department policy and warranted his discharge rests upon three pieces of evidence -- the video presented, [redacted]'s testimony and [redacted]'s statement to IAD. The City's witnesses, including current Commissioner Bethel and Lieutenant McDonald, did not possess any first-hand knowledge of the events of June 8, 2017. Instead, Commissioner Bethel's stated conclusion regarding [redacted] purported improper firearm use was made years later and comes from his review of the video, the IAD investigation report and the UFRB's findings; whereas, Lieutenant McDonald acknowledged making no such determination, but instead, his role involved gathering and presenting all the relevant evidence to the UFRB.

I recognize that City's case has likely been hobbled by the passage of time, stemming from the necessary deferral of the arbitration hearing in this case due to pendency of the related criminal charges that the District Attorney's Office brought against [redacted]. Indeed, such circumstances may well explain the absence of testimony from the decisionmakers in this matter, such as former Commissioner Ross and the members of the UFRB.

The effect of such delay, however, cannot alter the City's evidentiary burden. Likewise, the gravity of the underlying circumstances, Jones's tragic death, do not permit me to lower the bar. Simply put, I cannot simply credit at face value the written findings of UFRB, which Commissioner Ross apparently relied upon in discharging [redacted] by a

Commissioner's Direct Action. Instead, I must weigh the evidence presented as to what transpired during the June 8, 2017 encounter between [REDACTED] and Jones and determine whether the City has established that [REDACTED] violated Department policy in discharging his weapon in response.

In examining the record, it is apparent that much is not in dispute. Indeed, the parties acknowledge this to be true.

In this regard, I take note that City does not challenge [REDACTED]'s account of the circumstances leading to the point at which Jones aimed his weapon at him, and he, in turn, responded by attempting to discharge his firearm at Jones, but it jammed. In fact, [REDACTED]'s account is supported by [REDACTED]'s testimony. Moreover, the Notice of Dismissal includes a consistent recitation of this portion of the interaction between [REDACTED] and Jones.

Plainly then, at this stage of the encounter, no issue exists as to the propriety of [REDACTED]'s conduct. Indeed, I do not understand the City to claim otherwise. Simply put, Jones's actions created a threat of imminent death or grievous bodily harm to which [REDACTED] was authorized to respond by discharging his firearm.

Where the parties depart concerns [REDACTED] actions once he had cleared the jam and restored his gun to the ready state. Namely, the City avers that it was at this moment, [REDACTED] violated Department policy by deviating from its firearm training. In particular, it maintains that by [REDACTED] own account, he failed, upon restoring his firearm to the ready state, to assess or scan the environment for threats.

On review, I am unpersuaded by the City's construction of the Department's mandate in this regard. The training materials introduced by the City reflect a critical

exception to the obligation to assess once an officer has restored his weapon to the ready state; namely, where the threat to life remains imminent.¹⁶

The City's witness Captain Brown, Commanding Officer of the Department's Training Bureau, confirmed this reading of the training materials. In fact, he expressly testified that the exception applies where "a threat to life is pending." (Tr. 94.) When presented on cross-examination with an example in which an armed suspect escapes the officer's control, he said, there could be the "possibility" of an imminent threat to life. (Tr. 94.)

According to _____ account, once he had cleared and restored his firearm to the ready state, he determined that the imminent threat to his life and the lives of _____

_____ posed by Jones remained. More specifically, he explained, "I thought he was going to take cover and try to fire shots at me. I needed to eliminate the threat for my sake and the civilians." (Joint Exhibit 4A.)¹⁷

If find nothing in the record that contradicts _____ stated belief in this regard or renders it unreasonable. Further, the City has not offered any evidence suggesting that despite such a reasonable belief, it would still have been improper for _____ to discharge his weapon at Jones, as he ran towards the parked car on Whitaker Avenue.

Although we are now aware that Jones dropped his gun before running from the restaurant parking lot and proceeding southbound on Whitaker Avenue, the content of the

¹⁶ Specifically, the in-service lesson plan for the Department's firearm training states: "With the old out and the new round in the chamber, 'cover' (demonstrate 'cover') the suspect and scan the environment for threats, *unless it is necessary to shoot (i.e., - threat to life is still imminent)*. (City Exhibit 4 at 9 (emphasis added).)

¹⁷ Although Pownall did not testify at the hearing in this case, I have not drawn any negative inference from that fact. In declining to do so, I have weighed that despite dismissing the criminal charges filed against Pownall, the District Attorney's Office has stated that it reserves the right to reinstate those charges and is contemplating doing so. See note 12, *infra*.

video does not permit me to conclude that [redacted] knew or should have known this fact. To the contrary, after reviewing the video numerous times, at both normal speed and in slow motion, I saw no inconsistency between Jones's movements and [redacted] conclusion that he was running for cover from which he could fire his weapon.

I note that as Jones emerged from the parking lot on the northside of the restaurant and began running along Whitaker Avenue, he does not appear to be holding a gun in either hand. I am satisfied, however, that this fact is not sufficient to rebut the threat perceived by [redacted], as it would have been reasonable for him to conclude that Jones had returned the weapon to his hoody or waist band, as he fled. In fact, consistent with that perception, the video supports [redacted] statement that upon reaching the fallen Jones, he searched him for a gun.

Turning to [redacted] testimony, it too offers no basis to reject [redacted]'s reported belief that Jones continued to pose an imminent threat to life as he ran from the restaurant parking lot after unsuccessfully attempt to fire his gun. By his account, he dropped down in the patrol car when Jones escaped [redacted], grasp and drew his weapon and then again when [redacted] pursued Jones onto Whitaker Avenue and discharged his weapon. It was only after he raised himself again upon the cessation of the shooting that he observed Jones's weapon on the ground. As such, I am compelled to find his testimony insufficient to demonstrate that [redacted] knew or should have known that Jones's had discarded his weapon and was unarmed as he ran along the sidewalk on Whitaker Avenue.

This conclusion, I note, is consistent with the UFRB's implicit finding that the first two shots fired by [redacted] were justified. Obviously, if the UFRB had determined

that [redacted] knew or should have known that Jones's had dropped his gun before running out of the restaurant parking lot, it would certainly have found all three shots fired were not justified, as opposed to only the final shot.

Further, I find a lack of evidentiary support for the UFRB's finding that the final shot was not justified. To the extent the UFRB intended to substantiate this determination by the stating in its findings "no motion or threat observed at the time of discharge," such claim is at odds with the video.

As recounted above, the video clearly depicts Jones running towards the parked car on Whitaker Avenue, as [redacted] emerges from the restaurant parking lot and discharges his weapon three times. In view of these circumstances, I am unable to credit the UFRB's apparent basis for concluding the final shot was not justified. Indeed, Jones was running at the time, so there was, no doubt, motion. Likewise, in fleeing toward the parked car, Jones's actions were consistent with [redacted] conclusion that he was seeking to take cover, so he could fire his weapon. As such, the video substantiates that an observable threat was present when all three shots were fired.

To determine no threat was present would necessitate examining the content of the video without considering the context provided by the portion of the encounter that occurred off camera during which Jones drew his gun and attempted to shoot. Obviously, such an assessment of the video is not reasonable. Indeed, as noted above, the City does not contest [redacted] account in that regard. Moreover, it is largely confirmed by [redacted] testimony, and is recited in the Notice of Termination.

Finally, in analyzing the UFRB's determination that [redacted] final shot was not justified, I take note that its report also references [redacted] alleged violations of

Directives 9.7 and 12.8, relating to his making a vehicle stop while transporting civilians and neglecting to notify Police Radio that he had done so. It is unclear to me, however, whether the UFRB intended to cite these violations as support for its ultimate conclusion.

In the event the UFRB so intended, I find the claim unpersuasive on the evidence before me. These purported violations bear on whether [redacted] should have stopped his vehicle to encounter Jones, and if so, what actions he should have taken in doing so.

They do not demonstrate that [redacted] after encountering Jones and being subject to an imminent threat of death, contravened Department policy by discharging his firearm at Jones in seeking to eliminate such threat, which he believed was ongoing.¹⁸

In sum, judging [redacted] actions in discharging his firearm on June 8, 2017, with consideration to the totality of the circumstances, I cannot find that the City has met its burden. Simply put, the evidence presented does not permit me to conclude that

[redacted] s conduct violated Department policy governing the use of a firearm, as opposed to a justified use of force intended to eliminate an imminent threat to the life of Pownall and the citizens he was transporting. As such, it follows that the City lacked just cause to discharge him.

Accordingly, for all these reasons, the Union's grievance is granted. In regard to

¹⁸ In regard to the issue of whether these alleged violations of Directives 9.7 and 12.8 could provide an independent basis for the Department to discipline [redacted], I conclude that it would be improper for me to decide that question, as the Department proffered no such charges against [redacted]. Under the Department's Disciplinary Code, such alleged violations can be charged pursuant to Section 5-§011-10 – Failure to comply with any Police Commissioner's orders, directives, memorandums or regulations; or any oral or written orders of superiors. Such violations although referenced in the Notice of Dismissal cannot be deemed subsumed within the lone charge cited for Pownall's discharge – Section 6-§008-10 – Discharging, using, displaying or improper handling of a firearm while not in accordance to Departmental Policy. Further, under Section 5-§011-10, even if these violations were deemed established and found to constitute a first and second offense, the maximum penalty under the Department's Disciplinary Code would be a five-day and ten-day suspension, respectively. Accordingly for these reasons, in deciding the issue presented, I decline to address whether [redacted] violated Directives 9.7 and 12.8 based upon his actions on June 8, 2017,

remedy, I direct the City to promptly reinstate [redacted] to his former position within the Department without loss of seniority. In addition, I instruct the Department to revise his personnel record to delete all references to his discharge to the maximum extent permitted under the governing law.

As to the matter of make whole relief, the City is directed to make payment to [redacted] for all wages and benefits lost, including overtime, as a consequence of his discharge, through the date of his reinstatement, but excluding the period during which the felony charges filed in connection with his conduct on June 8, 2017 were pending and any subsequent period when he was not available for duty relative to the disposition of those charges.¹⁹ In declining to award [redacted] back pay for this period, I am persuaded by the City's assertion that while subject to such serious felony charges, [redacted] could not function as a police officer.

¹⁹ The record does not include evidence of [redacted]'s actual damages. As such, the parties will need to meet and confer to determine the amount due him or return to me for a ruling in the event they are unable to do so. In addressing the matter of lost overtime, I note that the make whole award requires proof that is more than speculative. Instead, it necessitates showing to a reasonable degree of certainty that but for [redacted]'s discharge, overtime would have been offered to him and he would have worked such overtime.

AWARD

1. The grievance is granted.
2. The City did not have just cause to discharge _____, effective October 5, 2017.
3. The City will promptly reinstate _____ to his former position with the Department without loss of seniority, and revise his personnel records, to the maximum extent permitted under governing law, to expunge all references to his October 5, 2017 discharge. In addition, the City will make him whole for all wages and benefits lost as a consequence of his discharge, including overtime, through the date of his reinstatement, but excluding the period during which the felony charges filed in connection with his conduct on June 8, 2017 were pending and any subsequent period when he was not available for duty due to the disposition of those charges. Such make whole relief will also be reduced by all outside wages and other earnings received by him as to the back pay period. I will retain jurisdiction of this matter to resolve any dispute as to the monies to be paid to _____, based on this award, including the issue of whether he satisfied his obligation to mitigate his damages.

April 25, 2024


David J. Reilly, Esq.
Arbitrator

STATE OF NEW YORK)
)
COUNTY OF NEW YORK)

ss.:

I, DAVID J. REILLY, ESQ., do hereby affirm upon my oath as Arbitrator that I am the individual described herein and who executed this instrument, which is my Award.

April 25, 2024


David J. Reilly, Esq.
Arbitrator

AMERICAN ARBITRATION ASSOCIATION

-----X
In the Matter of the Arbitration

between

FRATERNAL ORDER OF POLICE, LODGE NO. 5,

“Union”

- and -

CITY OF PHILADELPHIA

“City”
-----X

:
:
: AAA Case No.
: 01-19-0003-1624

:
:
: Opinion & Award

:
:
: Re: Corporal Thomas Young -
: Discharge

:
:
: Hearing: June 13, 2022 and
: July 29, 2022

APPEARANCES

For the Union

WILLIG, WILLIAMS & DAVIDSON
Jessica C. Caggiano, Esq.

For the City

CITY OF PHILADELPHIA LAW DEPARTMENT
Frank E. Wehr II, Divisional Deputy City Solicitor

BEFORE: David J. Reilly, Esq., Arbitrator

BACKGROUND

The City, pursuant to a Commissioner's Direct Action ("CDA"), decided to discharge Corporal Thomas Young, effective July 19, 2019.¹ This action represented the City's response to thirteen Facebook posts/comments that he had made during 2012 - 2018, which it learned of in 2019 through the Plain View Project.

The City determined that these posts violated the Department's Social Media Policy, Directive 6.10, and, in turn, constituted violations of its Disciplinary Code: (1) Article I - Conduct Unbecoming, Section 1-§021-10; and (2) Article V – Neglect of Duty, Section 5-§011-10. More specifically, it concluded that the posts/comments "displayed a course of conduct... using racial slurs, profanity, dehumanizing, defamatory and/or discriminatory language, and/or language that condoned, glorified or encouraged violence, and/or language that was insensitive and mocked individuals, due process, and the criminal justice system." (Joint Exhibit 5.)

The Union contends the City lacked just cause to discharge Young. It asks that he be reinstated to his former position with the Department and be made whole for all pay and benefits lost as a consequence of his discharge. It also requests that the City be directed to revise his personnel records to expunge all reference to his discharge to the extent consistent with governing law.

The relevant facts of this case, which are largely undisputed, may be set forth succinctly.

¹ The Department did not deliver the CDA and the underlying charges to Young due to his retirement on July 19, 2019, prior to his scheduled *Gniotek* hearing. (Joint Exhibits 5 & 17.) Instead, it placed these documents in his personnel file, along with a memorandum titled "Pending Disciplinary Charges," which states, "If this Employee is ever returned to duty, this will be processed." (Joint Exhibit 2.)

Young's Employment History

At the time of his discharge, Young had completed approximately thirty years of service with the Department. (Tr. II: 5.)²

In 2001, the Department promoted him to Corporal, which rank he held at all relevant times for purposes of this matter. (Tr. II: 6.) As a Corporal, he had responsibility for managing the District's operations room and supervising a staff of four – seven officers. (Tr. II: 8.) His duties also required him to interact regularly with the public. (Tr. II: 8-9.)

With his elevation to Corporal, the Department assigned him to the 22nd District. In or about 2004, he returned to the 6th District, where he had been assigned during his first twelve years with the Department. He remained there until his 2015 transfer to PCIC. (Tr. II: 6.)

In testifying, Union Vice President John McGrody described the 6th District as one of the most diverse Districts in the City, and possibly, the country. (Tr. II: 126.) The District's residents, he noted, represent varied racial and ethnic groups and include a substantial LGBTQ community. (Tr. II: 127-128.)

Throughout his tenure with the Department, Young received annual evaluations from his superior officers rating his performance as satisfactory, which also included comments reflecting positively on his service. (Joint Exhibit 18.)³ In addition, the

² References to the transcript of the June 13, 2022 and July 29, 2022 hearings in this case will be designated as "Tr." followed by the applicable volume and page number. The June 13, 2022 and July 29, 2022 transcripts will be identified as volumes I and II, respectively.

³ Most recently, in 2017, his rating officer commented: "You are knowledgeable and demonstrate a professional demeanor at all times. You have a great rapport with your co-workers. As I have stated all along I can't accomplish the goals of this operation without you. Tommy keep up the good work." (Joint Exhibit 18.) Other rating officers commended his leadership, strict adherence to procedure and setting an example for subordinates. (Joint Exhibit 18.) [REDACTED] referencing his work experience with Young,

Department awarded him numerous commendations for his actions on the job, including for his bravery and heroism. (Joint Exhibit 19.)⁴

He has no record of recent prior discipline. In testifying, he related having one reprimand, which was issued in or about 2006. The discipline, he said, was unrelated to social media or unprofessional or inappropriate conduct. He stated further that he has never been counseled, formally or informally, regarding his social media use. (Tr. II: 9-10.)

Department Directive 6.10

In 2011, the Department adopted Directive 6.10, detailing its policy regarding the use of social media and social networking by both police officers and civilian personnel. (Joint Exhibit 7.) As background, the Directive states: “[I]t must be formally and universally recognized that the personal use of social media has the potential to impact the [D]epartment as a whole, as well as individual members serving in their official capacity. As such, this policy provides information of a precautionary nature as well as prohibitions on the use of social media by [D]epartment personnel.” (Joint Exhibit 7.)

It also references:

As members of the Philadelphia Police Department, employees are embodiments of its mission. It is, thus, essential that each member accept his or her role as an ambassador of the [D]epartment. In doing so, each member must strive to maintain public trust and confidence, not only in his or her professional capacity, but also in his or her personal and on-line activities. Moreover, as police personnel are necessarily held to a higher standard than general members of the public, the on-line activities of employees of the police department shall reflect such professional expectations and standards.

described him as an “all around police officer” who was well respected by the command staff, his fellow officers and the local community. (Tr. II: 125-126.)

