IN THE MATTER OF ARBITRATION BETWEEN

AFSCME District Council 159	*	AAA Case No.
	*	01-18-0000-3049
	*	
Union	*	Jacquelyn Lomax
	*	Five-Day Suspension
	*	
AND	*	
	*	
City of Philadelphia	*	
	*	
	*	
	*	
Employer	*	

For the Union: James R. Glowacki, Esq.

For the Employer: Erica Kane, Esq.

OPINION AND AWARD

Dates of Hearing: January 24, 2020

Date of Award: March 2, 2020

Arbitrator: Samantha E. Tower, Esq.

BACKGROUND

Jacquelyn Lomax (Grievant) started working for the City of Philadelphia (City) in 1987. She subsequently became a Correctional Officer in the Philadelphia Prison System (PPS, PDP or Department) in 2001. Grievant has no prior discipline in her personnel file.

The City suspended Grievant for five days for violations of General Orders/Policies: 01 & 37 (GO 01 & GO 37) for her conduct on [redacted]. (J5) AFSCME District Council 159 (Union) filed a grievance challenging Grievant's suspension. A hearing on this matter was held on January 24, 2020. The parties were given a full opportunity to present evidence and examine witnesses. The parties gave oral closings and did not file post-hearing briefs.

The following General Orders are at issue:

> 01. It is essential that each employee has a working knowledge of and complies with the policies and procedures, which relate to or have bearing upon his/her duties, responsibilities and employment in the PPS. Each employee must have a working knowledge of the Pennsylvania State Constitution and its laws, U.S. Constitution and Federal Laws, Philadelphia Home Rule Charter and the Civil Service Regulations that a reasonable person would have. The employee must also

have a working knowledge of the most recent version of the Inmate Handbook. It shall be incumbent on the PDP to provide the above information or make known where an employee can review and/or obtain the above information.

37. Any employee who fails to take proper action while on duty, fails to assert proper authority, or shows reluctance to carry out rules or orders shall be subject to disciplinary action.

(J2)

The Notice of Suspension states in relevant part:

Violation of General Orders/Policies: 01 & 37

Specifically, an Internal Affairs Investigation was requested regarding allegations of Staff Misconduct against you. It is alleged that on [redacted], you allowed Inmate R[redacted] R[redacted] (PP# [redacted]) from Section # [redacted] to enter Section # [redacted] on G-Dorm to physically assault Inmate S[redacted] P[redacted] (PP# [redacted])

On January 17, 2017, you were interviewed by Internal Affairs and denied allowing Inmate R[redacted] inside of Section # [redacted] to fight Inmate P[redacted]. You stated that you did not issue Inmate Misconduct reports or send Inmate P[redacted] to Medical because they were only shoving each other. You stated you did not inform a supervisor about the fight, but Inmate R[redacted] was removed off the unit only because he was an inmate worker.

According to a memorandum submitted by you concerning the incident, the section gates were unsecured and Inmates R[redacted] and P[redacted] were fighting in Section # [redacted]; Inmate R[redacted] was removed from the unit to eliminate any further incident.

Therefore, due to the nature of the charged and after a review of the record, you are hereby suspended for Five Working Days.

(J5)

Sergeant Alysha Abbott testified that she conducted investigations in Internal Affairs at the time of the incident and was responsible for investigating the [redacted] incident. After interviewing Grievant, her co-workers, and the inmates involved in the incident, Abbott said that she ultimately determined that Grievant did not take proper action when she opened the doors in the dorm which gave R[redacted] the opportunity to go into P[redacted]'s area. Abbott also determined that Grievant did not follow Prison protocol when she failed to fill out an Inmate Misconduct Report for R[redacted] and when she failed to send the inmates to Medical to get assessed after the altercation.

Abbott testified that she did not believe Grievant intentionally permitted the inmates to engage in an altercation but by leaving two gates open rather than opening and shutting each gate separately, Grievant created a situation where one inmate was able to go into a different section and an inmate was assaulted. She

testified that when officers are letting inmates get supplies they are supposed to unlock and lock gates one at a time. She acknowledged that she did not find evidence that Grievant allowed R[redacted] into P[redacted]'s area for the purpose of a fight. Instead, she explained that the fight was able to occur because the gates were open. Abbott also testified that Grievant should have sent the inmates to Medical to get assessed. She said that it is not up to an inmate to decide whether to go to Medical.

