

AMERICAN ARBITRATION ASSOCIATION

IN THE MATTER OF:

FRATERNAL ORDER OF POLICE,
LODGE # 5

AND

Demotion and Transfer: Gregory Riley
AAA Case No. 14 390 1667 08 EG

CITY OF PHILADELPHIA

OPINION AND AWARD OF ARBITRATOR

Hearing Dates: June 11, 2010
July 1, 2010

Arbitrator: Thomas G. McConnell Jr.

Appearances:

For the FOP:

Bridget Walsh, Esq.

For the City:

Jeffrey First, Esq.

PROCEDURAL HISTORY

This is a grievance arbitration proceeding involving the Fraternal Order of Police, Lodge 5 (FOP) and the City of Philadelphia (City). Hearings were held on June 11 and July 1, 2010, at which time the parties were given a full opportunity to present their cases.

ISSUES

The parties were able to stipulate to the issues in this case? Whether the City had just cause to demote and transfer the grievant? If not, what shall the remedy be?

FACTUAL BACKGROUND AND PROFFERED EVIDENCE

General Description of Underlying Incident

On May 25, 2007, Officer William Forbes and Officer Ileana Muniz were in plainclothes and observed what they thought was a drug transaction going on at Bailey and Oxford Streets. At that time, Robert Weiser and Brian Sturgis were parked in a vehicle at Bailey and Oxford Street and an individual approached the vehicle. Officer Forbes then pulled alongside Mr. Weiser's vehicle and the officers exited their vehicle and identified themselves as police officers. Officer Forbes approached the individual who had been seen approaching the vehicle in the transaction, while Officer Muniz went to the driver side of the vehicle. When Mr. Weiser moved his hands out of view, Officer Muniz reached into the vehicle, at which time Weiser put the car in reverse. Muniz was pulled a short distance along with the car, and Officer Forbes grabbed onto the trunk area. Ultimately Officer Forbes and Officer Muniz found it necessary to fire shots as the incident unfolded, and Weiser and Sturgis were apprehended.

Weiser was apprehended and detained at 33rd and Girard Streets, and was placed in handcuffs in a police wagon. Gregory Riley, the grievant in this matter, and a sergeant at that time, was driving Officer Muniz to Internal Affairs to be interviewed about the incident when he heard over the radio that Weiser was apprehended. Mr. Riley testified that, as he was driving Officer Muniz to Internal Affairs to give a statement, he received a directive from Lieutenant Hyers to bring Muniz back to 33rd and Girard for an identification of Weiser.

When arriving at the scene, and at Mr. Riley's direction, the outer doors and inner door of the wagon were opened so that Officer Muniz could identify the suspect. There is no dispute that there was an altercation between Muniz and Weiser at that point. The witness accounts do differ markedly as to what occurred during the altercation.

Testimony of Officer David Nelson

Officer David Nelson testified that, on the day in question, he and his partner, Officer Donna Tygh, were involved in a car stop when they heard gunshots and the radio call regarding the events which unfolded at Bailey and Oxford Streets. Officer Nelson and Officer Tygh then abandoned the car stop and responded to Bailey and Oxford. Officer Nelson and Officer Tygh ultimately ended up at 33rd and Girard. Officer Nelson testified that he witnessed Mr. Riley and Officer Muniz arrive and go to the back of the wagon, and that the doors were then opened for the identification. Nelson testified that he then heard Muniz yelling from inside the wagon, "you motherfucker, you motherfucker, you tried to kill me." Officer Nelson testified that he could see that Officer Muniz was hitting Weiser but he could not see what she was hitting him with. Officer Nelson testified that he then looked at Mr. Riley, who was next to him, and said,

"yo sarge you going to stop this?" and that Mr. Riley had a "deer caught in the headlights" look on his face and said nothing in response. Officer Nelson testified that Officer Sharrod Davis then pulled Officer Muniz out of the wagon by the back of her belt. According to Officer Nelson's account, he could see that Officer Muniz's radio was "full of blood" and he also saw her shaking it to get the blood off. Officer Nelson testified that someone handed Muniz a paper towel and that she wiped the blood off.

On cross, Officer Nelson acknowledged that, instead of telling Mr. Riley to do something, he could have taken the initiative and intervened as Officer Davis did.

Officer Nelson testified that, a week or two after the incident, Mr. Riley asked for a "meet" and during this meeting Riley mentioned a captain who supposedly is in a motorcycle gang. According to Officer Nelson, Mr. Riley then inquired as to whether Nelson was in a motorcycle gang called "The Wheels of Soul." Officer Nelson testified that he responded that he did not ride with the "Wheels of Soul," and indicated that "he did his own thing."

On cross, Officer Nelson testified that, at some point after this incident, he did have a disagreement with Officer Muniz, but that he harbored no hard feelings for her, and would lay down his life for Officer Muniz or Mr. Riley. On cross, Officer Nelson acknowledged that during his career as a police officer, he had been investigated a couple of times by Internal Affairs.

Testimony of Officer Sharrod Davis

Officer Sharrod Davis testified that he was present at 33rd and Girard when Officer Muniz went into the wagon to do the identification. Officer Davis testified that he was talking with someone next to him when he heard screaming in the wagon. The scream was a high pitched woman's voice. Officer Davis then went into the wagon and

pulled Officer Muniz out. Officer Davis testified that he went in the wagon because he was concerned for Officer Muniz's safety. Officer Davis testified that he did not see Officer Muniz having any physical contact with Weiser, and that he did not see any blood. Officer Davis testified that he did not see what Mr. Riley was doing while Officer Muniz was in the wagon. Officer Davis did see Mr. Riley then take Officer Muniz to a vehicle and they drove away from the scene.