⁴ Young’s personnel file includes commendations for bravery heroism and merit, as well as letters of appreciation from members of the public. (Joint Exhibit 19.)

(Joint Exhibit 7.)

In regard to policy, the Directive specifies that “all existing laws, rules, regulations and directives that govern on- and off-duty conduct are applicable to conduct associated with social media and networking.” (Joint Exhibit 7.) In addition to proscribing posting while on duty and using City or Department property to post, whether on or off duty, it prohibits:

[U]sing ethnic slurs, profanity, personal insults, material that is harassing, defamatory, fraudulent or discriminatory, or other content or communications that would not be acceptable in a City workplace under City or agency policy or practice.

[D]isplaying sexually explicit images, cartoons, jokes, messages or other material that would be considered in violation of the City Policy Preventing Sexual Harassment in City Government.

(Joint Exhibit 7.)⁵

The Directive also instructs:

There is no reasonable expectation of privacy when engaging in social networking on-line. As such, the content of social networking websites may be obtained for use in criminal trials, civil proceedings, and departmental investigations.

(Joint Exhibit 7.)

In his testimony, Young acknowledged being aware of Department Directive 6.10 following its adoption in or about May 2011. (Tr. II: 15-16.) The Directive, he related, was distributed at roll call without much explanation. (Tr. II: 17-18.) He denied receiving any training regarding the Directive until after he had been placed on restricted duty in 2019 in connection with the IAD investigation of his Facebook posts/comments at issue here. (Tr. II: 16.) This training, he recalled, included instructions against improper

⁵ The Department added these specific prohibitions when it updated the Directive as of July 6, 2012. (Joint Exhibit 7.)

social media postings, while allowing for First Amendment protected content. (Tr. II: 16-17.)⁶

Plain View Project

The Plain View Project refers to a database established by a private organization and made public in June 2019, which contains Facebook posts made by current and former police officers of various police departments in the United States, including the Philadelphia Police Department. The Plain View Project's website includes a disclaimer that states:

The Facebook posts and comments in this database concern a variety of topics and express a variety of viewpoints, many of them controversial. These posts were selected because the viewpoints expressed could be relevant to important public issues, such as police practices, public safety, and the fair administration of the law. The posts and comments are open to various interpretations. We do not know what a poster meant when he or she typed them; we only know that when we saw them, they concerned us. We have shared these posts because we believe they should start a conversation, not because we believe they should end one.

The posts and comments included in the database comprise portions of a user's public Facebook activity, and are therefore not intended to present a complete representation of each person's Facebook presence, or each person's view on any given subject. Inclusion of a particular post or comment in this database is not intended to suggest that the particular poster or commenter shares any particular belief or viewpoint with any other posters or commenters in the database. Links to the original page from which each post was obtained are provided so you can see the context of the post if you wish.

(Joint Exhibit 16.)

Internal Affairs Division ("IAD") Investigation

Deputy Commissioner Robin Wimberly testified that the Department first learned of the Plain View Project in early Spring 2019. (Tr. I: 70.) At that time, she said, a

⁶ In a prior arbitration between the City and the Union, Staff Inspector Fran Healy testified that this training was conducted in Summer 2019 after the public release of the Plain View Project's database of social media posts. The training, he averred, included a review of Directive 6.10 and explained the scope of First Amendment protected speech. (Joint Exhibit 12.)

representative of the Plain View Project advised that Department employees were posting offensive or inappropriate material to their Facebook accounts. The representative, she averred, identified seven officers involved, which did not include Young. (Tr. I: 70.) Copies of the referenced posts, she said, were not provided.

Several months later, she related, the Plain View Project released a public database containing all of the offending social media posts that it had compiled, which included the online activity of approximately 325 officers of the Department. (Tr. I: 70-72.) As a consequence, she said, the Department's Internal Affairs Division ("IAD") commenced an investigation of each of the identified officers for Facebook posts possibly violative of Department Directive 6.10.

In his testimony, [REDACTED], an IAD investigator, confirmed being assigned to investigate Young, among other officers, in response to the Plain View Project database. (Tr. I: 35.) Describing his investigative process, he recounted following a common practice in interviewing each officer, including Young. In particular, he said, Young was shown all of the Facebook postings attributed to him by the Plain View Project and asked to confirm he authored each one, which he did. (Tr. I: 38-39; Joint Exhibit 6.)⁷

Young, he stated, was not questioned as to the reason for any of the posts or asked to explain them. The investigation, he said, also did not involve a review of Young's Facebook account or the links to any of the articles, videos or photographs included in Young's posts/comments at issue here. (Tr. I: 36-37.)

⁷ According to the IAD Report, [REDACTED] showed Young 21 Facebook posts or comments attributed to him by the Plain View Project. (Joint Exhibit 6.) Deputy Commissioner [REDACTED] confirmed that this investigative process was followed with all of the Police Officers implicated by the Plain View Project. (Tr. I: 72-73.)

Following the completion of the Young's interview, he confirmed submitting his investigative report through the chain of command. (Tr. I: 37.) Ultimately, he said, it was determined that certain of Young's posts were found to have violated the Department's Social Media Policy. (Tr. I: 40; Joint Exhibit 6.)⁸

Young's Discharge

Deputy Commissioner Wimberly, whose responsibilities include overseeing IAD, testified that the release of the Plain View Project database provoked a public outcry as to many of the posts attributed to the Department's officers. (Tr. I: 71, 98.) In expressing outrage, she said, members of the community demanded swift discipline of the offending officers and expressed having experienced biased treatment by Department members. (Tr. I: 71-72.) In addition, she averred, the matter produced substantial negative media coverage of the Department and adversely affected morale among the Department's officers, who are representative of a high degree of diversity. (Tr. I: 98).

In response, she recounted attending community meetings with then Commissioner [REDACTED] [REDACTED] to hear and address the public's concerns. (Tr. I: 71.)

Addressing the IAD investigations of the 325 officers implicated by the Plain View Project, she related that all substantiated violations of the Department's Social Media Policy were referred to an outside law firm, which assessed whether the offending posts constituted constitutionally protected speech. All posts found protected, she said, were disregarded for disciplinary purposes. (Tr. I: 72.)⁹

⁸ On cross-examination, Saba reported having no knowledge as to which of Young's posts were found to be violative of the Department's Social Media Policy. (Tr. I: 58.)

⁹ Deputy Commissioner [REDACTED] also stated that any posts made prior to the adoption of the Department's Social Media Policy were not considered in assessing discipline. (Tr. I: 72.)

Of the remainder, she averred, the “most egregious” cases were referred to then Commissioner Richard Ross and his executive team for review.¹⁰ Included among these, she said, were thirteen of Young’s posts/comments. (Joint Exhibit 13.)

These posts/comments, which Young made between July 9, 2012 and February 24, 2018,¹¹ consist of the following:

1. **February 8, 2014.** Young commented “Ban Islam from all Western Nations” in response to a post by Michael Bottum, another member of the Department. Bottum’s post included a photograph depicting a group of men wearing Middle-Eastern attire standing in front of a burning American flag, which is captioned: “Happy Ramadan from Salaam Mosque Detroit! Greetings from the religion of peace to all of America. Convert or die.” In addition, below the photograph, the following quote appears: “The future must not belong to those who slander the prophet of Islam.” Barrack Hussein Obama. Finally, Bottum wrote, “What a Disgrace this Guy is!! Lets (sic.) hear your Thoughts...???”
2. **June 14, 2016.** The original post consisted of photograph with a link to freedomdaily.com, labeled “Muslim terrorist kills French Police Chief and wife while livestreaming on Facebook – “Allahu...” In response, Young commented, “Ah, where ever Islam goes it brings peace and happiness. NOT!!”
3. **June 18, 2013.** In this post, Young provided a link to conservativepapers.com, which is captioned, “Muslim Refugees, Yes – Persecuted Christians – Christians are in imminent danger across the world, and...” and included a photograph of several men holding a boy while another individual strikes him with a stick. The post also contained Young’s comment, “Islam on the march.”
4. **July 30, 2017.** In this post, Young commented, “I hope the people of the West wake up to this Islamic invasion before it[s] too late.” This statement responded to a post by Laszlo Zsazados, which included a photograph of the ruins of a medieval castle with the notation that it had been built to shelter people against the Ottoman Empire invasions.
5. **November 13, 2015.** Young’s comment here relates to another post by Michael Bottum, in which he first referenced, “Another terrorist attack in Paris ... 30 dead so far ... I wonder if the religion of peace is responsible???”

¹⁰ In addition to [REDACTED] the executive team included Deputy Commissioners [REDACTED] [REDACTED] [REDACTED] and [REDACTED] [REDACTED] (Tr. I: 76.)

¹¹ One post is dated February 24 without reference to a year. It was represented that any post without a year relates to 2018.

and later remarked, “You sow what you reap ... France let these animals in This is all coming to a city near you” In the immediately following comment, Young replied, “Hey they’re letting [them] in here too.” And in a response to a comment regarding President Obama, he also wrote, “Treasonous POS.”

6. **December 2, 2015.** Here, Bottum posted, “It appears that the religion of peace is responsible for the most recent mass shooting in San Bernardino, CA.” In reply, Young commented, “That pesky Religion of Peace always up to something.”
7. **May 10, 2014.** Responding to a post by William Sperber, Young commented, “Ban Islam from our country.” Sperber’s post included a link to toprightnews.com captioned, “300 Somali Terrorists Who Crossed the Boarder Still At Large Inside the U.S.,” along with a video depicting a man in Middle-Eastern attire and a subtitle that reads, “are guaranteed to kill 330,000 Americans in a single hour.”
8. **January 23, 2016.** Commenting on another Zsazados post, Young questioned, “Why are we allowing these savages into America?” Zsazados’ post shared a video with a warning label that it may contain violent or graphic content. It also included his statements: “If anyone tries to tell you that all cultures are equal and diversity and all – just take a look. I reject this culture!!!!!!!!” and “This is the culture they are importing to the USA for the last 20 years. European immigration is almost non-existent anymore to America. All third world, so called diversity and cultural experience you need.”
9. **June 19, 2016.** Responding to a post by Bottum that the “gay community is buying more firearms for protection...,” Young remarked, “Protect us, under this president they are working against us importing thousands of Muslims into our country.”
10. **July 12, 2015.** The post, which was initiated by Bottum, includes a linked video from 800whistleblower.com, captioned, “Homosexuals Throw Human Excrement At Christians, And Wipe Their Anuses With Pages of the Bible.” In reply, Young wrote: “Liberalism is truly a mental disorder.” Then, in an exchange with another commenter, he related, “Ed as a cop I’ve had the misfortune to [be] detailed to events like this. I’m sure Michael G. Bottum had the misfortune over his career. . . . Dude my point was that even if you are right. I’ve been to similar events held in Philly.”
11. **December 20, 2017.** The post, originated by Zsazados, contains an embedded video with a violent/graphic content warning label, followed by an annotation, “Police officers broke this man’s leg after a traffic stop turned into a scuffle.”

Young, in turn, commented, “Don’t resist arrest.”

12. **February 24, 2018.**¹² The post, which was also initiated by Zsazados, includes a video of law enforcement responding to an Antifa protest, as to which Zsazados remarked, “Way to go Italian Police, this is how it’s always been done!!!” In the succeeding comments, Young noted, “I can already hear the Libs crying.”
13. **July 9, 2012.** The post, another by Zsazados, includes a link to an article from officer.com with the headline, “Border Patrol Agent Dies Following ATV Crash,” along with Zsazados’ explanation, “My son just called me about this border patrol agent in El Paso. The agent died on duty on his all terrain vehicle in the desert.” In response, Young submitted two comments: (1) “I see what they done to our department since we started and could cry. We can’t even clear a corner of drug dealers without calling for a supervisor. [H]ow are they going to address shootings. All the thug has to do is complain that the cop looked at him sternly or god forbid talked harshly and there is a major investigation;” and (2) “You’re right the political hacks have taken over and the thugs know it. We are a shadow of our former selves. At one time for better or worse the bad guys were afraid of us. Now they know the pendulum has swung in their direction and because of politics we are rendered completely ineffectual.”

(Joint Exhibit 13.)

According to [REDACTED] the Commissioner’s executive team determined that these posts/comments by Young constituted egregious violations of Directive 6.10, as they exhibited bigotry, racism, and promoted violence. In particular, she highlighted: (1) several of the posts exhibited anti-Islam bias, by suggesting Muslims are violent terrorists, calling for a ban on the religion and a bar to Muslims entering the country and mocking and dehumanizing Muslims; (2) others advocated violent responses and/or the use of excessive force by law enforcement, such as when responding to protests and resistance in effectuating an arrest following a traffic stop; and (3) one reflected racism, in that it included the racial pejorative term “thug.” (Tr. I: 78-98.)

¹² See note 11, *infra*.

For these offenses, she said, the executive team determined, consistent with the Department's Disciplinary Code, that dismissal was the appropriate response. (Tr. I: 98-99.)¹³

Adopting this recommendation, then Commissioner Ross signed a Commissioner's Direct Action ("CDA") providing for Young's discharge, as opposed to proceeding through a Police Board of Inquiry. (Joint Exhibit 17.)

Explaining the procedure once a CDA is signed, Deputy Commissioner [REDACTED] related that the assigned IAD investigator notifies the affected officer's commanding officer and the Union of the discipline to be imposed and then schedules a *Gniotek* hearing. (Tr. I: 99-100.) At the hearing, she said, the officer is issued the charges and provided the notice of discipline. In the case of a discharge, she averred, the officer receives a thirty-day suspension with intent to dismiss. (Tr. I: 100.) According to Deputy Commissioner [REDACTED] in virtually all cases, the officer is ultimately discharged upon completion of the thirty-day suspension. (Tr. I: 100).

Sergeant [REDACTED] confirmed scheduling Young for a *Gniotek* hearing on July 19, 2019, in order to issue him the charges and the notice of intent to dismiss. (Tr. I: 44-45; Joint Exhibit 5.) The hearing, he recalled, did not occur because Young elected to retire. (Tr. I: 45; Joint Exhibits 9-11.)

¹³ Dr. [REDACTED] [REDACTED] a Department Chaplain and Temple University professor, also testified for the City, addressing the impact of Young's posts on the public trust. He related that the posts highlighted anti-Muslim stereotypes, by identifying them as aggressive and destructive, and referring to them as outsiders. (Tr. I: 196-202.) Young's posts, he said, also dehumanized Muslims by comparing them to animals and commodities to be imported or sent back. (Tr. II: 199-205.) Other of Young's posts, he said, expressed xenophobia, anti-LGBTQ sentiments, racism and support for the use of excessive force against persons perceived to be different. (Tr. I: 210-228.) According to Dr. [REDACTED] he would be afraid to be stopped by an officer possessing such intense bias. (Tr. I: 229-230.)

Union Vice President [REDACTED] testified that in or about July 2019, Commissioner Ross informed him of the Department's decision regarding the imposition of discipline relative to the Plain View Project's disclosures, which included the discharge of approximately fifteen officers. (Tr. II: 132-133.) In response, he reported notifying each of the officers identified for discharge, including Young. (Tr. II: 132.)

In his testimony, Young confirmed being informed by the Union on or about July 18, 2019 of his discharge, as to which he was to receive formal notice the following day. (Tr. II: 52-53.) He reported further being advised by the Union that he could retire and grieve his discharge. (Tr. II: 53.) Although not planning to retire until his scheduled "DROP" date, December 31, 2021, he averred doing so to avoid the financial consequences of being discharged with a loss of salary and benefits. (Tr. II: 53-54.)

Young's Testimony Regarding His Facebook Posts

In testifying, Young reported establishing a Facebook account in or about 2011. (Tr. II: 13-14) He related using the account to stay in touch with friends, former colleagues and co-workers. (Tr. II: 14). According to Young, he understood that his account's privacy setting allowed only his designated friends to view his postings. (Tr. II: 14.)¹⁴

Addressing the thirteen Facebook posts for which he was discharged,¹⁵ Young stated:

- (1) **February 8, 2014** - He confirmed responding to fellow officer Bottum's post by commenting "Ban Islam from all Western Nations," but stated he intended to limit his remark to "Radical Islam." He

¹⁴ Young expressed a belief that Facebook granted the Plain View Project special access that allowed it to view his postings despite not being one of his recognized "friends." He acknowledged not having any evidence to substantiate this claim. (Tr. II: 63-64.)

¹⁵ According to Young, he did not learn of the specific Facebook posts triggering his discharge until sometime after July 19, 2019. (Tr. II: 24.)

explained that Department-provided training regarding “Radical Islam” had caused him to be concerned with non-vetted persons being granted access to the country.