After a Full Board Hearing, the Board recommended a five-day suspension to be held in abeyance for one year; however, Commissioner Blanche Carney reviewed the record of the full board and made the final decision to modify the discipline and have Grievant serve her five-day suspension rather than holding the suspension in abeyance.

Commissioner Carney testified that she took into consideration Grievant's tenure and the expectation that Grievant would know the policies and procedures. She explained on cross-examination that Grievant's tenure was a mitigating factor but that she holds all employees to the expectation that they know the policies and procedures. Commissioner Carney said that although the charge that

Grievant failed to follow procedures on purpose was not sustained, other serious charges were sustained.

She said that Grievant is not qualified to determine an inmate's injuries. According to Commissioner Carney, it is not up to inmates to decide whether they need to go to Medical. After an altercation, the staff has the obligation to ensure safety and should send inmates to Medical for an assessment. Grievant also should have notified a supervisor. Commissioner Carney explained that at the point of notification to a supervisor an investigation process begins.

Commissioner Carney testified that Grievant's failure to file a Misconduct Report was a serious violation of policy. She explained that the Misconduct Report can be shared with criminal justice partners, such as judges, district attorneys, and private counsel, and informs others that the incident occurred. Commissioner Carney said that without the Misconduct Report the parole board would not have all relevant information when the inmate is up for parole. Additionally, staff can review the inmate's history when there is a Misconduct Report which enables them to know whether to keep inmates separated or

segregated in an attempt to avoid further conflict. She explained that if the staff does not have the proper information it jeopardizes the safety and security of everyone in the prison because the staff needs to know if there is a bigger issue or illegal activity within or outside the prison. It is the responsibility of the Department to keep inmates safe while they are in custody.

Commissioner Carney testified that she believes a five-day suspension was warranted. She said that she does not frequently modify the Board's recommendations but, here, Grievant so grossly violated the basic procedures that she determined that the five-day suspension recommended by the Board should not be held in abeyance. According to Commissioner Carney, even though Grievant did not necessarily act with ill will or for the purpose of causing a fight, her failure to assert proper duty and to follow proper procedures was indifferent or reckless. Grievant should have been aware of the potential outcomes in the situation.

Grievant testified that she has never received any prior discipline in thirty years of employment with the City. She said that she was working in the "G dorm" on

[redacted] and unlocked the gates to allow the inmate workers to get their supplies. One or two workers will get the supplies for all inmates in their section. She testified that it was her responsibility to make sure that the inmates got their supplies and went back into their section, however, it is not practical to be with each inmate while they are gathering supplies.

When she heard a commotion she looked and saw an altercation between two inmates. She said that she saw inmate R[redacted] push inmate P[redacted] but did not see either inmate throw a punch. According to Grievant, she did not consider this incident to be serious because this kind of altercation happens all the time. She said, "stop," and they stopped. Grievant testified that she did not feel it was necessary to fill out an Inmate Misconduct Report. She explained that if she filled out a Misconduct Report for everything that happens in the prison she would be spending all of her time doing reports rather than the rest of her job. She also did not think a report was necessary because the inmates stopped when she gave them a verbal command. According to Grievant, staff is supposed to use their own judgment about when to file a Report after an infraction.

Grievant testified that she removed inmate R[redacted] to another dorm "down the row." She thought it was necessary to remove him to deescalate the situation in case there was something else going on that she did not know about. When asked if she sent either inmate to get checked out at Medical, Grievant said that neither inmate wanted to go. She said that they did not appear to be injured and that she did not see either inmate fall. She said that correctional officers are told to use their own judgment and she did not think the incident was that serious.

Grievant testified that she never would have let an inmate into another area for the purpose of fighting. She said she had no malicious intent and insisted that she notified a supervisor about the incident but could not recall which one.

On cross-examination, Grievant acknowledged that she did not witness the entire altercation. She agreed that neither inmates nor officers are qualified to determine whether an inmate needs medical attention but she said that inmates have the right to refuse to go to medical. When asked if it would have been valuable for the incoming shift to have the Inmate Misconduct Report,

Grievant said that she told the incoming shift about the altercation and reiterated that she did not think the altercation was serious.