Testimony of Officer Donna Tygh

Officer Donna Tygh testified that she was present at 33rd and Girard when Officer Muniz went in the wagon to do the identification. Officer Tygh was on the passenger side of the wagon talking to another officer. From her vantage point, Officer Tygh could not see into the wagon. Officer Tygh testified that she did see Officer Muniz after she was pulled from the wagon, with a radio in her right hand. Officer Tygh testified that she saw Officer Muniz shaking her left hand, as if in a flailing action. According to Officer Tygh's account, there was something shiny on the radio, which appeared to be blood. Officer Tygh testified that, later on someone noticed a spot of blood on her shirt, which appeared to be blood. Officer Tygh testified that she did not observe any blood on Officer Muniz's clothing.

On cross, Officer Tygh testified that she is not sure how much time had transpired between the time she was at 33rd and Girard and the time someone noticed the spot on the shirt. Officer Tygh testified that no one ever asked for the shirt to test to see if the substance on it was blood. Officer Tygh testified that she was not certain how many other responses she and Officer Nelson had made that night before arriving at 33rd and Girard.

Testimony of Lieutenant Michael Young

Lieutenant Michael Young works for Internal Affairs and was involved in the investigation of what happened at Bailey and Oxford and 33rd and Girard. In doing so, Lieutenant Young obtained 75-48 reports, the radio tapes of 911 calls and radio traffic between police officers and police radio, ballistic reports, crime lab reports, and a medical report regarding Weiser's condition. Lieutenant Young also conducted or was privy to transcripts of numerous interviews.

Lieutenant Young testified that he concluded that Mr. Riley had used poor judgment and had failed to properly supervise the scene at 33rd and Girard. Lieutenant Young testified that Directive 22, which was entered into evidence as Joint Ex. 5, requires a supervisor to contact Internal Affairs through a "computer use of force message." Lieutenant Young testified that this message must be sent within the same tour of duty the use of force occurs. Lieutenant Young testified that a second report must be completed during that tour of duty and must be forwarded to Internal Affairs within five days of the incident.

On cross, Lieutenant Young testified that FOP Ex. 1 is the second written use of force form, signed by Officer Muniz and Mr. Riley, but it does not have a commanding officer signature on it and that it is not dated by Muniz or Riley. Lieutenant Young testified that he is not sure if FOP Ex. 1 was ever forwarded to Internal Affairs, and if so when it was forwarded. Lieutenant Young was also referred to FOP Ex. 2 on cross, a form completed by Corporal Raymond Johnson. Lieutenant Young testified that FOP Ex. 2 is not a computer generated use of force form, but rather a hospital case notification. Lieutenant Young testified that a computer generated use of force form

was communicated to Internal Affairs in this case, but not until several days after the incident. Lieutenant Young then located that form, and it was marked and entered separately as FOP Ex. 3. This was forwarded to Internal Affairs on May 29, 2007. Though FOP 2 and FOP Ex. 3 are the same forms, Lieutenant Young testified that FOP Ex. 2 is actually filled out to reflect a different purpose than use of force, namely, notification that the suspect was taken to the hospital. Lieutenant Young acknowledged on cross that Directive 22 requires the computer generated use of force form to be completed by the corporal (Section VII, Section 6 of Directive 22).

Lieutenant Young acknowledged on cross that his role is to do the investigation, and not to recommend charges under the Disciplinary Code. Lieutenant Young testified that he had investigated Officer Nelson about 12 years ago. Lieutenant Young had a vague recollection concerning that investigation, but believed it had something to do with Nelson standing up in court and saying "we arrested the wrong man." Lieutenant Young testified that the investigation may have also included missing drugs, and that he "believes" the charges were sustained. Lieutenant Young acknowledged on cross that Officer Muniz's radio was tested and came back negative for blood. The test occurred quite some time after the incident.

Testimony of Captain John Gallagher

Captain John Gallagher testified that he has known Mr. Riley since they both were police officers. Captain Gallagher has supervised Mr. Riley on three occasions. Captain Gallagher is currently Riley's direct supervisor. Captain Gallagher testified that he has never had any reason to doubt Mr. Riley's character; that Riley is a person of integrity with a "great moral compass,;" and that he would count on Riley to be 100%

honest with respect to any issue. Captain Gallagher testified that Mr. Riley's "ability to tell the truth is beyond question."

Testimony of Captain Benjamin Nash

Captain Benjamin Nash has known Mr. Riley since approximately 1990, when they were "rookie cops." Captain Nash testified that he subsequently worked with Mr. Riley when they both worked in the IMPACT unit. Captain Nash supervised Mr. Riley when Nash was promoted to lieutenant, for about three years. Captain Nash testified that Mr. Riley is a man of strong character, and very dedicated. Captain Nash testified that he has always Mr. Riley to be a truthful person.

Testimony of Officer John Descher

Officer John Descher was present at 33rd and Girard when Officer Muniz entered the wagon. At that time, Officer Descher was talking with Officer Tygh and Officer Nelson. Officer Descher was not in a position to see what happened in the wagon, but did see Officer Muniz after she was pulled out of the wagon. Officer Descher did not see any blood on Officer Muniz or on her radio.

Testimony of Officer William Forbes

Officer William Forbes was not present at 33rd and Girard, as he was taken to the hospital after his foot had been run over at Bailey and Oxford. Officer Forbes testified that Officer Nelson was removed from 5 squad in the summer following the May 2007 incident at issue in this proceeding. From statements Officer Nelson has made, Officer Forbes believes that Officer Nelson blames Officer Muniz for being taken off of 5 squad.