- (2) **June 14, 2016** – He related that his comment regarding Islam not bringing peace and happiness represented sarcasm, which was intended as a joke for Zsazados, a friend and former officer.
- (3) **June 18, 2013** – He expressed uncertainty as to whether he authored the words “Islam on the march,” or whether instead, they were contained in the link he posted to conservativepapers.com. In explaining this posting, he recalled being concerned with the content of the linked article, which reported that radical Muslims were routinely beating up fellow refugee camp occupants for being Christians or followers of other religions.
- (4) **July 30, 2017** – He averred that his comment regarding an Islamic invasion referred to the acts of “radical Muslims” removing buildings and cultural symbols that pre-dated their “take over” of countries such as Afghanistan. Referencing the photograph included in Zsazados’ post, he expressed the belief that it was the ruin of a Christian castle that was “taken down” by “radical Muslims.”
- (5) **November 13, 2015** – He testified that his comment “they’re letting them in here too,” related to the content of the article shared by Bottum, which reported that the federal government was granting entry to unvetted persons, who had not been shown to be non-terrorists. He denied that his comment expressed agreement with the characterization of Muslims as animals. According to Young, his further comment, “Treasonous POS,” referred to government officials who would grant non-vetted persons entry into the country.
- (6) **December 2, 2015** – He understood Bottum’s post as referencing a mass shooting by a radical Muslim couple in San Bernardino, California due to their outrage over a Christmas/Hanukkah party being held in a county workplace. His comment regarding that “pesky Religion of Peace,” he explained, was intended as a joke directed to Bottum.
- (7) **May 10, 2014** – He identified the poster, William Sperber, as a former police officer and acquaintance. Addressing his comment, “Ban Islam from our country,” he expressed that it was limited to “radical Islam.”
- (8) **January 23, 2016** – He recalled that the video posted by Zsazados depicted the stoning of a pregnant woman by a group of men, which may have occurred in Pakistan. According to Young, the men were

dressed in “Middle Eastern garb,” but he was not aware whether they were Muslims. He explained that his use of the term “these savages” was a reference to “radical Islamists.”

- (9) **June 19, 2016** – In regard to his comment, “protect us, under this president they are working against us importing thousands of Muslims into our country,” he averred that “us” referred to all Americans.
- (10) **July 12, 2015** – He noted: (1) the comment “Liberalism is truly a mental disorder” represented a slogan from a radio program and was intended as a joke for Bottum; and (2) his reference to having the misfortune of being detailed to events of the type referenced in Bottum’s post was not intended to convey his objection to protecting certain groups, but rather his general dislike for parade/special event details and desire not to work a detail where such behavior occurred (i.e., throwing human excrement”).
- (11) **December 20, 2017** – He recalled that the video posted by Zsazados showed a traffic stop during which the driver jumped out of his vehicle and started fighting with police. His comment, “don’t resist arrest,” he explained, simply meant, “don’t get out of the car and fight the police. Just comply, give them your license and there wouldn’t be an issue at all.” According to Young, he did not intend to be “flip” about the incident or condone the use of excessive force. Instead, he noted, “if you engage the police in a fight, the cops might be injured or you might be injured.”
- (12) **February 24, 2018** – The video posted by Zsazados, he related, depicted protesters in Rome vandalizing property, followed by the police “swooping in” and promptly arresting them. His comment, “I can already here the libs crying,” he said, was intended as a joke for Bottum, expressing that some people might be upset by the Italian police not allowing the protest to continue. He did not recall that the video showed any violence, nor did he intend his comment to encourage or celebrate violence.
- (13) **July 9, 2012** – He averred understanding the term “thug” to refer to a violent street level criminal, and expressed his disagreement that it is a racially derogatory reference to African- American men. He recalled hearing the term used by the Commissioner and by actors in old-time gangster movies. He also noted that the posted article, which concerned the death of a border patrol agent in an ATV accident, did not involve any persons of color. Finally, he expressed being uncertain whether he had received the July 2012 revision to Directive 6.10 before posting these comments.

Young stated that while he still maintains a Facebook account, he no longer uses it other than to check a birthday. Referencing the posts at issue here, he stated, “As a whole if I could do things over, I would never have joined Facebook. It cost me my job, a job I loved, obviously this wasn’t worth everything I lost.”

Procedural History

On August 15, 2019, the Union filed the instant grievance contesting Young’s discharge. (Joint Exhibit 3.) When the parties were unable to resolve the matter at the lower stages of the grievance procedure, the Union demanded arbitration. (Joint Exhibit 4.) Pursuant to the procedures of their collective bargaining agreement (the “Agreement”), the parties selected me to hear and decide this case. (Joint Exhibit 1.)

I held a hearing in this matter at the offices of the American Arbitration Association in Philadelphia, PA, commencing on June 13, 2022, and continuing on July 29, 2022. At the hearing, the parties each had full opportunity to present evidence and argument in support of their respective positions. They did so. Upon the conclusion of the July 29, 2022 hearing, the parties elected to close by submitting post-hearing briefs. Following receipt of those briefs, I declared the hearing record closed as of December 3, 2022.

DISCUSSION AND FINDINGS

The Issue:

The issues presented and/or stipulated by the parties to be decided here are as follows:

1. Is the grievance arbitrable?

2. If so, did the City have just cause to discharge Corporal Thomas Young, effective July 19, 2019?
3. And, if not, what shall be the remedy?

Positions of the Parties

Both parties filed extensive post-hearing briefs. Their respective positions are summarized below.

City's Position.

Arbitrability. Addressing the preliminary or threshold issue of arbitrability, the City maintains that the instant grievance should be dismissed as not arbitrable for several reasons.

First, the City states, the grievance fails because it contests Young's discharge, which never occurred. Young's separation of employment, it asserts, arose from his voluntary retirement and not a dismissal by the Department.

As such, it concludes, the grievance is a nullity and not arbitrable. The Agreement, it asserts, does not permit grievances, and, in turn, arbitral review of prospective or potential actions. The plain language of the Agreement, it stresses, makes this intent clear, inasmuch as it states in Article XXI(A) that a grievance contesting a suspension or discharge must be filed "within thirty (30) days *after* the Grievant/FOP is notified of the suspension or discharge...." (Joint Exhibit 1 at 76.) By this provision, it reasons, the grievance procedure is not triggered by notice of an intent to dismiss, but rather, the actual imposition of discipline, which did not occur here.

To hold otherwise, it asserts, would allow the Union to bring premature challenges to actions not yet taken. Stated otherwise, such construction of the Agreement

would deny the City the opportunity to complete the disciplinary process before being forced to defend its decision through the grievance and arbitration procedure.¹⁶

The governing Civil Regulations, it states, buttress this conclusion as to when a discharge occurs, and, in turn, when such action becomes ripe for challenge through the grievance and arbitration procedure. It highlights in this regard that the Regulations require that before such action is taken, the employee must receive notification of the intention to dismiss, so as to allow him/her an opportunity to be heard and prevent his/her discharge. CSR 17.01. For this reason, it states, as of Young's July 19, 2019 retirement, it was legally barred from implementing his discharge and retained the right to alter that decision.

Second, it points out, to the extent the Union seeks to challenge Young's retirement, the instant grievance fails to present such a claim. As written, it notes, the grievance challenges Young's dismissal. As such, it reasons, the Union is barred from unilaterally expanding the scope of the grievance to include Young's retirement. Instead, it concludes, the Union is confined to the issue stated in the grievance, as filed. *See City of Philadelphia v. Fraternal Order of Police Lodge No. 5*, 564 Pa. 290, 296 (2001) (held grievance contesting a failure to promote grievants to rank of staff inspector could not be expanded by the union to assert an claim of underpayment for performance of staff inspector duties).

¹⁶ By analogy, it cites as support for this position, the Pennsylvania Labor Board's rejection of charges asserting violations that have not actually occurred. In particular, it notes, the Board refuses to consider a "failure to bargain" charge where the alleged unlawful action has been merely proposed. *See Assoc. of Pa. State College and Univ. Faculties v. Pa. Labor Relations Board*, 2009 WL 8173486 *5 (Pa. Commw., Oct. 22, 2009) (affirmed dismissal of charge, noting "[T]he mere announcement and subsequent approval of a policy change is not tantamount to its implementation.").

In sum, it avers, the Union is limited to contesting Young's dismissal, which is barred because Young was never discharged.

Finally, it submits, even if the Union had explicitly challenged Young's retirement as improper discipline, the outcome would be the same. The Agreement, it points out, expressly limits grievable discipline to suspensions, demotions and dismissals. It makes no provision for contesting a retirement as being discipline.

The Union's past efforts to expand the scope of the term "discipline," it avers, have failed. *See City of Philadelphia v. Fraternal Order of Police Lodge No. 5*, 181 A.3d 485, 493 (Pa. Commw. 2018) ("suspension[s], demotion[s] or dismissal[s] are the only disciplinary actions reviewable under the CBA."); *Fraternal Order of Police Lodge No. 5 -and- City of Philadelphia*, AAA Case No. 01-18-0004-7308 at 12-13 (Buchheit 2021) ("the only type of disciplinary acts explicitly referenced in the definition of 'grievances' set forth in Article XXI of the CBA are 'suspensions, demotions and discharges.'").

In sum, it submits, with Young having never been discharged, and his retirement not being grievable, the grievance must be dismissed as not arbitrable.

Merits. Alternatively, the City contends, if Young's voluntary retirement is deemed to be an arbitrable dismissal, the grievance should nonetheless be denied, because it had just cause to discharge him. It maintains that the evidence conclusively demonstrates that he violated Department Disciplinary Code Sections 1-§021-10 and 5-§011-10, by the thirteen identified Facebook posts/comments, which contravened the Department's Social Media Policy set forth in Directive 6.10. These inflammatory posts/comments, it stresses, vilified Muslims, celebrated extra-judicial violence and the use of excessive force by police and contained racial slurs. Such patently offensive

content, it states, demonstrates how little regard Young has for the communities and individuals he has sworn to protect and serve; his primary duty as a member of the Department.

The uncontroverted evidence presented, it asserts, satisfies the seven factors commonly considered in assessing just cause. These are: (1) the employee received notice of the prohibited conduct and the associated probable disciplinary response; (2) the work rule or managerial directive at issue is reasonably related to the orderly, efficient and safe operation of the employer's business and the employee's expected performance; (3) the employer conducted an investigation of the alleged misconduct; (4) such investigation was fair and objective; (5) substantial evidence exists substantiating the finding of misconduct; (6) the employer applied its rules, orders and penalties fairly and without discrimination to all employees; and (7) the discipline is proportional to the offense and the employee's record. *American Fed'n of State, County & Municipal Employees, District Council 88, AFL-CIO v. City of Reading*, 130 Pa. Cmwlth. 575, 582 n. 3 (1990).

In support of this assertion, it cites the following:

- (1) The parties' Agreement contains a Disciplinary Code, which identifies proscribed conduct and the penalties applicable to violations of those expectations. Moreover, in particular, Young acknowledged being aware of the Department's Social Media Policy at all relevant times and his obligation to comply with its terms when engaging in social media activity. As updated in 2012, the policy prohibits "using ethnic slurs, profanity, personal insults, material that is harassing, defamatory fraudulent, or discriminatory, or other content or communications that would not be acceptable in a city workplace under City or agency policy or practice." (Joint Exhibit 7.)
- (2) The Department's Social Media Policy relates directly to the orderly, efficient and safe administration of law enforcement. More specifically, the Policy supports the Department's core values of

honor, service and integrity. (Joint Exhibit 1 at 152.) Citing Staff Inspector Fran Healy's prior testimony, it stresses, the relationship between the Department's mission and Directive 6.10 is beyond challenge in that off-duty conduct violative of the Policy "directly impact[s] [the Department's] ability to serve its mission.... The issue of trust and transparency with the community [the Department] serve[s] is obviously, paramount for what [it does]. Without the community's trust, [the Department] really can't do policing." (Joint Exhibit 12.)

- (3) The evidence presented, which establishes that Young authored each of the offending posts/comments for which he was charged, satisfies factors 3 – 5. Sergeant [REDACTED] investigation by which this evidence was gathered bears the hallmarks of being thorough, fair and objective. Indeed, after affording Young ample time to review these materials, he secured Young's acknowledgement that he authored each of the posts/comments attributed to him by the Plain View Project. Moreover, there has been no showing of any bias by Sergeant Saba or any failures that would undermine the integrity of his investigation.
- (4) In view of the egregious nature of Young's offense, termination represented a proportionate response. It is within the prescribed penalty range for a first offense for his established violation of Disciplinary Code Section 1-§021-10 Conduct Unbecoming – 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. Young's posts/comments were not misinterpreted, as he claims, but reflect clear and unambiguous hate speech, as well as endorsements of the use of excessive force by law enforcement against civilians. No basis exists to explain away or minimize the gravity of these repeated offenses. Further, his abject bigotry cannot be corrected through training and/or progressive discipline. As such, the Department should not be compelled to retain an officer, such as Young, who is so diametrically opposed to its mission. Indeed, discharge represented the only appropriate disciplinary response given the grave nature of his misconduct and the degree to which it undermined the community's trust in the Department.
- (5) The Department applied its rules, directives and bargained-for Disciplinary Code fairly and without discrimination here in both issuing charges and determining the contested penalty. Indeed, the penalty of discharge was within the range prescribed by the Disciplinary Code for Young's admitted offense. The Union's attempt to show disparate treatment is unavailing, as critical distinctions exist between Young and the cited comparators. The offenses committed by

these alleged comparators vary greatly from Young's in regard to the number and offensiveness of the posts/comments at issue.

Accordingly, for all these reasons, the City asks that the grievance be dismissed as not arbitrable, or in the alternative, denied on basis that it has satisfied its burden of demonstrating that Young was discharged for just cause.

Union's Position.

Arbitrability. Contrary to the City's claim, the Union maintains that the Department did, in fact, discharge Young, thus confirming that its grievance contesting that action is arbitrable under the plain language of the Agreement.

Under established law, it notes, the issue of arbitrability in public labor arbitration is a matter to be decided by the arbitrator, as opposed to the court. *Township of Sugarloaf v. Bowling*, 563 Pa. 237, 239, 241-242 (2000) ("The issue of whether a particular matter is arbitrable pursuant to Act 111 must first be submitted to the Arbitrator.").

The City, it argues, has not satisfied its heavy burden of proving the instant grievance is not arbitrable. In support, it highlights that the following stands uncontested: (1) the Agreement authorizes the Union to grieve unjust discipline, including suspensions and discharges; and (2) per that authority, it timely grieved Young's discharge.

Young's retirement before his formal receipt of a notice of dismissal or notice of suspension with intent to dismiss, it argues, does not undermine the arbitrability of the instant grievance. The Agreement, it explains, does not prescribe that such process must occur before a grievance can be filed challenging a discharge; nor does it otherwise define "discharge."

On the evidence presented, it asserts, there can be no doubt that the City discharged Young. In particular, it cites, the Department (1) drafted charges; (2) prepared and signed all the necessary documents to effect that decision, including the CDA; and (3) issued Young a *Gniotek* hearing notice for purposes of informing him of such decision and issuing him the requisite documents. Further, it references Deputy Commissioner Wimberly's testimony that there was nothing Young could have said at his *Gniotek* hearing that would have changed the decision to discharge him.

The argument advanced by the City in contesting arbitrability, it notes, has been rejected by at least one other arbitrator, under a similar circumstances. *See Fraternal Order of Police Lodge No. 5 -and- City of Philadelphia*, AAA Case No. 01-19-0002-2847 (Brown 2021) ("*McCammitt*") (held grievance arbitrable despite grievant's retirement prior to dismissal but after receipt of notice of suspension with intent to dismiss for violating the social media policy). The reasoning in *McCammitt*, it argues, calls for the same result on the record here, given the Commissioner's unequivocal notice to the FOP of his decision to discharge Young.

The practical realities surrounding the disciplinary process, it states, demonstrate the finality of that decision. Simply put, it submits, the Department does not rescind a Notice of Suspension with Intent to Dismiss once it issues one.

Young's decision to file for pension benefits, it reasons, does not conflict with his having been discharged. Citing Arbitrator Brown's finding in *McCammitt*, it posits, his efforts in that regard are consistent with an employee's duty to mitigate damages when contesting his/her discharge. *Id.* at 13.

In sum, it concludes, the grievance properly challenges Young's discharge, which was a certainty and not speculative. Accordingly, for all the reasons stated, it avers, the grievance should be found arbitrable.

Merits. Turning to the merits, the Union argues that the City lacked just cause to discharge Young based upon the thirteen identified Facebook posts/comments. It contends that the City has failed to meet its burden of proof in this regard.

Citing *Enterprise Wire Co.*, 46 L.A. 359 (1965), it asserts that just cause should be assessed by applying the "seven tests" identified by Arbitrator Carroll Daugherty in deciding that case. Under that standard, it states, if the employer's evidence falls short of meeting one or more of those tests, "just cause either was not satisfied or at least was seriously weakened in that some arbitrary, capricious or discriminatory element was present." Koven & Smith, *Just Cause: The Seven Tests*, at 23 (Kendall/Hunt 2d ed., 1992).

On the record here, it submits, the City has failed to satisfy several of Daugherty's seven tests. In particular, it cites, the Department's failure: (1) to give Young adequate notice of the prohibitions of the Social Media Policy and the serious discipline applicable to violations; (2) to conduct a fair, thorough and impartial investigation substantiating the charged violations; (3) to discipline Young consistent with its response to other officers engaging in substantially similar conduct; and (4) to impose a penalty proportionate to Young's conduct with consideration of his length of service and work record.