The stipulated issue is: whether the Department had just cause to issue a five-day suspension to Grievant? If not, what shall be the remedy?

EMPLOYER POSITION

The City contends that there was just cause for Grievant's suspension. Internal Affairs investigated the [redacted] incident and found that Grievant violated several General Orders. After a full Board hearing, Grievant was found to have violated GO 1 and GO 37 and a five-day suspension to be held in abeyance for one year was recommended. Commissioner Carney exercised her ultimate authority regarding discipline and modified the recommended discipline so it was not held in abeyance.

The City asserts that, at minimum, Grievant should have sent the inmates to Medical, filed a Misconduct Report, and notified a supervisor. The City and the prison

are responsible for the safety of inmates and can be held liable for an injury while inmates are in custody.

The City contends that Grievant is not qualified to make a determination about whether an inmate is injured. The proper protocol is to send an inmate to Medical when there is an altercation. Here, Grievant first left multiple doors open in the dorm which created an opportunity for R[redacted] to go into P[redacted]'s unit. Abbott testified that the doors should be opened one at a time, thus, Grievant failed to follow prison protocols. Additionally, Grievant did not witness the entire altercation and had no way of knowing if the inmates engaged in more than mere shoving yet she did not send them to Medical. It insists that Grievant's failure to follow protocol undermines her responsibility to ensure the safety of inmates and staff.

It also stresses that the Misconduct Report is important because it alerts other staff, as well as the parole board and district attorney of the incident. The City points out that while Grievant said she tried to notify a supervisor there is no evidence of her claim. Moreover, the notification needs to be in writing so that

other employees, particularly on the next shift, know that an altercation occurred.

The City requests that the grievance be denied and the five-day suspension be upheld.

UNION POSITION

The Union argues that Grievant was unjustly suspended. According to the Union, the City failed to show how Grievant violated the General Orders that were sustained. The Union contends that Grievant witnessed a minor incident of the type that occurs every day. It points out that Grievant's uncontested testimony is that she has the discretion to handle minor incidents.

The Union asserts that a five-day suspension is not warranted for a 30 year employee with no prior discipline. Here, Grievant used her experience to handle the situation. She separated the inmates and asked whether they wanted to go to Medical. Moreover, the situation did not escalate or repeat.

The Union insists that even if Grievant should have sent the inmates to medical, her lapse in judgment does not warrant a five-day suspension. Inmate P[redacted]'s emergency referral to Medical was three days after the altercation. The Union points out that there is no testimony that P[redacted]'s medical need was related to the incident or that Grievant was responsible for his condition.

The Union also asserts that Grievant was deprived of due process because she did not have all of the relevant information. It stresses that Abbott conducted an incomplete investigation and did not include a record of her conversation with the inmates. Commissioner Carney's testimony was inconsistent and confusing and it is unclear whether Grievant's longevity and clean discipline history was a mitigating or aggravating factor in the discipline. Additionally, the Union contends that the City failed to establish that Grievant had malicious intent yet the Employee Violation Report says that Grievant allowed inmate R[redacted] to physically assault inmate P[redacted]. (J2)

The Union asks the Arbitrator to sustain the grievance because there was no just cause for a five-day

suspension. It requests that Grievant be made whole and that the discipline be expunged from her record.

FINDINGS

The stipulated issue to be decided is: Whether the Department had just cause to issue the five-day suspension to Grievant? If not, what shall be the remedy?

The Union makes a claim that Grievant's due process rights were violated because she did not have all of the information in the investigation file. It points out that Abbott did not include the inmates' interviews in the investigative report and also asserts that the Employee Violation Report states that Grievant "allowed" R[redacted] to assault P[redacted]. The Union correctly points out that there is no evidence in this record that Grievant intentionally left the doors open for the purpose of allowing the inmates to engage in an altercation. Based on the totality of evidence in this record, it is not apparent how the use of the word "allow" in the Employee Violation Report resulted in prejudice to Grievant. Nor has the Union explained in the circumstances here how the absence of the notes related

to the inmate interviews could have resulted in prejudice to the Grievant in this case.