Testimony of Officer Muniz

Officer Muniz testified that, when Mr. Riley took her to 33rd and Girard, she did enter the back of the wagon to identify the suspect. Officer Muniz testified that the

lights were not on and she could not see very well, and thus the inner secured door was opened. Officer Muniz testified that Weiser then came at her, and that she then attempted to close the inner mesh door on him. Officer Muniz testified that Weiser was kicking at her, and there was a very brief struggle as she closed the door. Officer Davis then helped her get down off the back of the wagon. Officer Muniz testified that it is possible that she struck Weiser with the radio in the struggle, as she did have the radio in her hand.

Officer Muniz testified that, after the identification, Mr. Riley drove her to Internal Affairs, where they took pictures of her, and took the magazines from her gun. After they finished at Internal Affairs, Officer Muniz testified that she and Mr. Riley were headed back to the District when they needed to respond to a burglary call. This was about 5 or 6 a.m. Officer Muniz was working a 6 p.m. to 2:00 a.m. tour of duty. Officer Muniz testified that, after responding to the burglary call, Mr. Riley drove her back to headquarters, where she turned in her equipment and went home.

In relation to Weiser's injuries, Officer Muniz testified that she is not certain how those injuries occurred, but that it is possible he fell back in the wagon during the struggle, or that it is possible that he was injured during the encounter at Bailey and Oxford earlier.

Officer Muniz testified that she did not fill out the use of force form on May 26, 2007, which was the Saturday of Memorial Day weekend. Officer Muniz testified that normally the requirement would be to fill out such a form in the same tour of duty, but that in practice it does sometimes happen that the form is filled out later on. In this case, Officer Muniz testified that she had been through emotional turmoil, and had

worked a 12 hour shift, and thus filled out the form on her next work day, which was May 29, 2007. Muniz testified that FOP Ex. 1 is the form she filled out.

Officer Muniz testified that, a few weeks after this incident, she had a "run in" with Officer Nelson, and that Nelson was then taken off of 5 squad. Officer Muniz testified that she believes Officer Nelson blamed her for being taken off of 5 squad, and that he regularly tried to intimidate her after that time. Officer Muniz testified that Officer Nelson's behavior caused her to request a transfer, and that she was then transferred to Center City.

On cross, Officer Muniz testified that she never said "there's that motherfucker who tried to kill me," as alleged by Officer Nelson. Officer Muniz testified that she was still feeling the stress of what had happened at Oxford and Bailey when she arrived at 33rd and Girard, but that she was still capable of maintaining professional composure. Officer Muniz testified that she did see Weiser as a threat even though he was handcuffed. Officer Muniz testified that the whole incident in the wagon only lasted a few seconds. Officer Muniz testified that Officer Davis did help her get down from the wagon, but she did not view his help as "pulling her out of the wagon." Officer Muniz testified that she had no blood on her clothing or body, and that there was no blood on the radio. Officer Muniz testified that this testimony is supported in part by the pictures taken at Internal Affairs. Officer Muniz testified that Weiser could have received the injuries to his head in the wagon, perhaps from falling back during the struggle.

Testimony of Lieutenant Hyers

Lieutenant Hyers is assigned to the office of the Police Commissioner. Before this assignment Lieutenant Hyers was assigned to the 23rd District.

While in the 23rd District, Lieutenant Hyers recruited Officer Nelson to be a member of 5 squad, which in the district is considered to be an elite unit.

With the approval of the Captain, Lieutenant Hyers put Officer Nelson back in a line squad after an incident involving Officer Muniz. This incident occurred after the May 27, 2007, incident at issue in this proceeding.

Lieutenant Hyers testified that he directed Officer Nelson and Officer Tygh to take Officer Muniz to Internal Affairs for an interview regarding the May 27, 2007 incident. According to Lieutenant Hyers, Officer Nelson then hung up on him. Lieutenant Hyers then called back, and Officer Nelson then indicated that he would prefer not to drive Officer Muniz to Internal Affairs. Lieutenant Hyers testified that he then said, "I am not asking you I am telling you." Lieutenant Hyers testified that Officer Nelson then hung up again. Lieutenant Hyers then called Officer Tygh, who was with Officer Nelson and directed her to come to his office with Nelson. Lieutenant Hyers testified that he then arranged for an officer from the 22nd District to take Muniz up to Internal Affairs. Lieutenant Hyers testified that Officer Tygh arrived first and that he asked her if Nelson had hung up on the lieutenant. According to Lieutenant Hyers, Officer Tygh then answered "yes" while also indicating that she did not want to "get between" Nelson and Hyers. Lieutenant Hyers testified that his response was that "he is a lieutenant and you and Nelson are police officers, there is no in between here." Lieutenant Hyers testified that he then took Nelson and Tygh off of 5 squad.

Lieutenant Hyers testified that, a few days after Officer Nelson was taken off 5 squad, Hyers was leaving the building and observed a group of officers talking on the back patio. Lieutenant Hyers testified that at that time he was aware that Officer Nelson and Officer Tygh were upset that they were taken off of 5 squad, and that Nelson blamed

Muniz for it. Lieutenant Hyers testified that as he walked by the group of officers he overheard Officer Nelson stating that "he (Nelson) is not going down because of her, and that other people are going to go down with him (Nelson)." Lieutenant Hyers testified that Officer Nelson was talking sufficiently loud that Hyers felt the statement was made so that Hyers would hear it.

On cross, Hyers testified that he believes Officer Nelson made the "someone else is going down" statement around September 15, 2007. Lieutenant Hyers testified that he wrote the September 20, 2007 memo within days of hearing the comment. Lieutenant Hyers acknowledged on cross that, although he states in the memo that he heard the comment "immediately following" Nelson and Tygh's return to line squads, it could not have been immediately following as they were returned to line squads earlier that summer, in June or July. Lieutenant Hyers testified that he wrote the September 20, 2007 memo within a few days or weeks of hearing the comments.