These deficiencies in the City's proof, it argues, demonstrate that Young's discharge contravenes due process, fairness and equity, all of which lie at the heart of the just cause standard.

In regard to notice, it asserts, the Department failed to adequately inform Young as to the impropriety of his charged conduct or the severity of the discipline that would follow from such actions. Just cause, it states, requires that the employee receive clear notice of both the employer's expectations and the range of penalties for non-compliance.

The failure of notice here, it argues, arises from several factors. These include: (1) the Department's lack of active enforcement of its Policy through monitoring of its officers' social media accounts and advising them of what constitutes appropriate activity; (2) the absence of guidance regarding the scope of First Amendment protected speech; and (3) the lack of any formal training regarding the Policy until 2019.¹⁷

Turning to the investigation underlying Young's discharge, it asserts, the Department's efforts were seriously deficient. The testimony and documentary evidence, it highlights, reveals the Department's cursory process, which focused exclusively on confirming Young authored the identified posts/comments. No inquiry was made to determine his intent or his awareness that the posts/comments violated the Policy. Young's ability to volunteer such explanatory information, it maintains, cannot cure the Department's failings in this regard. Doing so, it reasons, would allow the City to improperly shift onto Young its burden of demonstrating that the referenced

¹⁷ The City's claim that an officer should just know where the line is between constitutionally protected speech and prohibited activity under the Policy, it maintains, is refuted by the Department's belated social media training in 2019, which was provided to address that very uncertainty. Moreover, it notes, the Department required the assistance of an outside law firm to determine what speech could be punished in response to the Plain View Project without violating the First Amendment. It argues further that the Department's neglect in this regard is compounded by its earlier provision of mandatory Radical Islam training to all officers, including Young. The Department's failure to instruct its officers as to the intersection between that training and their obligations under the Social Media Policy, it contends, created uncertainty as to the type of speech prohibited by the Policy. It points out in this regard that the majority of Young's offending posts/comments reflect content from the Radical Islam training (e.g., a "common misconception" is thinking of Islam as the "religion of peace"). (Union Exhibit 17 at 3.)

posts/comments violated the Policy. *See City of Philadelphia -and- Fraternal Order of Police Lodge No. 5*, AAA Case No. 01-19-0002-2846 (Brown 2021) (“*Fenico Award*”).

The Department’s failure to investigate the purpose and meaning of Young’s posts/comments, it maintains, is fatal to the City’s case. His posts/comments, it reasons, cannot be deemed violative of the Policy by simply taking them at face value, as the Department chose to do so.

By proceeding in this manner, it notes, the Department relied upon erroneous or baseless assumptions in finding several of his posts/comments to have violated the Policy. As to these four posts/comments, it explains:

(1) **July 9, 2012** – (a) the City did not determine whether Young, prior to posting the comment at issue, had received and was on notice of the July 2012 revision to the Policy expressly proscribing discriminatory remarks; and (b) it assumed Young’s use of the term “thug” was a racial pejorative for African-American males, even though it did not review the underlying article, which did not even concern African-American men;

(2) **February 24, 2018** – the Department, having neglected to review the posted video, was without basis to conclude that it depicted force, excessive or otherwise, and thus erred in categorizing Young’s comment (i.e., “I can already hear the Libs crying”) as endorsing violence or excessive force by law enforcement;

(3) **December 20, 2017** – the underlying video, which the Department did not review, depicted a suspect fighting with police officers during a traffic stop; as such, the Department incorrectly assumed Young’s comment (i.e., don’t resist arrest) represented a flippant remark favoring excessive force, as opposed to a common sense statement; and

(4) **July 12, 2015** – the Department did not consult the underlying article, and thereby erred in concluding that Young’s “misfortune” comment concerned protecting certain groups, rather than expressing his aversion to being detailed to events, in general, and to activity of the type occurring at this one, in particular (i.e., throwing human excrement).

For these reasons, it states, the City has failed to meet its burden of showing these four posts/comments violated the Policy.

As to Young's other nine posts/comments, it states that when evaluated in light of all of the relevant circumstances, they do not represent anti-Islam remarks, as the Department charged. It explains that while Young's language should have been more precise, these posts/comments concerned high-profile terrorist attacks or the violent statements and actions of radicals. When properly contextualized, it concludes, these post/comments represent efforts by Young to communicate the dangers of jihadism, as addressed in the Department's Radical Islam training. Simply put, it insists, Young did not intend to these posts/comments to express anti-Islam bias, but instead to warn of Jihad, consistent with his training.

Alternatively, it argues, even if all thirteen of Young's posts/comments are found violative of the Policy, the City still lacked just cause for his discharge due to the Department's failure to consistently discipline other officers committing the same or substantially similar offense.

As proof of this failure, it cites four other officers who received more lenient discipline (i.e., thirty-day suspensions), despite being charged with Conduct Unbecoming in violation of Disciplinary Code Section 1-§021-10, based on posts similar in quantity and quality to Young's (i.e., Officers [REDACTED] [REDACTED] and [REDACTED] and Corporal [REDACTED]).¹⁸ The Department, it notes, failed to provide any reasonable explanation demonstrating Young was properly deemed beyond remediation, whereas, these other four officers warranted an opportunity to correct their behavior.

¹⁸ It also highlights that [REDACTED] 30-day suspension was mitigated in arbitration to a 15-day suspension due to inconsistency in the level of discipline imposed for violations of the Social Media Policy. *See FOP Lodge No. 5 -and- City of Philadelphia*, AAA Case No. 01-19-0004-2311 (Reilly 2021).

Further, it points out that other officers implicated by the Plain View Project received even more lenient discipline for similar or more egregious violations of the Policy. In particular, it cites:

(1) Lieutenant [REDACTED] [REDACTED] -- one-day suspension for racially disparaging and mocking statements);

(2) Officer [REDACTED] [REDACTED] -- no discipline for substantiated violation, including the use of the term “animal” in relation to an article regarding Muslims;

(3) Detective [REDACTED] [REDACTED] -- was not charged with conduct unbecoming and received only a reprimand for posts that were racially offensive and endorsed violence, despite a prior Social Media Policy violation; and

(4) Officer [REDACTED] [REDACTED] -- two-day suspension for posts with racist and anti-Islam content.¹⁹

In sum, it states, no basis exists to distinguish Young from these other officers as to the level of discipline imposed. As such, it submits, his discharge was undoubtedly arbitrary, and thus, without just cause.

Finally, it asserts that on the record here, the penalty of discharge is disproportionate to any proven misconduct by Young. In determining proportionality, it argues, Young was entitled to consideration of his extended and exemplary record of service without any prior discipline relative to the Policy or a lack of professionalism. In addition, it cites the absence of any negligence or mal-intent that would be necessary to justify the severe penalty imposed here.

In sum, it concludes that Young is exactly the kind of employee for whom progressive discipline is appropriate. And, therefore, if any penalty is due on the record here, it should be significantly less than that imposed.

¹⁹ It also cites Officer [REDACTED] [REDACTED] who received a 12-day suspension in January 2019 for violating the Social Media Policy by posting a photograph of himself in “Black face.”

Accordingly, for all of these reasons, it submits that the grievance should be granted and the requested relief awarded.

Opinion

Arbitrability

In contesting arbitrability of the instant grievance, the City does so on substantive grounds. More specifically, it maintains that the Union seeks to grieve an event that never occurred; namely Young's discharge.

Resolving a disputed matter of substantive arbitrability requires application of a two-part test. This standard requires determining whether: (1) the parties have entered into a valid agreement to arbitrate; and (2) the parties' dispute falls within the scope of their agreement. In doing so, general principles of contract construction control.

Upon examination of the record, I am satisfied that the evidence supports a finding that both prongs of this test have been met here.

First, per Article XXI of the Agreement, the parties have clearly entered into a valid agreement to arbitrate. Specifically, they have committed to a multi-step procedure for processing grievances to resolution, which culminates in arbitration. For this purpose, they have defined a grievance as being "limited to contract violations, disciplinary suspensions, demotions and discharges." (Joint Exhibit 1 at 75.)

Second, the instant grievance, on its face, presents an issue that plainly falls within the scope of the parties' agreement to arbitrate. In contesting Young's discharge, the grievance, by definition, states a grievable, and, in turn, an arbitrable matter.

The question that remains to be decided then is whether the City actually discharged Young, and thereby generated a grievable dispute. On review of the

Agreement's grievance and arbitration procedure, I am satisfied, as the City asserts, that it does not permit arbitration of contemplated discipline. Instead, it limits arbitration to the specific acts identified, including discharge. It does not allow for advisory opinions by an arbitrator regarding actions under consideration. Indeed, I do not understand the Union to claim otherwise.

On the record here, I am satisfied that the Department crossed the line from contemplated to actual discipline. Simply put, it made a definite decision to discharge Young prior to his retirement on July 19, 2019. There was nothing speculative or equivocal about that determination. It was a certainty.

In reaching this conclusion, I take note that prior to July 19, 2019, the Department drafted the charges and the Commissioner signed the CDA confirming that discharge would be the penalty imposed upon Young for those transgressions. (Joint Exhibits 5 & 17.) Further, on July 18, 2019, the Commissioner notified the Union of his decision to discharge Young and approximately fourteen other officers for violating the Social Media Policy based upon the Plain View Project's disclosures. As Union Vice President [REDACTED] testimony reflects, there was nothing conditional or qualified about the Commissioner's notification. The Union thus informed Young and the other affected officers that they were being discharged.

All that remained was for Sergeant [REDACTED] to conduct a *Gniotek* hearing and issue Young the Notice of Suspension with Intent to Dismiss. I am persuaded that this step was ministerial in nature and would not have altered the decision to discharge Young. Indeed, Deputy Commissioner Wimberly acknowledged as much, stating there was

nothing that Young could have said at the *Gniotek* hearing that would have caused the Department not to issue him the notice of discharge. (Tr. I: 167.)

In sum, the die had been cast. A final decision had been made to discharge Young. Therefore, I am compelled to conclude that per the Agreement, the Union had the contractual right to contest that decision by filing the instant grievance.

Young's act of filing for retirement did not alter these circumstances. There is nothing in the record that suggests he acted to preempt or derail a decision as to his discharge. To the contrary, the Department had finalized that decision before he took that step. As such, I persuaded that he acted purely for financial reasons; namely to maintain a source of income despite his unavoidable separation from employment. The Department confirmed this reality by placing the charges in Young's personnel file with a memorandum stating, "If this employee s ever returned to duty, this will be processed." (Joint Exhibit 1.)

Accordingly, for all these reasons, I conclude that the grievance is arbitrable as to the issue of whether the City had just cause to discharge Young.²⁰

Merits

In turning to the merits of the instant grievance, some preliminary comments are appropriate here.

There can be no dispute that the City's Police Department has a legitimate interest in setting standards governing the off-duty conduct of its officers. Indeed, its

²⁰ The City also contests the arbitrability of the instant grievance on two additional grounds. In particular, it avers: (1) the Union has improperly expanded the scope of the grievance to encompass Young's retirement; and (2) Young's retirement is not a grievable matter under the Agreement. It is unnecessary for me to address these two additional theories, inasmuch as I have concluded that the grievance, as written, presents a grievable issue in contesting Young's discharge.

obligation to maintain the public's trust in effectively fulfilling its mission commands as much. In setting such expectations, it may properly hold its officers as members of law enforcement to a higher standard than applies to the general public, consistent with its core values of honor, service and integrity. (Joint Exhibit 7.)

For this reason, conduct that undermines public confidence in an individual officer or the Department in general is an appropriate subject to be addressed. Plainly, the scope of such conduct extends to social media use. The need is obvious. Social media posts have the potential to reach a very wide audience, and, as such, when improper, their negative impact can be far ranging and severe. Such effect was evident from the release of the Plain View Project's database of posts from members of law enforcement, including 325 of the Department's officers.

Consequently, I am satisfied that the Department's Directive 6.10 defining the permissible use of social media and networking by its officers, while allowing for First Amendment protected speech, is reasonably related to the orderly, efficient and safe administration of its law enforcement mission. To that end, the Policy proscribes, among other matters:

using ethnic slurs, profanity, personal insults, material that is harassing, defamatory, fraudulent or discriminatory, or other content or communications that would not be acceptable in a City workplace under City or agency policy or practice.

(Joint Exhibit 5.)

An officer who breaches the standards set by this Directive can and should expect that discipline will follow.

The City, of course, bears the burden of proof, where, as here, it charges an officer with disregarding such responsibilities. In particular, it must establish through the

weight of the credible evidence that Young is guilty of the charged offenses. It must also demonstrate that the level of discipline imposed is appropriate.

The Union, on other hand, bears no parallel burden. It need not disprove the charges against Young. Indeed, he is entitled to the presumption of innocence.

After a careful and thorough review of the record and the parties' respective arguments, I am convinced that the City has failed to meet its burden. More specifically, although I am persuaded that Young committed certain of the charged violations of the Social Media Policy, I do not find on the record here that the City had just cause for the level of discipline imposed; namely, discharge. My reasons for this conclusion follow.

The Department's decision to discharge Young stems from thirteen posts/comments that he made to his Facebook account during 2012 – 2018. These posts reportedly violated Directive 6.10 and, in turn, triggered the cited charges under the Department Disciplinary Code – (1) Section 1-§021-10 - Conduct Unbecoming; and (2) Section 5-§011-10 – Neglect of Duty.²¹ As I understand, the Neglect of Duty charge rests upon the alleged violations of Directive 6.10; while the purportedly egregious nature of Young's posts provides the basis for the more serious Conduct Unbecoming charge.²²

Addressing the issue of whether Young's posts violated the Department's Social Media Policy, I am persuaded from my review of the record that the answer is yes as to eight of them.

²¹ The Disciplinary Code defines Conduct Unbecoming for purposes of Section 1-§021-10 as: "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;" whereas, it identifies Neglect of Duty under Section 5-§011-10 as: "failure to comply with any Police Commissioner's orders, directives, memorandums, or regulations; or any oral or written orders of superiors." (Joint Exhibit 1.)

²² The prescribed discipline for a first offense of Conduct Unbecoming per Section 1-§021-10 is a 30-day suspension or dismissal. In contrast, a first offense of Neglect of Duty per Section 5-§011-10 carries potential discipline ranging from reprimand to a 5-day suspension. (Joint Exhibit 1.)

By its terms, the Policy proscribes making posts or sharing content on social media that contains material that is discriminatory or harassing or would not be acceptable in a City workplace under established policy or practice. This restriction thus precludes social media activity that demeans, intimidates or ridicules persons based on any classification protected by applicable anti-discrimination statutes, including race, ethnicity and religion. In addition, the Policy bars social media posts that encourage or endorse acts of violence.

In examining the thirteen posts/comments on which the Department relied in discharging Young, I find that eight, on their face, fall into the category of prohibited content per the Policy. Stated otherwise, in contravention of the Policy, these eight posts/comments demean or ridicule Muslims, as a group, by the use of offensive stereotypes and/or portraying them as terrorists or persons committed to violence based upon their religion.

More specifically, in reaching this conclusion, I note the following as to Young's comments/posts:

February 8, 2014. This comment, on its face, indicates Young's opposition to Islam, by declaring "Ban Islam from all Western Nations." Further, in the context of the post to which he is responding, which includes a photograph of men in Middle Eastern attire standing behind a burning American flag, with the words "greetings from the religion of peace to all America, convert or die, it is apparent that his message conveys the sentiment that Muslims are violent and intent on doing harm to Americans.

I am unpersuaded by the Union's argument that the message of this post mirrors that communicated by the Department's 2008 "Radical Islam" training, which it provided

to all officers, including Young. In contrast to this post, the 2008 training did not express that all Muslims are terrorists or intent on committing acts of violence against Americans. Instead, as the power point used in conducting that training reflects, it focused on educating officers as to the potential for Islam to be misused in radicalizing individuals. This distinction is clear from the Venn diagram on the second page of the training materials, which shows Shiite Extremists and Jihadists as small subsets among the universe of Muslims. (Union Exhibit 4 at 2.)²³

Further, this comment cannot be excused based upon Young's claimed imprecision in his choice of words. Even accepting his stated intention to limit this comment to Radical Islam, the fact remains that his words conveyed otherwise and thus served to undermine the public trust by reflecting an anti-Islam bias. In doing so, he violated the Social Media Policy.

June 14, 2016. The person initiating this post shared an article reporting the murder of a French police chief and his wife by a Muslim terrorist. In responding with the comment, "Ah where ever Islam goes it brings peace and happiness, Not!!" Young, in a mocking tone, linked Islam, as a religion, to this act of violence and thereby demeaned and disparaged all Muslims. His description of the remark as a sarcastic joke intended for the original poster offers no defense. The comment remains a per se violation of the Social Media Policy.

²³ The Union repeats this argument in support of its assertion that Young's posts/comments dated June 14, 2016, June 18, 2013, July 30, 2017, November 13, 2015, December 2, 2015, May 10, 2014, January 23, 2016 and June 19, 2016, should be found not to have violated the Social Media Policy. I reject this claim for the reasons expressed above. Namely, the referenced training served to inform and raise officers' awareness as to the threat posed by "Radical Islam," whereas, Young's posts/comments, regardless of his intent, conveyed the message that all Muslims are terrorists and should be banned from the country.