A determination as to whether there was just cause for an employee's discipline must be made on a case-by-case basis, in light of the relevant facts and circumstances which pertain in each case. Here, the underlying facts are not in dispute. Grievant unlocked the doors in her area to enable the worker inmates to collect cleaning supplies. While the doors were unlocked inmate R[redacted] entered inmate P[redacted]'s area and an altercation ensued. Grievant saw part of the altercation and told the inmates to stop. Although there is no evidence in this record to support a finding that Grievant left the doors open for the purpose of allowing R[redacted] into P[redacted]'s area for a fight, by leaving multiple doors open Grievant allowed an assault to occur because she created an opportunity for R[redacted] to enter P[redacted]'s area unsupervised. Sergeant Abbott testified persuasively that Grievant should not have left two doors unlocked, rather, she should have opened and closed one door at a time.

The Union asserts that even if Grievant should have sent the inmates to get checked at Medical, it was a

lapse in judgment and it does not warrant a five-day suspension. I disagree. Commissioner Carney credibly testified that the City and the Department are responsible for the safety of inmates while they are in custody. She also said that inmates do not get to decide if they will go to Medical. Sergeant Abbott consistently testified that it is not the inmate's decision whether or not to go to Medical. She said that the officer or supervisor must decide and they are supposed to send inmates to Medical. Grievant's own testimony is that she is not qualified to make medical determinations. Here, Grievant did not even see the entire altercation yet she determined that it was not that serious and she let the inmates decide whether or not to go to Medical. Given the facts in this record I do not agree that her decision not to send the inmates to Medical was a small lapse in judgment. While it may be true that P[redacted]'s visit to Medical three days later was not related to the [redacted] altercation, there is no way of knowing without an initial visit to Medical for an assessment immediately after the altercation.

The Union asserts that Grievant used her best judgment when she decided not to file an Inmate Misconduct Report after the altercation. Grievant testified that if

she filled out an Inmate Misconduct Report for every altercation she would spend all of her time filling out reports and not on her other duties. Yet, she explained that she moved R[redacted] "down the row" to separate him from P[redacted] in an effort to deescalate the situation. Clearly Grievant thought the situation was serious enough to separate the inmates but she failed to fill out the report that would be a written record to put other staff on notice, as well as other criminal justice partners, that the inmate had engaged in misconduct. Commissioner Carney credibly testified that the Inmate Misconduct Report enables the staff to have all relevant information about an inmate and helps the staff know when to properly secure and separate inmates.

I find that Grievant decision to leave both gates open, her failure to send the inmates to Medical after the altercation, and her decision to not file an Inmate Misconduct Report was a violation of GO 37 which states:

> Any employee who fails to take proper action while on duty, fails to assert proper authority, or shows reluctance to carry out rules or orders shall be subject to disciplinary action.

Due to this serious breach in her obligation to take proper action while on duty she failed to ensure the inmates'

safety which is a primary responsibility of correctional officers. Given the seriousness of these violations of GO 37, the City had just cause to issue a five-day suspension.

The City also charged Grievant with a violation of GO 1 which states that is it essential that employees have a working knowledge of and comply with the policies and procedures, which relate to or have a bearing upon his/her duties, responsibilities and employment in the PPS. There is no evidence -- and no claim - by the Union that Grievant did not have a working knowledge of the policies and procedures, however, based on the foregoing findings related to GO 37, I find that Grievant violated GO 1 when she failed to comply with the Department's policies and procedures.

The Union contends that Grievant's lengthy tenure and clear disciplinary record should be considered as mitigating factors and that a five-day suspension is unwarranted. While I agree that Grievant's clear disciplinary record in her 30 years with the City should be considered, the evidence establishes that her tenure and clean record were considered by the Board and Commissioner Carney. The Board noted in its recommendation that it had

considered Grievant's record and Commissioner Carney testified that she considered Grievant's tenure to be a mitigating factor but she decided to modify the discipline because of the serious nature of the violations. Moreover, as discussed above, based on the facts in this particular record, Grievant's failure to take proper action on [redacted] violated GO 1 and GO 37 and put inmate and staff safety in jeopardy.

Based on the foregoing, I find that the evidence establishes that there was just cause for Grievant's five-day suspension, and the grievance will be denied in the Award below.

AWARD

The grievance is denied. The City had just cause to suspend Grievant.

Samantha E. Tower

Samantha E. Tower, Arbitrator
March 2, 2020