Testimony of Gregory Riley

Gregory Riley was a sergeant in the 23rd District prior to the events at issue here.

Riley was a sergeant in the 23rd from November 2005 to November 2007, at first assigned as a line squad supervisor and then as a tactical sergeant in 5 squad.

The FOP has entered FOP 5, a packet of evaluations Mr. Riley had while in the 23rd, and after that time when he worked at Northwest Detectives, IMPACT, and East Detectives (where he was working as of the date he testified in this matter). These evaluations all reflect positively on Mr. Riley's work performance.

May 27, 2007 was a scheduled off day for Mr. Riley, and he worked overtime on a 3 p.m. to 11:00 p.m. tour of duty. Mr. Riley responded to Bailey and Oxford that night. One of the suspects was apprehended within a block or two of the scene. Mr. Riley was

planning on taking Officer Muniz to Internal Affairs when he heard that the first suspect was apprehended. Mr. Riley then took Muniz to identify that suspect. After that was accomplished, Mr. Riley was in the process of driving Officer Muniz to Internal Affairs when he received information that the car in the incident was found. Mr. Riley then took Officer Muniz to the site of the car to identify the car. After this was done, Mr. Riley again began driving toward the expressway to go to Internal Affairs when he received a call that another suspect was being detained at 33rd and Girard. Later in his testimony Mr. Riley stated that the call may have come from Lieutenant Hyers. Mr. Riley then drove to 33rd and Girard, and saw about 10 to 15 uniformed officers there, along with perhaps two officers in plainclothes.

Mr. Riley testified that he then walked with Officer Muniz over to the wagon. Another officer opened up the outside doors. Mr. Riley testified that he then noticed Sharrod Davis, an officer he had not seen in a while, and that he began talking to Davis about what had transpired at Bailey and Oxford. Mr. Riley testified that he then decided it would be better to open the secure, mesh door inside the wagon so that Muniz would get a better view of the suspect. Mr. Riley was concerned that a defense attorney might challenge the identification if that door were not open as well. Mr. Riley testified that he made the judgment to have the mesh door opened in part because he knew that the suspect was secured in the wagon. Mr. Riley testified that he believes that Officer Muniz then opened the inner door and that he then heard some commotion. According to Mr. Riley's account, Officer Davis responded and assisted in getting Officer Muniz out of the wagon. Mr. Riley testified that he was responding as well but that Officer Davis got there first. Mr. Riley testified that the whole incident lasted only two seconds, and that during that time he did see Officer Muniz standing over the suspect, who was on the

floor. Mr. Riley testified that the suspect was "flailing" his legs up at Officer Muniz. Mr. Riley testified that it was difficult to see into the wagon, due to the small confines.

Mr. Riley testified that Officer Muniz became emotional after she left the wagon, and he was attempting to calm her down. Mr. Riley testified that he did not want to have other officers seeing her in that condition, and so they then left the scene after being assured that others were going to finish the job there. While on the expressway to Internal Affairs, Mr. Riley testified that Officer Muniz was crying, and that he tried to calm her down.

Officer Muniz was then interviewed at Internal Affairs, and photos were taken of Muniz and her clothing. Mr. Riley testified that he did not see any blood on Officer Muniz at 33rd and Girard, and did not see any at Internal Affairs. Officer Forbes, who had been taken to the hospital after his foot injury, arrived at Internal Affairs while Mr. Riley and Officer Muniz were there.

Mr. Riley testified that, while at Internal Affairs, Lieutenant Young inquired as to how Weiser got injured. Mr. Riley testified that he did not know how Weiser got injured, but surmised that Weiser could have been injured at the scene of Bailey and Oxford, as Officer Muniz was attempting to detain him; at 33rd and Girard, in the wagon; or at some other time.

Mr. Riley testified that, as he was driving Muniz and Forbes back to the 23rd, they encountered an open, unsecured property, and stopped there to make sure the property was secure. After doing that, the guns of Forbes and Muniz were dropped off at the crime lab and Riley then drove back to the 23rd.

Mr. Riley testified that, upon arriving at the 23rd, Raymond Johnson, a corporal, told him that he had taken care of the computer generated use of force form, meaning he

had sent that to Internal Affairs. Mr. Riley identified that communication as FOP Ex. 2. Mr. Riley testified that there was some confusion as to what to do with the handwritten use of force report, which was required to be submitted under Directive 22. Mr. Riley testified that, given the fact that it was then about 5:00 a.m., and given what Officer Muniz had been through, he made the decision to hold off on completing that form until Muniz worked her next shift. Mr. Riley testified that the handwritten use of force form was then completed on Tuesday, May 29, 2007. Mr. Riley testified that he also had some concern as to whether he had to do another computer generated use of force communication, and then discussed it with the captain. Mr. Riley testified that the captain decided that to be safe another one should be done, and that the form entered as FOP Ex. 3 was then completed and forwarded. Mr. Riley testified that he had only dealt with two or three other instances where use of force forms needed to be completed, hence he was somewhat confused about the protocol.

Mr. Riley provided two statements to Internal Affairs after the events of May 27, 2007. In the first statement, Mr. Riley indicated that he saw Weiser lunge toward the door at 33rd and Girard. In the second, Mr. Riley indicated that he did not see that, but assumed that is what happened. Mr. Riley testified that, in the first statement, he was answering based not only what he knew but what he had learned from others. Also, Mr. Riley testified that by the time of the first statement, a month had gone by, and thus he really did not have a very focused recollection. Mr. Riley testified that, by the time of the second statement, he had had time to think about the events. Mr. Riley also testified that he had "pretty much" put the events at 33rd and Girard out of his head after May 27, 2007, as he felt there was nothing unusual which happened that night at that scene.