June 18, 2013. The anti-Muslim sentiment conveyed by this post is clear and direct. By sharing an article referencing that Christians are in imminent danger of persecution by Muslims across the world, and adding the words, “Islam on the march,” Young expressed that all Muslims are intent on killing Christians based simply on their religion. Obviously, on its face, his post violates the Policy by disparaging Muslims in that it labels them as inherently violent and actively engaged in persecution.

July 30, 2017. In commenting that people of the West should wake up to this Islamic invasion before its too late, Young shared a view that all Muslims are an invading force to be feared. His stated concern for the acts of radical Muslims destroying cultural and religious symbols, such as reportedly depicted in the photograph shared by the original poster, does not provide him with a defense. Regardless of such intent, his words, as visible to the public, send a message that demeans all adherents of Islam, and thereby violates the Policy.

November 13, 2015. In reviewing the totality of this post, including Young’s comments, two points stand clear. First, the poster, in speculating that Islam may have been responsible for a French terrorist attack, noted “France let these animals in ... this is all coming to a city near you.” Second, Young, in turn, commented, Hey they’re letting [them] in here too.” By this exchange, it is reasonable to read Young’s comment as expressing his concurrence with the characterization of Muslims as “animals.”

Young’s more nuanced explanation that his comment reflected concern with federal officials granting non-vetted persons entry into the country is unavailing. Even if true, it serves only to reduce the gravity of his transgression. His words, on their face, remain dehumanizing of Muslims, and thus violative of the Policy.

December 2, 2015. His public comment mocking Islam cannot be excused, as he suggests, as a joke intended for the poster. Instead, by remarking, “That pesky Religion of Peace always up to something,” he effectively concurred with the poster’s suggestion that the “religion of peace” was responsible for a mass shooting in California. Regardless of his belief that the persons responsible for this crime were radical Muslims, his comment was not so limited. Instead, it links Islam and all Muslims with terrorism. Such disparagement of a religious group, no doubt, violates the Policy.

May 10, 2014. His comment to “Ban Islam from our country,” standing alone, conveys an obvious anti-Islamic sentiment. When read in the context of the entire post, which references Somali terrorists having gained access to the United States, it serves to link Islam and terrorism. His stated intent to limit his remark to Radical Islam does not alter the message received by the public; namely, Islam must be banned to protect residents of the United States from terrorism. In portraying all Muslims as terrorists, he committed an obvious violation of the Policy.

January 23, 2016. This post originated with a video and the poster’s statement rejecting that all cultures are equal. According to Young, the video, which the Department concededly did not access, depicted the stoning of a woman in Pakistan, to which he commented, “Why are we allowing these savages into America.” On review, I am not persuaded that Young’s comment can be deemed an endorsement of the poster’s disparagement of non-European cultures, as opposed to an understandable reaction to the violence that he reported observing in the video. In sum, with no evidence other than the post, I am not satisfied that the City has established the necessary linkage between Young’s comment and the Policy’s proscriptions, so as to demonstrate a violation.

June 19, 2016. This comment, by which Young states a need for protection due to the federal government importing thousands of Muslims into this country, plainly expresses an anti-Islamic bias. On its face, it suggests that all Muslims are to be feared. This sentiment by Young is bolstered when his comment is assessed in the context of the poster's initial remark commending the gay community for purchasing more firearms because the government cannot protect them. By portraying all Muslims as group to be feared, Young's comment represents precisely the type of disparaging and discriminatory comment that the Policy prohibits.

July 12, 2015. Contrary to Deputy Commissioner Wimberly's explanation of the Policy violation committed in this instance, I am not persuaded that Young's comment attacks or demeans a protected group or classification. The original post does include a video with the caption "Homosexuals Throw Excrement at Christians ..." Nonetheless, with only the post upon which to rely, I do not find a sufficient basis to conclude that Young's statement indicating he had the "misfortune" of being detailed to events like "this" expresses a desire not to be assigned to protect LGBTQ groups or any other group. Instead, I find equally plausible Young's explanation that his comment expressed his displeasure with details, in general, and the referenced behavior, in particular, as opposed to protecting any particular group. In sum, in contrast to other posts addressed above, Young's comment here do not represent a per se violation of the Policy. In concluding otherwise, I am compelled to find that the Department relied upon unjustified assumptions and speculation.

December 20, 2017. On review, I find a lack of evidentiary support for the Department's determination that Young's comment (i.e., "Don't resist arrest") endorsed

violence or excessive force by law enforcement. Other than the video, which the Department did not review, the only other information in this post by which to judge Young's comment is the caption, "Police Break Man's Leg." I find this reference too ambiguous to classify Young's comment as expressing support for the use of excessive force. Stated otherwise, without confirmation that the video depicted an unjustified physical response by the police, I cannot agree with the characterization that Young's comment represented a flippant remark that endorsed such inappropriate conduct, while also exhibiting a callous disregard for the injuries sustained by the person being detained.

February 24, 2018. Here too, the record reflects an insufficient basis to conclude that Young, by commenting, "I can already hear the Libs crying," was supporting the use of excessive force by law enforcement. On its face, his comment, standing alone, is simply insufficient to support that determination. Instead, such finding requires context, which is lacking here.

The Department never reviewed the posted video to which his comment relates. Likewise, the poster's statement "Way to go Italian Police, this is how it's always been done, does not provide the bridge by which to find Young's comment violated the Policy. To the contrary, the statement is too vague to do so. It is equally consistent with Young's account that the video simply showed the police halting an Antifa protest once the participants began engaging in vandalism.

In sum, the Department has failed to establish that Young's comment here violated the Policy.

July 9, 2012. Young's Policy violation in this instance, according to Deputy Commissioner Wimberly's testimony, stems from his use of the term thug, which she

described as a racial slur for African-American males. I find this conclusion unsupported by the record. Unlike certain more vile and egregious racial epithets, the term thug, standing alone, does not, without more, express a racial aspersion. To the contrary, its common dictionary meaning is much more general, referring to a violent or brutish criminal or bully. *See Merriam Dictionary (2022).*

Therefore, greater context is required beyond Young's mere use of term "thug" in order to conclude it represents a racial slur, whether intentional or otherwise. Such additional evidence is absent on the record in this case.

I find nothing in Young's comments suggesting his use of the term carried a racial connotation. To the contrary, he employs the term as a general reference to street-level criminals, who he also calls "bad guys." Nor is there any information in the balance of the post that even suggests such context. In fact, the post originated with the poster sharing an article reporting on the death of a border patrol agent from injuries sustained from an on-duty all terrain vehicle accident. There is nothing indicating that this article, which the Department did not review, concerns or involves African-American Males.

As such, it necessarily follows that the City has not demonstrated that Young's referenced comment violated the Policy.

Having found that the City proved that Young violated the Department's Social Media Policy by eight of the thirteen identified posts/comments to his Facebook account, there remains the issue of whether the level of discipline imposed was an appropriate response.²⁴ I conclude that it was not.

²⁴ These demonstrated violations of the Social Media Policy, I am satisfied, serve to substantiate the charges here -- (1) Article I - Conduct Unbecoming, Section 1-§021-10; and (2) Article V – Neglect of Duty, Section 5-§011-10. The violations, on their face, reflect a neglect of duty for purposes of Section 5-§011-10, inasmuch as they constitute a violation of a Commissioner's directive. Further, when taken

In beginning this analysis, I note that a basic tenet of just cause mandates that the penalty must be proportionate to the offense committed.

Under this standard, it is well recognized that certain offenses so undermine the employment relationship that they call for summary discharge, even for a first offense. The charges here, however, do not fall into that category. Indeed, the parties have so agreed. Under the Department's Disciplinary Code, which has been negotiated and incorporated into the Agreement, the Conduct Unbecoming charge (i.e., Section 1-§021-10), the more serious of the two, does not mandate dismissal for a first offense. Instead, it defines the permissible range of discipline as a thirty-day suspension or discharge.

Accordingly, determining the proportionate response here requires consideration of the totality of the relevant circumstances.

As an initial matter, I take note that Young's misconduct was no minor matter. It occurred repetitively over a period years. Moreover, by his offending posts/comments, he breached the public trust. Regardless of his stated intent, these posts/comments express clear anti-Islamic sentiments and demean Muslims by identifying them as a group to be

together, they also confirm a course of conduct by which Young exhibited little regard for his duties as a police officer, and thereby establish the Section 1-§021-10 charge. In so finding, I reject the Union's due process challenge by which it asserts the City failed to conduct a fair and thorough investigation. Contrary to the Union's assertion, I am not persuaded that the City had an obligation to examine the source material referenced in each post/comment and inquire as to Young's intent in making these posts/comments. Such further examination may have made for a more thorough investigation and avoided charging those violations that I have found could not be substantiated. However, for the reasons I have explained above, each of the eight offending posts/comments, on its face, violates the Social Media Policy. Indeed, as to those posts/comments, their content, along with Young's confirmation of having posted each, as confirmed by the Department's investigation, was sufficient to prove his misconduct. Likewise, I am unpersuaded by the Union's claim that Young lacked sufficient notice of the Policy's prohibitions in regard to his offending posts, all of which fall squarely within the Policy's prohibition against posting material that is discriminatory or harassing or would not be acceptable in a City workplace under established policy or practice. This restriction is clear from a simple reading of the Policy, and, as such, should have been known to Young, who acknowledged receiving and reviewing the Policy. Finally, I find unavailing the Union's assertion that the Department's failure to actively enforce the Policy by monitoring its officers' social media activity for violations unfairly deprived officers, such as Young, from receiving notice and an opportunity to conform to the Department's expectations regarding permissible social media activity. I find no basis to impose such an obligation on the Department.

feared based upon a propensity for terrorism and violence. As such, by this conduct, he cast doubt on his ability to perform his duties without bias and consistent with the Department's core values of honor, service and integrity. Plainly, his offenses called for substantial discipline.

I am persuaded, however, that a penalty short of discharge is the appropriate response.

In reaching this result, I have weighed Young's length of service and record of performance, factors that the Department declined to assess. I am convinced that they mitigate against dismissal.

As the evidence shows, Young has thirty years of service with the Department, without recent record of serious discipline. Further, his annual evaluations reflect exemplary performance, which is further substantiated by the numerous commendations that the Department issued him for his on-duty actions.

These factors cause me to conclude that Young should be afforded an opportunity to demonstrate that he can and will reform his social media activity in order to comply with the requirements of Directive 6.10. His unblemished work record, which confirms his compliance with all other Department directives and requirements, indicates that he is capable of doing so. I do not find the gravity of his Social Media Policy violations to suggest otherwise.²⁵

²⁵ I am persuaded in this regard by his testimony that his anti-Islamic posts/comments were intended to be limited to "Radical Islam." As I have stated, such intent does not excuse his transgression in making posts/comments that, on their face, publicly demeaned Islam and disparaged all Muslims, as a group. It does, however, serve to mitigate the gravity of his offense and, in turn, the appropriate level of discipline. Indeed, it demonstrates that Young is capable of reforming his conduct and complying with the requirements of the Department's Social Media Policy.

Finally, in regard to proportionality of penalty, the just cause standard obligates the Department in meting out discipline to do so even-handedly absent reasonable justification to distinguish between employees guilty of the same or similar offense. Stated otherwise, notwithstanding convincing proof of both the offending conduct and the proportionality of the discipline imposed, just cause must be found lacking when there is credible evidence of unjustifiable disparate treatment.

Applying this standard to the evidence presented here, I find the Department has not been consistent in the level of discipline imposed for violations of its Social Media Policy. This fact is evident from a comparison of Young's discharge to the discipline other officers received for similar violations of the Policy.

In particular, the treatment of five other officers stands out. They are [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] and [REDACTED] [REDACTED]²⁶ In response to Facebook posts revealed by the Plain View Project in 2019, which violated Directive 6.10, [REDACTED] [REDACTED] [REDACTED] and [REDACTED] each received a thirty-day suspension, whereas, the Department issued Crowe a two-day suspension.

On review, I find no rational basis to justify the far more lenient response taken as to these officers for violations comparable to those committed by Young. Indeed, their posts presented a wide variety of offensive content, including material that was demeaning or harassing based on religion, race, sex/gender, ethnicity and national origin, as well as endorsements of violence. In fact, some of these posts were arguably more egregious than any of Young's posts/comments. (Union Exhibits 1-6, 8 & 12-13.) In addition, [REDACTED] was a repeat offender. She had been disciplined two years earlier for

²⁶ In support of its disparate treatment claim, the Union identified the Department's response to Social Media Policy violations committed by several other officers. However, on review, I find that they are not appropriate comparators or there is insufficient evidence to conclude there was disparate treatment.

violating Directive 6.10 based upon forty offending posts laced with profanity and offensive content that maligned the City's mayor and responded to other posters with racially harassing and threatening remarks. (Union Exhibit 1.)

On the record here, no basis exists for me to disregard such lesser discipline in assessing whether the City had just cause to discharge Young. Indeed, it compels me to conclude that just cause exists only for a penalty of less than dismissal.

In sum, giving due consideration to the mitigating circumstances discussed above and such disparity in Department's disciplining of other officers for violating Directive 6.10, I am convinced that the appropriate penalty for Young's offending posts/comments is a thirty-day suspension.

Accordingly, for all of these reasons, the Union's grievance is granted in part and denied in part. I direct the City to promptly reinstate Young to his former position with the Department without loss of seniority. The City shall also make payment to him for all wages and benefits lost as a consequence of his discharge, including overtime, through the date of his reinstatement, less the period of the thirty-day suspension.²⁷ In addition, I instruct the Department to revise Young's personnel record, to the maximum extent permitted under governing law, to reflect that his July 19, 2019 separation from employment has been adjusted to a thirty-day suspension.

²⁷ The record does not include evidence of Young's damages. As such, the parties will need to meet and confer to determine the amount due him or return to me for a ruling in the event they are unable to do so. In addressing the matter of lost overtime, I note that the make whole award requires proof that is more than speculative. Instead, it necessitates showing to a reasonable degree of certainty that but for Young's discharge, overtime would have been offered to him and he would have worked such overtime.

AWARD

1. The grievance is granted, in part, and denied, in part.
2. The City had just cause to discipline Thomas Young for violating the Department's Social Media Policy by his offending Facebook posts/comments, but the penalty of dismissal was excessive. His discharge shall be converted to a thirty-day unpaid disciplinary suspension.
3. The City will promptly reinstate Thomas Young to his former position with the Department without loss of seniority, and revise his personnel records, to the maximum extent permitted under governing law, to reflect that his July 19, 2019 separation from employment has been adjusted to a thirty-day suspension. In addition, the City will make him whole for all wages and benefits lost as a consequence of his discharge, including overtime, through the date of his reinstatement, less all outside wages and other earnings received by him as to this period and the period of a thirty-day unpaid disciplinary suspension. I will retain jurisdiction of this matter to resolve any dispute as to the monies to be paid to Mr. Young based on this award, including the issue of whether he satisfied his obligation to mitigate his damages.

December 30, 2022



David J. Reilly, Esq.
Arbitrator

STATE OF NEW YORK)
)
COUNTY OF NEW YORK) ss.:

I, DAVID J. REILLY, ESQ., do hereby affirm upon my oath as Arbitrator that I am the individual described herein and who executed this instrument, which is my Award.

December 30, 2022



David J. Reilly, Esq.
Arbitrator

AMERICAN ARBITRATION ASSOCIATION

In the Matter of Arbitration Between

Fraternal Order of Police, Lodge No. 5	:	AAA Case Number: 01-19-0004-1595
and	:	Grievance: P/O Novice Sloan
City of Philadelphia	:	Discharge

Opinion and Award

Hearing Dates:	May 31 and July 17, 2023
Briefs Received:	November 4, 2023
Arbitrator:	Thomas P. Leonard, Esquire

Appearances:

FOP Lodge #5

Thomas M. Gribbin, Jr., Esquire
Willig, Williams & Davidson

City of Philadelphia

Lindsey Cordes, Esquire
Nicole Morris, Esquire
Law Department

Procedural History

Pursuant to the terms of a Collective Bargaining Agreement (CBA) between the Fraternal Order of Police Lodge No. 5 (FOP) and the City of Philadelphia (City) and the Labor Arbitration Rules of the American Arbitration Association, the parties selected the undersigned arbitrator to hear and decide the dispute described below. Upon due notice, arbitration hearings were held on May 31, 2023 and July 17, 2023 in the Philadelphia offices of the American Arbitration Association.

At the arbitration hearings, the parties presented testimony, cross-examined witnesses and introduced documentary evidence. The parties submitted submitted post-hearing briefs on November 4, 2023.

Issues

Whether the City had just cause to discharge the grievant, Police Officer Novice Sloan?
If not, what shall be the remedy?

Relevant CBA Provisions

XX. DISCIPLINE AND DISCHARGE

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J. Disciplinary Code

1. The Disciplinary Code (attachment M) shall be effective immediately for all infractions that are charged by the Department on or after the date that this Award is issued, regardless of when the underlying conduct occurred.