With respect to Officer Nelson's testimony about the "meet" he asked for, Mr. Riley testified that he had heard Nelson's name "dropped" two or three times in relation to the Wheels of Soul, a motorcycle gang which had been designated by the Police Department as an outlaw gang. Riley testified that he met with Nelson simply to watch himself, without any real belief or proof that Nelson was involved with that gang. Mr. Riley testified that the conversation in question occurred prior to May 27, 2007.

On cross, Mr. Riley testified that Officer Muniz was only in the wagon for a few seconds. Mr. Riley testified that, in his opinion, it would have been hard for anyone to see in the wagon based upon the body positions of Weiser and Muniz. Mr. Riley denied on cross that he ever heard Nelson say "yo sarge you going to do something?" while Officer Muniz was in the wagon. Mr. Riley testified that he does not even remember Nelson standing in his vicinity.

On cross, Mr. Riley testified that Officer Muniz's mental state was not good at all after the events at Bailey and Oxford. Mr. Riley testified that Muniz was crying as he was driving to Internal Affairs, before he received the call to go to 33rd and Girard. Mr. Riley testified that Officer Muniz related that she thought her partner might have been killed. Officer Riley testified that he was able to calm Officer Muniz down by the time they reached 33rd and Girard and that he felt she could perform the identification. Officer Riley testified that, once in the wagon, Officer Muniz might have said, "that's him," but did not say "that's him, that's the motherfucker" as alleged by Officer Nelson. Mr. Riley acknowledged in his testimony that he might not have heard everything said.

With respect to FOP Ex. 1, Mr. Riley testified that the handwritten use of force report was supposed to be done within five days and forwarded to Internal Affairs within five days. Mr. Riley testified that there is no date by his signature or Muniz's

signature perhaps because he had only done a few of these and was not familiar with the protocol.

Testimony of Officer Nelson on Rebuttal

Officer Nelson was recalled on City rebuttal. Officer Nelson denied that he ever said that others were "going to go down" if he was "going down." Officer Nelson testified that he did have an argument with Officer Muniz in the operations room, but that it was a short one and that he harbored no grudges because of it. Officer Nelson testified that he never said he will "make sure that bitch doesn't have a job" in relation to Officer Muniz. Officer Nelson testified that he told the truth during the hearings in this matter.

On cross, Officer Nelson testified that Lieutenant Hyers called him in on June 27, 2007 and asked him about the incident with Officer Muniz. Officer Nelson testified that he told Lieutenant Hyers that she cursed at him and that he cursed back and that was the end of it. Officer Nelson testified that Lieutenant Hyers told him to leave Officer ~~Muniz alone; that Hyers had Tygh take Muniz to Internal Affairs; and that later in the~~ tour of duty Hyers called he and Tygh in and handed them memos removing them from 5 squad. Officer Nelson testified that he does not remember any meeting where Lieutenant Hyers told he and Tygh that if they had any information an officer acted inappropriately they needed to report it immediately. Officer Nelson testified that if Lieutenant Hyers testified to that then he must be lying.

On cross, Officer Nelson agreed that if a supervisor gives an order an officer has to follow it. Nelson testified that Lieutenant Hyers did take him off 5 squad but that he was never really given a reason. Officer Nelson testified that he believes he was taken off of 5 squad on June 27, 2007 and that he began work in a line squad on June 29, 2007.

POSITIONS OF THE PARTIES (IN BRIEF)

The City's position may be summarized as follows:

- There are issues of credibility here which must of course be resolved by the arbitrator. The City maintains that Officer Nelson had no reason to lie here. He came into the hearing room and looked everyone in the eye and told the truth. It would be virtually impossible to make up the story he presented in his testimony.
- Officer Nelson's view was not blocked by anything. He saw Officer Muniz hitting a defenseless Weiser. Officer Muniz admitted she struck Weiser in her testimony and in the use of force report. It was not a wise use of discretion to bring Officer Muniz back for the identification given her fragile emotional state. There is a department policy indicating that he should have taken her back to Internal Affairs after the shooting and that clearly would have been the better course.
- Officer Nelson credibly testified that Officer Muniz, upon seeing Weiser, stated, "that's him that's the motherfucker," demonstrating that Muniz was obviously upset. The grievant's denial that this was said is not credible.
- Officer Nelson also testified credibly that the grievant did nothing while the altercation was going on, even after Nelson implored him to do something. Though the grievant testified that the whole incident lasted two seconds, obviously he was attempting to minimize what happened.
- The FOP will argue that Officer Nelson "had it in" for Officer Muniz, but this is simply not true. Officer Nelson credibly testified that he made no statements indicating he was going to take other officers down. On this point, Lieutenant Hyers could not explain why he wrote a memo in September 2007 supposedly documenting this conversation which took place several months before. If this was such a serious matter, why would he wait so long to document it? Even if Officer Nelson did make those statements, he could just have been blowing off steam.
- As to the false statement charges, Mr. Riley denied that he saw blood on Officer Muniz's radio; and denied that he saw Officer Muniz hit Weiser. Officer Nelson provided credible testimony demonstrating that the grievant lied with respect to all of these denials.
- Finally, as to the failure to follow directives, the use of force form must be filled out the day of the incident, which the grievant concedes was not done here. The

fact that the grievant did not fill in the date of completion also raises suspicion as to what date it really was completed.

- Just cause exists for the demotion and transfer. The grievance should be denied.

The FOP's position may be summarized as follows:

- It must first be stated that the notice of demotion raises no issue as to any abuse of discretion because the grievant made the decision to bring Officer Muniz to 33rd and Girard for the identification. Even if it was before the arbitrator, the grievant provided a credible explanation that Lieutenant Hyers instructed him to do that before taking Officer Muniz to Internal Affairs.
- The grievant did not see Officer Muniz hit the suspect, and did not see any blood. Though Officer Nelson testified that he saw Officer Muniz hit the suspect, his testimony is not corroborated, even though there were at least 10 officers in the vicinity. This same analysis applies with respect to Officer Nelson's claim that Officer Muniz's radio was dripping with blood when she emerged from the wagon. Officer Nelson's testimony is not credible, and clearly was fabricated as "pay back" for what he perceived was Officer Muniz's role in his removal from 5 squad.
- There are various ways that Weiser could have been injured, including at the scene of the shooting, at a different location. There is no actual proof that Weiser was injured in the back of the wagon.
- As to the allegations of false statements, the first allegation is that the grievant lied when he said in his first statement that Weiser lunged at the door, and in the second statement he said he did not remember whether Weiser lunged at the door. The grievant credibly explained that, in the first statement, he was recounting what others had told him, while in the second statement he was attempting to remember what he actually saw. This was not a false statement when viewed in that context.
- The grievant credibly denied that he saw Officer Muniz hit the grievant, and credibly denied that he saw any blood. The only testimony which would support a falsification charge on these points is Officer Nelson, who was not credible. While Officer Tygh claimed that she later saw what appeared to be a drop of blood on her shirt back at headquarters, assuming it was blood it could have come from various places. If Officer Muniz had blood on her clothing, the pictures taken at Internal Affairs would have shown that.

- As to the allegation that the grievant failed to respond when the altercation occurred, once again sustaining this charge requires crediting Officer Nelson, who had an obvious axe to grind in this case. In fact, Officer Nelson never said anything to the grievant, and the grievant did respond, but Officer Davis just happened to get to the wagon first.
- Though the City also urges that the grievant failed to follow Directive 22 in relation to filling use of force forms, in fact the first computer generated form was filed on the date in question. To be safe a second form was then forwarded the following Tuesday. The other required use of force form was filed on the following Tuesday, at best a technical violation which can be readily understood given the number of hours the grievant and Officer Muniz were on duty in the day in question, and the extreme stress officer Muniz was under at the time. It must also be noted that the grievant had only dealt with such forms a few times in the past and really lacked any notice as to the requirements in question.
- Finally, the penalty was inappropriate here. The failure to supervise is the only charge carrying with it a possible demotion, and that has not been proven. Even if proven, the PBI did not recommend a demotion and the Commissioner did not testify as to the thought process behind the transfer and demotion.
- The transfer and demotion were not supported by just cause. An order should be entered directing the City to rescind the transfer and demotion and making the grievant whole. The arbitrator should retain jurisdiction to ensure proper implementation of the award.

DISCUSSION

The City has demoted Gregory Riley from the position of Sergeant to Detective, and transferred him from the 23rd District to Detectives, based upon three charges: 1. Conduct Unbecoming an Officer, Section 1.12 (Making a false statement in response to an official Department investigation); 2. Neglect of Duty, Section 4.15 (Failure to Properly Supervise Subordinates; and 3. Neglect of Duty, Section 4.20 (Failure to comply with any Commissioner's Orders, Directives, Regulations, etc., or any oral or written orders of superiors).

The underlying events, key to all charges, occurred on Friday, May 25, 2007, going into the early morning of Saturday, May 26, 2007. The weekend in question was Memorial Day weekend. On the night of May 25, 2007, Officers Forbes and Muniz intervened when they witnessed an alleged drug transaction. During the course of this intervention, the driver of the vehicle attempted to flee by placing the car in reverse while Muniz was leaning into the vehicle. During the ensuing minutes Officer Forbes had his foot run over, the suspects fled, and shots were fired by the officers. The two suspects in the car were apprehended, the passenger about a block away from Bailey and Oxford and the driver, Robert Weiser, was apprehended near 33rd and Girard and was placed in the back of a police wagon in handcuffs. From the testimony presented, it is not clear to me whether Weiser was strapped to a seat with any sort of restraint or seat belt.

Mr. Riley was one of the first officers to respond to Bailey and Oxford. Mr. Riley and Officer Muniz ultimately ended up at 33rd and Girard so that Muniz could perform an identification of Weiser. The doors at the back of the wagon were then opened, and Mr. Riley then directed that the inner door also be opened. Though the inner door had a metal mesh screen which would have allowed some view of the suspect, Mr. Riley was concerned that the identification might be challenged if Officer Muniz did not have a full and open view. It is not clear to me if Officer Muniz then opened the inner door, or whether another officer did. Officer Muniz testified that the inner lights were not on inside the back of the wagon.

There is a marked conflict in the testimony as to what occurred when Officer Muniz was in the back of the wagon. The most prominent conflict relates to the accounts of Officer Nelson, versus the accounts of Officer Muniz and Mr. Riley.

The differences in these accounts are detailed in the factual background section above, but the thrust of the difference relates in part to Officer Nelson's claim that Officer Muniz essentially lost her composure upon seeing Weiser, began cursing at him, and began hitting him with her radio. Officer Nelson testified that he looked at Mr. Riley, and asked if he was going to do something, but that Riley appeared to be frozen. Officer Nelson testified that Officer Davis then intervened and pulled Officer Muniz out of the wagon. Officer Nelson testified that, as Officer Muniz emerged from the wagon, she was shaking her radio, which had blood all over it. Officer Nelson testified that someone handed her a paper towel and that she wiped it off.