Relevant Disciplinary Code Sections

Introduction

The intent of this Disciplinary Code is to instill and support the core values of the Philadelphia Police Department by establishing fair and consistent penalties for violations of Philadelphia Police Department rules, policies, and principles. The Articles herein are intended to direct the Police Board of Inquiry and all Commanders in administering such fair and uniform penalties. This code shall apply to all personnel of the Police Department. The core values of the Philadelphia Police Department are:

Honor – It is a privilege to serve as a member of the law enforcement community and especially as a member of the Philadelphia Police Department. Each day when you pin on your badge, remember those who went before you and the sacrifices made in the name of this badge. Treat your badge with honor, respect, and pride. Do nothing that will tarnish your badge, for one day you will pass it to another Philadelphia police officer to honor and respect.

Service – Service with honor means providing police service respectfully and recognizing the dignity of every person. We can demand that others respect and honor our work only when we respect them and their rights. We are in the business of providing police service with the highest degree of professionalism. Every day we come into contact with crime victims. Residents are afraid to enjoy their neighborhoods, and young people scared to stand up and do the right thing. Our job is to help them and to do so with courtesy and compassion.

Integrity – Integrity is the bedrock of policing and the foundation for building a successful relationship with our partners. Integrity means reflecting our values through our actions. It is not enough to espouse honor, service and integrity. Each of us must live these values in our professional and personal. Lives. We do this by being honest in our dealings and abiding by the laws and respecting the civil rights of all. Serving with integrity builds trust between the community and the police.

Members of the Philadelphia Police Department must be morally and ethically above reproach at all times, regardless of duty status. All members shall respect the sanctity of the law and shall be committed to holding themselves to the highest standard of accountability. No member shall depart from standards of professional conduct or disobey the law.

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Conduct Unbecoming

Article 1: Conduct Unbecoming

1-§021-10: Any incident conduct, or course of conduct which indicated that an employee has little or no regard for his/her responsibility as a member of the Police Department.

1 st Offense	2 nd Offense	3 rd Offense
30 days or Dismissal	Dismissal	_____

1-§026-10: Engaging in any action that constitutes the commission of a felony or misdemeanor which carries a potential sentence of more than (1) year. Engaging in any action that constitutes an intentional violation of Chapter 39 of the Crimes Code (Related to theft and related offenses.) Also included any action that constitutes the commission of an equivalent offense in another jurisdiction, state or territory. Neither a criminal conviction nor the pendency of criminal charges in necessary for disciplinary action in such matters.

1 st Offense	2 nd Offense	3 rd Offense
30 days or Dismissal	Dismissal	_____

(Joint Exhibit 1, Disciplinary Code, pp. 1, 2, 10 and 12).

Facts

The grievant was a Philadelphia Police Officer in the 17th District. He served for a little over 14 months before his discharge. He was appointed to the Department on June 18, 2018 and was discharged effective October 28, 2019, by Commissioner's Direct Action following a complaint by a citizen, [REDACTED], that he sexually assaulted her.

After Ms. [REDACTED]'s complaint, Sergeant James Norbury of the Department's Internal Affairs Division (IAD) interviewed her and her caseworker. Sergeant Norbury also obtained through a search warrant electronic and digital evidence from the grievant, including a video recording taken by him engaging in sexual activities with Ms. [REDACTED].

The following facts are derived from Sgt. Norbury's investigation; the testimony in this arbitration of Sgt. Norbury, Sgt. [REDACTED] of the District Attorney's Office and Acting Commissioner Christine Coulter; the grievant's video recording and from the grievant's testimony in this arbitration.

Ms. [REDACTED] did not testify in this arbitration hearing, even though the City subpoenaed her for both days. At the first day of hearing, the City asserted that her absence was due to child care issues. I continued the hearing to a second day to allow Ms. [REDACTED] to appear. She did not appear at the second day of hearing. The City offered the testimony of a social worker to testify that her absence was due to her being "in treatment."

The grievant first met Ms. [REDACTED] while he was working in the 17th District. The grievant met Ms. [REDACTED] at her place of employment, a convenience store that was on his beat. She agreed to go on a date with him. Late on the evening of [REDACTED], he picked her up at her residence. They bought takeout from a Chinese restaurant. They went to an adult novelty shop where they purchased items.

When they got to his residence, he excused himself to go upstairs to get a shower. He testified that when he came out of the shower she said she wanted to get drunk and get high before she had sex with him. He has an open bar on the two floors of his residence. He described it as “open bottle” by which anyone could have access to the alcohol. He did not see her drink but that she told him that she did. She told him that she “get lit” which to him meant “she wanted to get drunk and high.” (Tr. 220) Later, when they engaged in sexual relations, he smelled alcohol on her.

The video recording showed that the two then engaged in a variety of sexual activities. The video shows him setting up the video camera to film their sex acts. The video lasts over seven (7) minutes. It appears that the activities began as consensual. However, she started crying during the video. At one point she cried “What are you doing to me?” (02:35 to 02:40). Throughout the video she is in tears and not entirely coherent. At another point, he slapped her face. (05:26) Later, the video showed him standing on the bed with his penis near her face while she is sitting on the bed. He again slapped her face. (06:46). He then pulled her chin up to him. He then ejaculated on her face (07:01). Toward the end of the video, one of the last scenes is of Ms. [REDACTED]’s face with ejaculate matter over her face.

On August 13, 2019, Ms. [REDACTED] made a complaint the 17th District Captain that the grievant sexually assaulted her. The Captain sent the complaint to IAD. IAD investigator Norbury interviewed Ms. [REDACTED], a worker at [REDACTED] where Ms. [REDACTED] was staying; and Lt. Jennifer Vrana, who talked to a counselor at Project Home about Ms. [REDACTED]'s complaint. IAD Sergeant Norbury and his superiors then contacted the District Attorney's Office of Special Investigation to obtain a probable cause determination for a request a search warrant. The DA's office then obtained a search warrant for the grievant's phone records, social media accounts, digital evidence and the video recording made by the Grievant at his home.

On September 26, 2019, the District Attorney's Office County Detective [REDACTED] submitted an arrest warrant for the grievant charging him with Rape, Sexual Assault, Indecent Assault and Simple Assault. The Court approved the arrest warrant.

On September 27, 2019, Sergeant Norbury recommended that the Department find the grievant to have violated the following articles in the Philadelphia Police Department Disciplinary Code:

Article 1: Conduct Unbecoming

1-§021-10: Any incident conduct, or course of conduct which indicated that an employee has little or no regard for his/her responsibility as a member of the Police Department.

1-§026-10: Engaging in any action that constitutes the commission of a felony or misdemeanor which carries a potential sentence of more than (1) year. Engaging in any action that constitutes an intentional violation of Chapter 39 of the Crimes Code (Related to theft and related offenses.) Also included any action that constitutes the commission of an equivalent offense in another jurisdiction, state or territory.

Neither a criminal conviction nor the pendency of criminal charges is necessary for disciplinary action in such matters.

Sergeant Norbury's supervisors agreed with his recommendation on the disciplinary charges. On September 27, the grievant was arrested and brought to Internal Affairs Division for his criminal Gniotek warnings. At that time, the grievant was notified of the charges against him, the Department provided the opportunity to make a statement, and notified him of his right to remain silent and right to counsel. Id. He chose not to make any statements on the advice of FOP counsel. He then formally signed the Gniotek warnings.

The CBA and the Disciplinary Code gives the Police Commissioner ultimate authority to determine appropriate discipline for any violation of the Code. Based on the IAD investigation, the Department's executive team determined a Commissioner's Direct Action was most appropriate in this case, as bargained under the CBA, issuing a thirty day suspension and notice of intent to dismiss. The bargained-for penalties under each section are as follows: 1-§021 first offense, 30 days or dismissal and 1-§026 first offense, 30 days or dismissal;

After the Gniotek warnings on September 27, 2019, the grievant received his Notice of Intent to Dismiss and was also later personally served a copy. Jt. Ex. 5. Acting Commissioner Christine Coulter formally signed the CDA on November 4, 2019. Jt. Ex. 4. The grievant was also personally served notice of his dismissal effective October 28, 2019. Jt. Ex. 6.

The FOP then filed the present grievance. The FOP and the City agreed to hold the grievance in abeyance pending the disposition of the criminal charges against the grievant. On January 16, 2020, Municipal Court Judge Karen Simmons, at the close of a two day preliminary hearing, dismissed the criminal charges of rape, sexual assault, indecent assault and simple assault against the grievant. Judge Simmons stated that the DA had not met its burden of

proving their case ” by a preponderance of the evidence to show more likely than not” that the defendant had committed those offenses. To the Judge, the video did not show that Ms. [REDACTED] said “No” to the grievant’s actions.

Discussion

The issue in this is whether the City had just cause to discharge the grievant.

The City’s Position

The City met its burden of proving just cause under the traditional requirements for proving just cause. The Police Department IAD responded to Ms. [REDACTED]’s complaint in a fair and impartial manner by conducting an objective and thorough investigation of Ms. [REDACTED]’s complaint. The IAD investigator came to a well supported conclusion that the grievant’s date with Ms. [REDACTED] on the evening of August 8, changed from what may have been a consensual visit to the grievant’s residence to have sexual relations to nonconsensual sexual and physical assaults on an intoxicated woman. The grievant’s own video recording and his testimony in this arbitration hearing proved that Ms. [REDACTED], who the grievant admitted was “lit,” did not have the capacity to consent to the full range of the sexual activities that the video showed. At the very least, Ms. [REDACTED] did not consent to the grievant slapping her face, ejaculating on her face and recording the entire encounter on video. His conduct violated the Disciplinary Code

The FOP’s Position

The City did not meet its burden of proving just cause because the City’s case is entirely built on hearsay and circumstantial evidence. Because Ms. [REDACTED] did not testify in this

arbitration hearing, all of the City's evidence against the Grievant that was in the IAD investigation alleging that he sexually assaulted her constituted uncorroborated hearsay evidence that cannot serve as the basis for making a finding of fact. Also, the City's disciplinary charges against the Grievant are grounded on the premise that the grievant violated the Crimes Code. This premise has been nullified when a Municipal Court Judge dismissed the criminal charges at the conclusion of a preliminary hearing for the grievant on the grounds that the DA did not make a prima facie case and the Judge saw no evidence in the video that Ms [REDACTED] said "No" to the grievant's actions.

Analysis

In any discipline case, the burden of proof is on the employer to prove that it had just cause to discharge the employee, in this case, discharge.

The seven factors of just cause are whether (1) there was notice of the possible or probable disciplinary consequences of the conduct; (2) the work rule or managerial order is reasonably related to the orderly, efficient and safe operation of the employer's business and the performance properly expected of the employee; (3) the employer conducted an investigation to determine if the misconduct occurred; (4) the investigation was fair and objective; (5) whether substantial evidence or proof supported the finding of misconduct; (6) the employer applies its rules, orders, and penalties fairly and without discrimination to all employees; and (7) the discipline is proportionate to the offense and employee's record. American Fed'n of State, Cty. & Mun. Employees, Dist. Council 88, AFL-CIO v. City of Reading, 130 Pa. Cmwlth. 575, 582, n. 3 (1990).

Within the framework of the seven factor just cause analysis, the narrow issue in this case is whether City proved the fifth factor, whether “substantial evidence or proof supported the finding of misconduct.” In this case, the City has the burden to produce evidence to prove that the grievant violated the two sections of the Disciplinary Code.

As a threshold matter, the primary evidence that the City relies on is the grievant’s own video recording of the activities. Because it is his own recording of what he did, it is not hearsay. This facts of this case are distinguishable from my decision in the case of the discharge of *City of Philadelphia and FOP Lodge No. 5*; AAA Case No. 01-20-0000-6900 (Discharge of Joseph Stevenson) In that case, I found that another officer’s body worn camera video recording was inadmissible hearsay because the other officer was not available for cross examination. As stated above, the grievant in this case made the video that the Department relied on, so the unfairness of relying on someone else’s video that was an issue in Stevenson is not present here.

The first section of the Disciplinary Code at issue is 1-§021-10: Any incident, conduct, or course of conduct which indicated that an employee has little or no regard for his/her responsibility as a member of the Police Department. “

The conduct in this case concerns the grievant’s actions on [REDACTED] during a date with Ms. [REDACTED]. Acting on a complaint by Ms. [REDACTED], the IAD conducted an investigation that led to IAD obtaining a search warrant that found that the grievant video recorded his sexual activity with Ms. [REDACTED]. It was the video, combined with the interview with Ms. [REDACTED], that convinced the IAD to recommend that disciplinary charges be brought against the grievant,

that he sexually assaulted Ms. [REDACTED]. The Department's executive team then decided that the charges be made as a Commissioner's Direct Action, rather than via a Police Board of Inquiry. Acting Police Commissioner Coulter then suspended the grievant with the intent to dismiss.

The City has proven that it had substantial evidence to support the discharge of the grievant. The grievant's own video recording of his conduct with Ms. [REDACTED] gave the Department the evidence to justify its decision.

The City argues that the video of the grievant and Ms. [REDACTED] showed that his conduct went beyond consensual sexual intercourse with Mr. [REDACTED]. He assaulted her by slapping her in the face two times and ejaculating in her face. To put these actions in context, he did these actions after she was crying "What are you doing to me?"

The FOP argues that the video showed that the Grievant and Ms. [REDACTED] engaged in planned, consensual sexual intercourse. The FOP contends that based on the Grievant's testimony, the record shows Ms. [REDACTED] did not withdraw her consent.

The video evidence and the grievant's testimony in this arbitration does not support the FOP's argument. While the sexual activities may have begun as consensual, the video evidence is convincing that they did not remain consensual.

Ms. [REDACTED] was crying at various points in the seven minute encounter. At one point, in a crying voice, she asks, "What are you doing to me?" He slapped her face two times. Following this second slap, he ejaculated on her face. A final part of the video is a close up of video is Ms. [REDACTED]'s face covered with ejaculate matter.

It also appears to me that Ms. [REDACTED] was intoxicated. Her eyes looked glassy. Her speech was slurred. The grievant admitted that Ms. [REDACTED] had been drinking in his residence and that she was "lit." Meanwhile, the grievant testified he did not drink at all. Given this

evidence, it is difficult for me to conclude that she truly gave her consent to this particular conduct of the grievant, either the grievant's actions or his video recording of his actions. The Department has substantial evidence to support its conclusion that Ms. [REDACTED] did not consent to these aspects of her evening date with the grievant.

Chief Inspector Coulter (Acting Commissioner at the time of the grievant's discharge) noted in her testimony that she stands by the determination to discharge the grievant because his conduct was unbecoming of a police officer regardless of whether there was a criminal proceeding or not. (Tr. at 168.) She further stated that there was enough evidence in the investigation that inappropriate actions occurred that were detrimental to him being a part of the Department Id.

As the City's brief stated, the section of the Disciplinary Code at issue here reasonably relates to the orderly, efficient, and safe administration of law enforcement and the performance properly expected of employees like the grievant. The intent of the Disciplinary Code is to instill and support the core values of the Department by establishing fair and consistent penalties for violations of the PPD rules, policies and principles. The core values of the PPD are honor, service, and integrity. The Disciplinary Code makes clear that employees shall treat their badge with honor, respect, and pride. Employees shall do nothing to tarnish that badge. Further, the Code highlights integrity as "the bedrock of policing and the foundation for building a successful relationship with our partners." Integrity does not stop when the workday is over, rather integrity is espoused by being honest in our dealings and "abiding by the laws and respecting civil rights of all." All members "shall respect the sanctity of the law and shall be committed to holding themselves to the highest standard of accountability."

Coulter testified at length about the trust that is paramount between a police officer and the citizens he serves. She highlighted that the actions of the grievant were so damaging to the reputation of the department, that it would be a danger to have him continue to serve. (Tr. at 157.)

As Chief Inspector Coulter testified, having an officer on the force who videos himself having sex with a woman, slaps her in the face then ejaculates on her face after the woman questions on video “what are you doing to me” erodes public trust. *Id.* at 158. Chief Inspector Coulter emphasized how police officers have access to people, and reinstating an individual who commits the violent actions such that P/O Sloan did would be an absolute danger. *Id.* at 159.

If the Department had not discharged the grievant under the facts of this case, then it would have allowed the grievant to make a mockery of the core values of the Department as set forth in the Introduction to the Disciplinary Code: Honor, Service and Integrity.

The grievant’s degrading conduct toward Ms. [REDACTED], which he video recorded, is Conduct Unbecoming an officer that justifies his discharge under 1-§021-10.

The second section of the Conduct Unbecoming article is 1-§026-10,

Engaging in any action that constitutes the commission of a felony or misdemeanor which carries a potential sentence of more than (1) year. Engaging in any action that constitutes an intentional violation of Chapter 39 of the Crimes Code (Related to theft and related offenses.) Also included any action that constitutes the commission of an equivalent offense in another jurisdiction, state or territory. *Neither a criminal conviction nor the pendency of criminal charges is necessary for disciplinary action in such matters.*

(Emphasis added by arbitrator)

The FOP argues that the Municipal Judge's dismissal of the criminal charges against the grievant means that the City has not produced substantial evidence that the grievant violated 1-§026-10 of the Disciplinary Code.

The City points out two problems with this FOP argument. The first is that 1-§026-10 of the Disciplinary Code states that a "criminal conviction" is not necessary to find an officer has violated this section. The second is that the arbitrator in this matter sits as an independent fact finder and views the case in totality as it relates to the CBA.

The City's two arguments are persuasive. They convince me that the City had substantial evidence before it that the grievant violated 1-§026-10 of the Disciplinary Code. I am convinced that the City made its discharge decision based on video evidence, made by the grievant himself, that the grievant slapped Ms [REDACTED] in her face two times, ejaculated on her face and took a video shot of her face covered with the ejaculate matter.

The evidence convinces me that the Department had substantial evidence that the grievant's conduct, captured on his own video recording, at the very least constituted sexual assault, indecent assault and assault.

I must defer to Acting Commissioner Coulter's testimony that she does not know why the criminal case failed, but that in her opinion, the facts of the case show that the grievant's conduct violated the Pennsylvania Crimes Code. Coulter is a veteran of several decades of police experience and is due this deference.

The City, based on the evidence, proved that it had just cause to dismiss the Grievant from his employment as a sworn police officer for Conduct Unbecoming under 1-§026-10 of the Disciplinary Code

Award

For the reasons stated above, the City has proven that it had just cause to discharge the grievant, Novice Sloan. The FOP's grievance is denied.

December 18, 2023
Harrisburg, Pennsylvania


Thomas P. Leonard, Esquire

AMERICAN ARBITRATION ASSOCIATION

In the Matter of Arbitration Between:

**FRATERNAL ORDER OF POLICE
LODGE #5**

and

CITY OF PHILADELPHIA

**AAA Case #01-21-0016-1595
(Gr: Sgt. David Chisholm Discharge)**

Walt De Treux, Arbitrator

Hearing Date: 2/22/23

Decision Date: 4/17/23

Appearances: For the FOP – Thomas M. Gribbin, Esq., *WILLIG WILLIAMS & DAVIDSON*
For the City – Elliot I. Griffin, Esq., *BALLARD SPAHR*

Introduction and Statement of Relevant Facts

On October 26, 2020, two City of Philadelphia police officers fatally shot [REDACTED], a black male. The shooting sparked protests, riots, and civil unrest, particularly in the 18th Police District located in West Philadelphia. In the early morning hours of October 27, [REDACTED] [REDACTED] drove a van into the area around [REDACTED] & [REDACTED], where protestors, rioters, and police had converged. A young male and a toddler were in the rear seat of the van. Officers surrounded the van, broke out its windows, and removed the operator and passengers. Young and the male passenger were handcuffed. The toddler was removed from the scene and subsequently transported to DHS before being released to his grandmother.

The Department initiated an investigation into the incident. During the course of the extensive investigation, [REDACTED] [REDACTED] [REDACTED] Commanding Officer of the 18th District, requested an internal investigation of [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] alleged that Officer

█████ had thrown rocks at the civilian crowd and used inappropriate, threatening, and vulgar language toward a neighborhood resident. █████ █████ an Internal Affairs investigator, was tasked with reviewing body worn camera footage to determine if officers engaged in any misconduct. He specifically followed up on █████ █████ complaint, attempting to find footage of █████ █████ actions. █████ █████ complaints proved to be wholly unfounded as to █████ █████ who was not at the scene of the protests and riots at any time.

During the course of his video review, █████ █████ found footage of Sgt. David Chisholm, who had been deployed from the 26th District with a group of officers to assist in the police activity around █████ & █████ █████ observed Sgt. Chisholm using inappropriate language and homophobic slurs and encouraging officers to throw rocks back at the rioting crowd that was throwing rocks at the officers. Specifically, Sgt. Chisholm is heard on the body worn camera footage saying to his officers, “Fuck it, start moving forward. Throw fucking rocks back, fuck them. I don’t give a shit, move these fucking faggots,” and to unidentified civilians, “Fuck you too, you little bitch. I’m going to fuck you up faggot, I don’t give a shit. I’ll trade you for cigarettes in prison bitch, you piece of shit.”

█████ █████ reported his findings to the lead investigator, █████ █████ In the investigation report, █████ █████ erroneously stated that █████ █████ unfounded allegations were committed by Sgt. Chisholm rather than █████ █████ Sgt. Chisholm did not engage in rock throwing or make any of the comments █████ █████ attributed to █████ █████

Notwithstanding the lieutenant’s mischaracterization of the basis for concern with Sgt. Chisholm’s actions, the Department determined that the sergeant’s conduct warranted further

investigation. ■■■ interviewed Sgt. Chisholm and asked if he made the statements that had been reported by ■■■ ■■■ Sgt. Chisholm consistently answered, “I don’t remember saying that” or “not that I recall.” When shown the video at the end of his interview and asked if he was the officer in the video, Sgt. Chisholm responded, “I cannot say for sure that is me.”

Following the investigation, the Department charged Sgt. Chisholm with conduct unbecoming related to his use of inappropriate language to the public (Section 1-§017-10 of the disciplinary code), inappropriate communication based on sexual orientation (Section 1-§023-10), and lying or attempting to deceive during a departmental investigation (Section 1-§009-10). The Commissioner took direct action and terminated Sgt. Chisholm’s employment.

Sgt. Chisholm timely grieved his discharge. The parties were unable to resolve the grievance through the contractual steps and referred the matter to arbitration. On February 22, 2023, a hearing was held at the Philadelphia offices of Ballard Spahr, during which time both 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 discharge Sgt. David Chisholm? If not, what shall be the remedy?

Analysis and Decision

██████████ with whom the Commissioner consults on disciplinary matters, criticized Grievant for failing to “contain and de-escalate and protect” during a crisis situation. She described Grievant as “totally out of control” and “escalating the situation even more.” The Deputy Commissioner explained that Grievant’s conduct “does not fall in line with what we believe and what we want our department to be seen as.”

The FOP does not necessarily contest ██████████ harsh criticism of Grievant’s conduct and supervisory failures. It notes, however, that the disciplinary matrix, negotiated by the parties and codified in the collective bargaining agreement, carries a mandated penalty of reprimand to 5 days for a first time violation of conduct unbecoming related to the use of inappropriate language to the public (Section 1-§017-10) and reprimand to 15 days for inappropriate communication based on sexual orientation (Section 1-§023-10). The FOP argues that the Department should have disciplined Grievant at the low end of the range for those offenses.

Grievant was working in an unprecedented situation, certainly not one for which he was prepared and for which he received no instruction from his superiors. As Grievant described it, he had finished his tour of duty in the 26th District and was driving home when his lieutenant

directed him to return to the district. He and other officers were deployed to the 18th District without any instructions (although they were receiving reports of the civil unrest and “a lot of injured officers.”) In route to West Philadelphia, some civilians threw two-by-fours and other “stuff” at the officers’ vehicle. When he arrived on scene around 52nd & Market, Grievant observed “so many cop cars,” some destroyed and others on fire, and officers “limping because they were hit with God knows what.” Grievant and the officers proceeded to [REDACTED] & [REDACTED] [REDACTED] where some of the crowd began throwing Belgian blocks at them. Grievant did not see any staging area and he was unaware of who was commanding the scene. He did not receive any instructions from “all these bosses, 30, 40 yards behind us like huddled up.” When he saw other officers “literally getting beat up,” he moved his officers closer to assist. [REDACTED] [REDACTED]

[REDACTED] Commanding Officer of the Southwest Division described the scene to IAD,

“This was a riot. We hadn’t had a riot in the city since 1964. This was the second one in 6 months. This was a violent and chaotic night where a sergeant was almost killed. Residents, supervisors and officers were all afraid. I could see it in their eyes. Many of them have never experienced anything like this and probably never will. We had to barricade our own police facility at the 18th district because people were threatening to take over and overrun the district. This was a traumatic event that will take decades for the community as well as officers to heal from.”

It was during this unprecedented event that Grievant, admittedly scared and lacking any instruction from command staff, failed to act professionally when he used inappropriate language and encouraged his officers to throw bricks back at the crowd throwing bricks at them. (There is no evidence that any officer followed that suggestion.) In so doing, he engaged in conduct unbecoming as charged by the Department. The Commissioner certainly could have taken into consideration the extreme circumstances under which Grievant’s misconduct occurred, but [REDACTED] [REDACTED] [REDACTED] correctly noted that Grievant’s failure to de-

escalate contributed to an already horrific situation. Discipline on the high end of the penalty range for the charged offenses is consistent with just cause.

The Department terminated Grievant's employment based on his alleged violation of Section 1-§009-10 (lying or attempting to deceive during a departmental investigation). The charge is based on a series of questions in which the IAD investigator asked Grievant if he made the offensive statements and Grievant responded, "I don't remember saying that" or "Not that I recall." It is also based on Grievant responding, "I cannot say for sure that is me" when he was asked to identify himself on the video.

██████████ effectively concedes that Grievant was not lying or attempting to deceive when he did not remember or could not recall making statements that night. She testified, "...he doesn't recall anything from that night, and that's possible."

Grievant's interview occurred approximately four months after that chaotic night. Without seeing the video, he could not be expected to remember or recall what he said in the middle of a riot as he and his officers were under attack. The parties introduced into evidence transcripts of all the interviews conducted as part of the ██████████ investigation. At least 14 officers and several command staff were interviewed. Even a cursory review of those interviews reveals that almost every officer, including those holding positions as high in command as Inspector, numerous times over responded with "I don't know," "I can't recall," or "I can't remember." Those responses were not characterized as lying or attempting to deceive because the Department recognized that the officers and commanders truly did not remember or recall specific details occurring on a chaotic night. Likewise, Grievant did not lie or attempt to deceive when he did not remember or recall the words he said that night.

The Department took greater issue with Grievant's reluctance to positively identify himself from the video. As [REDACTED] [REDACTED] [REDACTED] explained, "...it's very difficult not to identify yourself." But she equivocated on whether Grievant was lying or attempting to deceive. She testified, "So he lied, *or however you want to frame it*, or he tried to deceive, but he didn't own it." (*emphasis added*) From her testimony, it is clear that Grievant's lack of accountability, i.e., his failure to "own it" or take responsibility, was the main factor leading to his discharge. [REDACTED] [REDACTED] [REDACTED] characterized Grievant as follows,

"[c]learly not in control, not in control at all, and then not taking responsibility. Even if it was a situation where he may have lost his cool, he came in and he just would not cooperate with the investigation and not identify his own self on the video, and the discipline for that is up to dismissal."

Failing to cooperate in the investigation and failing to take accountability for one's actions are not the same as lying or attempting to deceive. In his second to last question of the interview, [REDACTED] [REDACTED] asked Grievant if it was him on the body worn camera footage. Grievant responded, "I cannot say for sure that is me." [REDACTED] [REDACTED] did not ask any follow-up questions or press Grievant as to why he could not recognize himself. [REDACTED] [REDACTED] watched the same video and continued to insist that it was [REDACTED] [REDACTED]. On the other hand, [REDACTED] [REDACTED] learned Grievant was the officer in the video by showing it to other officers and supervisors who readily recognized Grievant. At hearing, Grievant offered that he viewed the video on a small screen and maintained that he was not positive it was him. Seeing the video on a big screen at hearing, he promptly identified himself.

Grievant likely had less uncertainty about his identity than he was willing to admit in his first and only response to [REDACTED] [REDACTED] question. But the answer speaks more to his unwillingness to accept responsibility for his actions than it does to any attempt to lie or deceive. As the FOP

points out, Grievant had no incentive to lie as a charge of lying can lead to discharge while a charge of conduct unbecoming for inappropriate language carries a much lesser penalty.

Even if the evidence supported the City's characterization of Grievant's response as lying or attempting to deceive, the mandated penalty in the disciplinary matrix ranges from 10 days to dismissal. Grievant's hedging ("I cannot say for sure that is me") is less than a full denial. It came in response to one question in the interview without any pressing follow-up to what the investigator and Department thought was an implausible denial. Grievant is a 19-year veteran of the force with no prior disciplinary record. If the City sustained its burden of proof on the lying/attempting to deceive charge, given the context of the alleged attempt to deceive and Grievant's many years of good service , only a penalty less than discharge would comport with just cause.

The Department elevated Grievant's discipline to termination because his conduct was unacceptable and unprofessional and he failed to take responsibility for it. The Department did not prove, however, that Grievant lied or attempted to deceive during the IAD interview. Only the lying/attempting to deceive charge carries a possible penalty of dismissal. Grievant's failure to take accountability for his actions should certainly be considered when determining the severity of the disciplinary penalty for the conduct unbecoming charges related to inappropriate language and communications. That is, Grievant's failure to accept responsibility and his uncooperativeness during the investigation lends support for discipline on the high range of the penalties mandated in the disciplinary matrix for the conduct unbecoming offenses.

For these reasons, I find that the City had just cause to discipline, but not to discharge, Sgt. David Chisholm.

Award and Remedy

The grievance is sustained in part and denied in part. The City has just cause to discipline, but not discharge, Sgt. David Chisholm. To remedy the just cause violation, the Department is ordered to reduce Grievant's discharge to a 20-day suspension (5 days for the 1-§017-10 violation and 15 days for the 1-§023-10 violation) and to remove the 1-§009-10 charge from Grievant's disciplinary record. The City is further directed to reinstate Grievant to his former position without loss of seniority as soon as practicable after issuance of this Award and to make him whole for any losses incurred as a result of his discharge from the date of his discharge to the date of his reinstatement, less the 20-day suspension and any interim earnings.

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

Walt De Treux

WALT De TREUX

**BEFORE THE
AMERICAN ARBITRATION ASSOCIATION
ALAN A. SYMONETTE, ARBITRATOR**

IN THE MATTER OF:	)	
	)	
Fraternal Order of Police, Lodge #5	)	
	)	
and	)	Case No. 01-22-0003-6608
	)	
City of Philadelphia	)	
	)	
Grievance: Lt. Anthony McFadden	)	
(207582)	)	
_____	)	

OPINION AND AWARD

Before:		Alan A. Symonette, Esq. Impartial Arbitrator
Appearances:	FOP Lodge 5	Jessica Caggiano, Esq.
	City of Philadelphia	Megan Malone, Esq.
Subject:	Termination; Just Cause; Conduct Unbecoming, Inappropriate Language, Conduct, or Gestures to Police Department Employees While on Duty, Inappropriate Communications Based on Race; Remedy, Evidence	
Date of Grievance:	July 5, 2022	
Date of Hearing:	September 26, 2023 Philadelphia, PA	

Statement of the Award: For all the reasons set forth herein, the grievance is partially sustained, and the discipline mitigated. The discipline shall be reduced to a thirty-day suspension. It is ordered that he shall be reinstated to his former position and rank with back pay including applicable overtime. This payment shall be offset by any compensation received from his pension payments and other jobs worked. In addition, and for the reasons set forth herein, it is ordered that the Grievant, within thirty days after his return to work, appear before the Police Commissioner, the 911 dispatcher, [REDACTED], and the Citizens Oversight Board. He is to apologize for the use of his language and provide his explanation at that time.

This matter concerns a dispute that has arisen pursuant to the Collective Bargaining Agreement between the City of Philadelphia (“City”) and the Fraternal Order of Police Lodge No. 5 (“FOP or Union”). The underlying grievance was filed on July 5, 2022 on behalf of the Grievant, Lieutenant Anthony McFadden. The Union alleged that the Grievant, who was then assigned to the 39th Police District was discharged without just cause. The Union requested that the Grievant be reinstated to his former position and otherwise be made whole.

The City denied the grievance stating that the Grievant was properly charged with two charges of conduct unbecoming. Specifically, he was charged with using inappropriate language to Police Department employees while on duty and for making an inappropriate communication based on race. While in conversation with a 911 police dispatcher and while on hold, the Grievant used the N-Word. This was overheard by the dispatcher who subsequently filed an Equal Employment Opportunity complaint with the Internal Affairs Department against the Grievant. The Grievant was subsequently terminated from the police force by direct action of the then Police Commissioner.

The parties were unable to resolve the dispute through the grievance procedure. Accordingly, on August 17, 2022 the Union demanded that the dispute be arbitrated pursuant to the Voluntary Labor Arbitration Rules of the American Arbitration Association. The undersigned was selected to hear the evidence and resolve the dispute. A hearing was held on September 26, 2023 in the offices of the American Arbitration Association. Throughout the hearing the parties were represented by counsel who presented evidence through the sworn, oral testimony of witnesses and through documents. Counsel also had the opportunity to confront

the evidence presented by the opposing side. The proceedings were transcribed. The hearing was closed after the presentation of oral summations.

BACKGROUND

The facts underlying the Grievant's termination are not significantly in dispute. The Grievant was a Lieutenant with the Philadelphia Police Department. He was hired in 1990 [T.154].¹ Throughout his tenure with the Department, he worked in several assignments including the Special Victims Unit, the 15th Police District and the Homicide Division. At the time of his termination, he was assigned to the 39th Police District and was responsible for the supervision of assigned Officers and patrol supervisors as well as the day-to-day operations of the District.