In contrast to Officer Nelson's account, Officer Muniz testified that as she was performing the identification, Weiser lunged toward the door, in an apparent attempt to get out of the wagon. Officer Muniz testified that she then attempted to shut the door, and may have struggled with Weiser in doing so, perhaps even striking him with the radio. Officer Muniz testified that she did not have any blood on her radio or her clothes as she exited the wagon. Mr. Riley testified that the whole incident lasted just a few seconds, and that he did not see much due to the tight confines of the wagon and the fact that Officer Muniz was blocking any view he might have from his angle. Mr. Riley testified that he saw Weiser on the floor "flailing" his legs, with Officer Muniz standing over him. Mr. Riley testified that he did not see any blood on Officer Muniz or her radio as Officer Davis helped her back out of the wagon. Mr. Riley testified that he attempted to respond when he heard the commotion but that Officer Davis (who is considerably younger) moved faster to do so.

Upon reviewing all the evidence presented, I believe that Officer Muniz was engaged in a brief struggle with Weiser and I believe it is more likely than not that

Muniz hit Weiser with her radio at least once and possibly more as the struggle occurred. I also believe that Officer Nelson exaggerated what happened, at least with respect to seeing blood all over Officer Muniz's radio as she emerged from the wagon. In this regard, pictures were taken of Officer Muniz back at Internal Affairs that same night and there was no blood on her clothing; tests of the radio, which were conducted some time later, were negative for blood. Officer Davis, who actually pulled Officer Muniz out of the wagon, testified that he did not see any blood either. I do believe that Officer Nelson slanted his testimony on the incident based upon animosity toward Officer Muniz, whom he believed was responsible for the fact that he was removed from 5 squad the day before he provided his statement to Internal Affairs in this matter.

It is a very difficult factual resolution as to whether Officer Muniz lost her composure upon seeing Weiser, without any provocation, out of anger, or whether Muniz responded to aggression from Weiser, or some sort of move to get out of the wagon. It is also conceivable that, if Weiser did provoke Officer Muniz in any fashion, either by lunging or through some attempt to get out of the wagon, Muniz then lost her composure briefly as her emotions got the best of her based upon the events which had transpired at Bailey and Oxford. Assuming the allegations as to what occurred at Bailey and Oxford are true, certainly Officer Muniz had reason to be angry, as she thought for a time that her partner may have been killed and she was also placed in danger by the direct conduct of Weiser. According to the allegations, Weiser meanwhile had proved himself as someone who could very well engage in desperate or reckless behavior and the evidence suggests he might have been under the influence of drugs.

I have decided that, whatever caused the altercation in the wagon, brief as it was, the difficult factual resolution need not be made in this case. For in either case I believe

that Mr. Riley should have seen the potential for either scenario to occur. Such an altercation simply should not have occurred with approximately fifteen officers there and an individual handcuffed in the back of a wagon. Accordingly, whether Mr. Riley made a mistake in judgment in taking Officer Muniz to 33rd and Girard given her fragile emotional state, or whether he made a mistake in not being more vigilant during the identification process, I do believe that the City has proven a failure to properly supervise subordinates.¹

The Notice of Demotion also alleges that Mr. Riley made false statements during the Internal Affairs Investigation. This particular charge alleges that Mr. Riley provided a false statement in first stating that he saw Weiser lunge the door, and then in a second statement saying he assumed she lunged toward the door; in stating that he did not see Officer Muniz hit Weiser and denying he saw any blood on her; and in denying that he had been asked by another officer to intervene.

Turning first to the first allegation regarding false statements, regarding whether ~~Mr. Riley saw Weiser lunge at the door, there is no question in the first statement that~~ Mr. Riley states definitively that Weiser lunged for the door. In a second statement he claimed he did not actually see that, but understood that to happen. While the City has

¹ The FOP urges that the issue of Mr. Riley's discretion in bringing Officer Muniz to the scene is not addressed in the Notice of Demotion, and therefore should not be considered. While I agree that the Notice of Demotion could be more precise, the notice does address Officer Muniz's mental state as she was taken back, and Mr. Riley's general handling of the entire incident. I think his discretion during the entire incident is at issue, including the decision to bring Officer Muniz to 33rd and Girard in the first place. In this regard, Mr. Riley was the only one privy at that time to Officer Muniz's fragile emotional state.

set forth a colorable allegation, as noted by the FOP the question in the first statement related to "what happened" and not what Mr. Riley specifically saw. Mr. Riley therefore presented plausible testimony that he was combining what he knew with what he had heard from others, to provide a complete picture. A false statement charge is a serious one, and thus intent to falsify must, in my estimation, be quite apparent. Mr. Riley has presented a plausible explanation, and beyond that it is not clear to me why lying on that issue in the second statement would really serve any useful purpose for him. As such, I have concluded that the City has not met its burden of proof on this charge.

The remaining charges for false statements, though referencing "witnesses" whose accounts conflict with Mr. Riley's, are really based on one witness's account, Officer Nelson. No other witness at the scene reported seeing blood on Officer Muniz's radio, or reported seeing Officer Muniz hit Weiser.² Officer Nelson is the only officer to testify that he implored Mr. Riley to do something and that Riley did not respond.

While I am not discounting that there might have been some blood initially on Officer Muniz's radio, it strikes me as unreasonable that other officers could see and identify blood on her radio, especially since it was after midnight and presumably quite dark. It strikes me as reasonable, on the other hand, that Mr. Riley may not have noticed that there was blood on the radio, if there was any, and the overall evidence supports the conclusion that there was no blood on Officer Muniz's clothing.