In the afternoon of [REDACTED], the Grievant was driving from his residence to the 39th District. He was also listening to police radio. As he was driving, he heard several incidents within his District and the adjacent District. One of the calls involved a call about a person with a gun. The Grievant decided to assist in the call and called the 911 dispatcher to obtain a call back number to reach the person making the claim [T.161]. In making that call he reached dispatcher [REDACTED] and requested the number. After receiving the request, she told him to hold on while she obtained the number [T.168]. According to the Grievant, as he was driving, another car came out of a store parking lot and cut him off causing him to brake and maneuver to avoid the potential accident. He said his lunch and coffee flew onto the floor [T.169]. As he went to retrieve the items, the Grievant stated "Fu – king Ni—er. The utterance was heard on

¹ References to transcript pages and exhibits shall be as follows: Transcript Page – [T.#]; Joint Exhibits [J.#]; City Exhibits [C.#] and Union Exhibits [U.#]

police radio by Ms. [REDACTED] and was recorded. Ms. [REDACTED] responded with the information, the Grievant said thank you and proceeded to his assignment [T.170].

Ms. [REDACTED] reported the statement to her supervision and eventually with the support of that supervision filed an EEO Complaint which was assigned to an IAD investigator for review [C.2,T.44]. The assigned officer, Sergeant Stephanie Williams was given a copy of the recording. She had had prior dealings with both Ms. [REDACTED] and the Grievant [T.47]. The Mayor's office of Labor Relations, Employee Relations Unit was also notified of the complaint. She interviewed Ms. [REDACTED] on June 24, 2022 and subsequently the Grievant on June 30, 2022. The Grievant admitted making the statement [C.2]. The audio recording was consistent with the Grievant's admission. He admitted that he had just avoided an accident and was angry and stressed at the moment [T.56].

The incident eventually became public and was the subject of discussion throughout the Department and in the local media. According to [REDACTED], the [REDACTED] for the Department, the comment also came to the attention of the Philadelphia Citizen Police Oversight Commission. They contacted Ms. [REDACTED] and invited her to join a community meeting [T.28]. According to Ms. [REDACTED], the community participants expressed a lot of anger and concern and called for some sort of response and questioned whether or what the Police Department was going to do about the Lieutenant's statement [T.30].

The day following the Grievant's interview, July 1, 2022, Commissioner Danielle Outlaw, through Commissioner's Direct Action, terminated the Grievant and charged him with three counts of Conduct Unbecoming – Inappropriate Language Conduct or Gestures to Police Department Employees While on Duty; Any Act Conduct or Course of Conduct which

Objectively Constitutes Discriminating or Harassing Behavior Based on Race, Color, Gender, Religion, National Origin, Age, Ancestry, Sexual Orientation, Disability, or Gender Identity; and Inappropriate Communication(s) Based on Race, Color, Gender, Religion, National Origin, Age, Ancestry, Sexual Orientation, Disability or Gender Identity Conveyed in any Manner.

The Acting Commissioner at the time of the hearing testified that Direct Action is used when there is an egregious violation – as the case that was considered here [T.98].

Commissioner John Stanford testified that he agreed with the final decision. There was no place for this type of language and what that represents [T.102]. Commissioner Stanford recognized the Grievant's lengthy career and service. However, his use of that word creates a different circumstance [T.107]. In the scope of one's career in this profession, it can be but one incident that will ultimately decide the Grievant's role as a police officer [T.107]. He believed that the discipline was appropriate given the Grievant's responsibility to the Dispatcher involved and other officers. Such language has no role. It adds tension to the relationships formed between members of the force and impacts the trust in the police. It especially puts officers in a difficult position of having to deal with the repercussions of such language since such language has consequences across the department and in the community [T.105].

The Grievant testified at the hearing. He noted that he had thirty-two years of service without any discipline. He never had a complaint filed against him for use of language during that time. [164]. With respect to the incident himself he stated that he had never met [REDACTED] until speaking with her that afternoon. While he was driving and on his speaker phone he was cut off and had to swerve making his coffee and lunch fly to the floor of his vehicle. When he made the statement, he was on hold while Ms. [REDACTED] was retrieving the information

request, and he was hoping that he had not been heard. Had he known that she heard his comment, he would have apologized immediately and explained to her what happened. He was just mad. Nothing was directed toward her [172]. According to the Grievant, he regretted saying it. Any other time he would have said a different word to vent his frustration and stress [T.169].

The Grievant acknowledged supporting the filing of the grievance to get his job back. He stated that he made a mistake. “It was something stupid. I was frustrated. ... I never use that word. I know it’s taboo. It is not used in my house, my household. It is not used by our family. It’s not used by me [T.182].”

The Grievant stated that he found it to be “embarrassing, basically. It’s something I completely regret. I don’t think I’ll ever get past it.” He described the incident as one mistake that was against the policies. He stated that he knew what is right and what is wrong. He made a mistake. “I know it was wrong. [T.184].”

On cross examination, the Grievant acknowledged that in his capacity as a Lieutenant, he should be held to a higher standard because of his role as a supervisor. Yet even though he was stressed and had many other opportunities to vent his frustration, the first word that came to his mind was to use the “N-word.” He just did not know why he said it [T.187]. It was noted that when he tried to avoid the other car, he did not see the person inside. He just said it in the air [T.190].

When the Grievant was terminated, he filed for his service pension [T.180] He did not intend to retire but he needed the service pension to support his children who were in high school

and in college [T.181]. He did not want to lose everything that he had invested in over the thirty-two years.

Finally, the Grievant was asked if he were reinstated how would he recover the trust of the citizens of Philadelphia he was supposed to be serving. He responded that he served his time and learned a lesson, but this was only a mistake [T.192].

STATEMENT OF THE ISSUE TO BE DECIDED

The parties stipulated that the issue should be stated as follows: Was the Grievant terminated for just cause? If not, what shall the remedy be?

SUMMARY OF THE ARGUMENTS OF THE PARTIES

According to the City, the Grievant was terminated for just cause. It acknowledged that the Grievant had thirty-two years of unblemished service. He also has numerous accolades and commendations from the Department. However, he was also familiar with the Department's EEO directive that was implemented to prohibit discrimination based on race and other protected classes. He was trained in that and in implicit bias and clearly understood that as a Lieutenant, he was held to a higher standard. Yet the Grievant's use of this vile word had a significant impact that negated all those years of service and nullified all the anti-discrimination training.

The evidence demonstrated that the use of that word in that single incident had a greater impact beyond the single dispatcher that heard it. Evidence was presented that it had impact on the force but also on the citizens as reflected in the Citizen Police Oversight Commission meeting. The evidence showed that the citizens were genuinely angry and upset.

Commissioner Stanford testified that even though he was not the Commissioner when the decision was implemented, he agreed with it. He was also questioned about prior instances of officers using that language but still receiving a lesser penalty. The Acting Commissioner stated unequivocally that he was disgusted by the fact that individuals have used that word and were not fired. Even though most of this involved interaction with fellow officers the question becomes whether if one can treat his co-workers in that manner, how does one treat the public the officer is supposed to serve.

The City also argued that the Grievant's explanation was not credible. He testified that he was alone in his car and his statement was not directed to anyone. Just because it was not heard does not mean it could be excused. The Grievant as a Lieutenant understood the stresses of the job. He also understood that he interacts with people of all races, religions, and genders. Therefore, he should have known the impact of that language.

The reinstatement of the Grievant would say to the citizens of this city that the Department is soft on discipline and has stifling future cultural progress in the Department. Citizens are hoping for a culture change. The grievance should be sustained because it is fair. The Grievant admitted to his actions and this is a proportional punishment. The grievance should be denied.

The Union on the other hand states that there was insufficient cause to terminate the Grievant. One must ask, according to the Union, whether one mistake, under these circumstances would obliterate an otherwise excellent thirty-two-year career. The Grievant has thirty-two years' worth of commendations and satisfactory evaluations including comments from

his commanding officers over the various units and assignments. His evaluations were well above satisfactory.

There was no indication that the Grievant was a racist. He has conducted himself in a professional manner and treated people respectfully. Yet the Grievant had been described as not being credible because how would it just be something that you blurt out one time. Yet the only evidence is that one time and the only evidence is that the Grievant saying it is not language that he routinely uses. The Grievant must be viewed in consideration of his extensive record of bravery, heroism, and service to hundreds upon hundreds of people in stressful situations.

With respect to the incident itself, there is no indication of animus in the Grievant's tone when he was talking to the dispatcher who he did not know. He did not have any prior relationship where there was any reason for him to be stressed out at her. Indeed, context matters. In the prior examples submitted into evidence, the circumstances are always a bit different. That is why there is a range of discipline. It is also always why there is a full investigation to review every situation. In this instance, the Union noted that Commissioner Outlaw acted before the full investigation was completed. According to the Union, "to suggest that past Commissioner's are soft on discipline just because they took the time to examine [the] context and look at the work record ... is disingenuous to the process." The just cause standard was negotiated into contract because it did not want to be at the "whim" of the charging political heads of the departments. Especially here when a Commissioner decides to make an example of an officer.

Finally notice in just cause means that the individual charged can expect a certain penalty. According to the Union, it is not doing something that other people have done and

getting hit with termination where everyone else has been penalized with some kind of suspension. In the case here, there is a person with no prior discipline and has been remorseful. All of these are critical in terms of just cause and should have been considered. No one in this case considered the Grievant's work history, the quality and length of service and the lack of prior discipline. The standard in the contract applies to everyone regardless of what level of inappropriate language is used in a particular moment.

The Grievant has been consistent. This was a regrettable outburst. According to the Union, since the Grievant is remorseful with a long and unblemished career it is a fair consideration for some kind of progressive discipline. The Union requests that the Grievant be reinstated and treated as others have been treated who have engaged in similar conduct.

ANALYSIS

I have reviewed all the evidence presented including the transcript, my notes of testimony and documents. The underlying facts are not in dispute. The Grievant, while on a call with a 911 dispatcher, had to serve to avoid an accident and used the N-word in reaction. The utterance was heard by the dispatcher who reported the incident to her supervisor who initiated an EEO investigation. The then Police Commissioner, by Direct Action, decided to dismiss the Grievant two weeks later.

The Union, while acknowledging that the word was used and was in violation of Department policy, claimed that the penalty of dismissal was too harsh. It claimed that the language was not directed at anyone but was speech due to the frustration and anger because of the near miss. Such a context was never completely considered. Regardless, the Grievant was

remorseful. It also noted that the Grievant had thirty-two years of service without discipline and that other officers who have been charged for using this language received less discipline.

There are very few words in the North American lexicon that invokes the 400-year history of the pain and trauma of slavery, institutional racism, degradation, violence, and oppression than the word used by the Grievant on June 22, 2022. In the report on the investigation, [REDACTED], the 911 dispatcher described her reaction after hearing the Grievant utter the N-word while she was trying to retrieve a call back number. She said:

“Civilian [REDACTED] stated she was in shock and there was no supervisor at the front desk at the time. Civilian [REDACTED] went to the Tape Room and spoke with Corporal [REDACTED], W/F. Civilian [REDACTED] stated she wanted to hear the call with Lt. McFadden again, to be sure she heard what she believed McFadden stated. Civilian [REDACTED] stated the call was replayed in the presence of Corporal [REDACTED], who then stated, “Oh no, that is not acceptable.” Civilian [REDACTED] stated Corporal [REDACTED] pulled up an EEO complaint form, which was submitted.

Civilian [REDACTED] stated she returned to the front desk after some time, and explained to Corporal Robert [REDACTED], B/M, the reason she had been gone for an extended time. Civilian [REDACTED] stated Cpl. [REDACTED] replayed the call and immediately notified Captain [REDACTED] B/M.” [C.2].

The Grievant’s statement almost immediately became the subject of consternation and anger in the community. Chief [REDACTED] testified to her attendance at the Citizens Oversight Commission. She stated that the Grievant’s statement caused substantial anger and demands that the Commissioner do something to address the Grievant’s action. Within a matter of days thereafter, before the conclusion of the official IAD investigation, the then Commissioner took direct action and dismissed the Grievance.

Acting Commissioner John Stanford testified in support of the direct-action decision. I agree with his take on the Grievant’s statement that there is no place for this type of language. He especially noted that it was disheartening from a person in a supervisory rank since officers

look toward supervision for guidance and direction [T.103]. He noted that the statement was made in a less than a provoking manner because of simply being placed on hold. This is an interesting qualification of the statement since on cross examination, when asked what, in his view, context meant in situations. He stated as an example, if the Lieutenant was fighting for his life and made the statement he did not think anyone would hold it against him [T.115] I find this to be interesting because the foundation of the concept of just cause requires the arbitrator to consider such factors as context in considering the propriety of certain discipline. The Commissioner also stated that he found that many of the prior suspension for the use of this word to be “disgusting” in that some of those officers were even still employed.

Just cause as found in the Collective Bargaining Agreement is the basic standard of industrial jurisprudence and requires that this arbitrator consider the service record of the Grievant and the context in which it was uttered. Given the gravity of the word in any situation, the underlying circumstances would carry considerably less weight. However, the Grievant’s service record should be considered because it is the better indicator of the Grievant’s character.

The Grievant had been employed as a sworn officer for thirty-two years serving in numerous critical assignments. According to his testimony and the record, he was awarded forty-eight awards and commendations, two awards for bravery and heroism and annual evaluations that were satisfactory; many of which contained superlative language. What is also important here is that the Grievant has not incurred any discipline in 32 years of service and most importantly there was no evidence presented that there was ever a civilian complaint either founded or unfounded filed against the Grievant. It has been my experience and as previously argued by the Union that any officer can receive a civilian complaint on any given day even if

the complaint is eventually unfounded. The Commissioner, however, acknowledged the Grievant's record of service. He had worked with him in the past and while finding that it was something no one "can take away from him" found it to not be worthy of consideration with review of his termination. I disagree.

The Grievant testified that he used to word in reaction to just after avoiding a collision when someone pulled out into traffic in front of him. His coffee and lunch spilled to the floor. I credit his explanation that he was angry and frustrated. It was not directed to anyone. He could not identify the occupants of the other vehicle including their race. This according to the Grievant was an embarrassing mistake. While I do credit his remorsefulness, I do not credit the Grievant's explanation of his utterance, however. The Grievant testified that his statement was accidental. "I never use that word. I know it's taboo. It's not used in my house, my household. It's not used by our family. It is not used by me." [T.182] I find trouble with the concept that of all the words that can be used to express anger, stress, and frustration, this one comes to the fore. I cannot believe that this arrived in his mind from the ether. Overall, however, the Grievant's service record must be considered in weighing the appropriateness of his dismissal. Given the overall quality of that record, I must give it significant weight to mitigate the penalty.

It is my conclusion that a reduction to a 30-day suspension with reinstatement with back pay, including overtime compensation is appropriate. The compensation, however, should be offset by all earnings received by his current employment and pension payments. However, I cannot rest with this limited award. The infraction that the Grievant committed is quite serious. In my view it is insufficient to reinstate the Grievant so that he or others feel that he has been vindicated. For the community of coworkers, including civilians, this penalty leaves them with

no real sense of resolution. At the same time, if I upheld the dismissal, the Grievant would take such a decision as an unjust verdict given his years of service. Neither outcome would address the scope of the offense that occurred. The Grievant must work to restore their trust and respect as a Philadelphia Police Officer.

To restore some semblance of trust between the Grievant and other members of the Department and community, he must understand the impact of his use of such language on the listener regardless of the context. Accordingly in addition to the Award stated above, I am ordering that the Grievant appear in person before the following individuals to apologize and to provide an explanation for his actions: The Police Commissioner; the 911 Dispatcher who he offended, [REDACTED]; and the Citizen's Oversight Board. This must be done within thirty days upon his return to work. Hopefully, that will impress upon him the importance of his role and the impact of the use, even casually, of such language.

AWARD

For all the reasons set forth herein, the Grievance is partially sustained and the discipline mitigated. The discipline shall be reduced to a thirty-day suspension. It is ordered that he shall be reinstated to his former position and rank with back pay including applicable overtime. This payment shall be offset by any compensation received from his pension payments and other jobs worked. In addition, and for the reasons set forth herein, it is ordered that the Grievant, within thirty days of his return to work, appear before the Police Commissioner, the 911 dispatcher, [REDACTED], and the Citizens Oversight Board. He is to apologize for the use of his language and provide his explanation.

Dated: December 14, 2023

**Alan
Symonette** Digitally signed by Alan
Symonette
Date: 2023.12.14
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Alan A. Symonette, Arbitrator
Media, Pennsylvania

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania that require filing confidential information and documents differently than non-confidential information and documents.

Dated: November 15, 2024

/s/ Catherine Twigg
Catherine Twigg

CERTIFICATE OF LENGTH

I certify that this brief complies with the word count requirement set forth in Pennsylvania Rule of Appellate Procedure 531(b)(1)(i) and 2135, this brief is 6,986 words. I have relied on Microsoft Word's word count function to determine the length of this brief.

Dated: November 15, 2024

/s/ Catherine Twigg
Catherine Twigg

PROOF OF SERVICE

I hereby certify that I have served a copy of the foregoing Brief on counsel of record for the parties by electronic filing.

Dated: November 15, 2024

/s/ Catherine Twigg
Catherine Twigg