I also believe that Officer Nelson concocted his testimony about asking Mr. Riley to do something at the scene of the incident to cover himself should Internal Affairs ask him why he did not respond as Officer Davis did. On this point, Officer Descher testified

² Officer Tygh testified that she saw something "shiny" on Officer Muniz's radio after she had left the wagon, and that someone else noticed a spot of what appeared to be blood on Tygh's shirt later on that morning. This is not particularly compelling evidence in support of Officer Nelson's claim that there was considerable blood apparent.

that he was standing with Officer Nelson and Officer Tygh when this incident occurred, and Tygh and Nelson both acknowledged that Tygh was not standing in a position to see into the wagon. If Nelson was standing with Tygh, it seems improbable that he was able to see into the wagon, or that he was in a position to say anything to Mr. Riley about what was occurring in the wagon. While I have substantial doubt that Mr. Riley actually was on the heels of Officer Davis as Davis went into the wagon to assist Officer Muniz, Riley is actually not charged with making a false statement regarding that issue. Rather, there is simply an allegation that Mr. Riley stood there and did nothing without any indication that he made a false statement regarding that issue.

In the final charge, the City alleges that Mr. Riley failed to follow Directive 22 by not sending a use of force report for Weiser's injury in a timely manner, and by not notifying Internal Affairs during that tour of duty that Officer Muniz entered the back of the wagon and that Weiser had an injury as a result of this.

Directive 22 is hardly a model of clarity in terms of what is required in the circumstances facing Mr. Riley on the night in question. The parties do seem to agree that Section VII, sub-section 6 requires that a computer generated use of force communication be done the same day as the incident. The parties agree that more formal use of force form must also be completed that same day and forwarded to Internal Affairs within five days of the incident.

Here FOP Ex. 2 was sent on May 26, 2007, the date of the incident, reflecting that Weiser was taken to the hospital while being arrested for an assault on police. Lieutenant Young, who investigated this incident on behalf of Internal Affairs, testified that, while FOP Ex. 2 constitutes the right form, the form can be used for two separate purposes, and that in this instance it was used to report hospitalization and not use of

force. Lieutenant Young testified that the computer generated use of force form, not notice of hospitalization, must be forwarded on the same day as the incident. While Mr. Riley testified that FOP Ex. 2 constitutes the notice required for use of force on the day of the incident, I do credit Lieutenant Young on this point. The proper computer generated form was actually forwarded on Tuesday, July 29, 2007. Though it could be argued that, as a supervisor, Mr. Riley was responsible for ensuring the corporal sent proper notice on May 26, 2007, Directive 22 only makes reference this being the role of the corporal. The City has not proven how Mr. Riley violated Directive 22 in relation to the computer generated use of force form.

As stated above, Directive 22 also requires another use of force form to be completed on the day of the incident, and to be forwarded to Internal Affairs within five days. The City alleges in the Notice of Demotion that this was not done. Mr. Riley acknowledged in his testimony that, due to the time of morning he and Officer Muniz returned to the District on the morning of May 26, 2007, and the strain Muniz was under during that long tour of duty, he made the decision that the use of force form could be completed on the next work day, which for Officer Muniz was May 29, 2007. Mr. Riley testified that FOP Ex. 1 represents the completed form he filed on that date, and though the form is executed by Riley and Muniz, neither one filled in the date next to their signatures. The Platoon Commander and Commanding Officer blocks are not completed at all.

The Notice of Demotion does not claim that FOP Ex. 1 was never received, and so the peculiar fact that FOP Ex. 1 is not dated by Riley or Muniz will not lead to further inquiry on my part. The Notice of Demotion does urge that the notice of injury report

was not received until May 29, 2007, and it is acknowledged by both parties that it should have been filed on May 26, 2007.

There are certainly mitigating factors regarding the failure to file have Officer Muniz fill out the form on May 26, 2009, and these factors would certainly come into play with respect to the level of discipline for not having the form completed in a timely manner. But this is a paramilitary organization and, as such, the form should have been filled out on the date required. The City has therefore proven that Riley violated Section 4.20 by not following Directive 22.

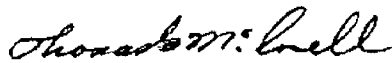
Based upon my analysis, the City has proven that Mr. Riley violated Section 4.15 of the Disciplinary Code (Failure to Properly Supervise Subordinates) through the manner in which he handled the decision to go to 33rd and Girard and while present there. Though the Disciplinary Code does reference demotion as a possible penalty for such a violation, we really have no idea what factors entered into the Police Commissioner's decision to demote and transfer Mr. Riley. Though charges such as making a false statement cannot result in a demotion under the precise terms of the Disciplinary Code, the City's position as enunciated in the preface to the Code is that the Police Commissioner can go beyond the Disciplinary Code penalties depending on the circumstances. While I make no judgment regarding the validity of that assertion here, as it is not before me, the fact that the City believes that raises the prospect that the Police Commissioner might have implemented a demotion and transfer at least in part on the charges I have found were not proven. This is particularly true in relation to the falsification charges, which are obviously very serious charges which can lead to dismissal under the terms of the Disciplinary Code.

sustained. But in the absence of such testimony I find it appropriate to alter the discipline to a five day suspension for the Section 4.15 charge and a two day suspension for the Section 4.20 charge.

AWARD

The grievance is sustained. The City is ordered to rescind the demotion and transfer, and to immediately offer the grievant his former job as sergeant. The discipline is reduced to a seven day suspension consistent with the foregoing opinion. The grievant shall be made whole for the loss of any wages, benefits, or other emoluments of employment flowing from the demotion and transfer, minus the seven day suspension. I will retain jurisdiction should there be any dispute about implementation of the remedy, including adjustment of the remedy if necessary.

Dated: October 12, 2010



Thomas G. McConnell Jr.