

Before Arbitrator Brian Clauss

FRATERNAL ORDER OF POLICE)	
LABOR COUNCIL,)	
)	
Union,)	
)	
And)	Grievant: Officer Eduardo Hower
)	29-Day Suspension
THE SHERIFF OF COOK COUNTY,)	GR #17-0902-01 -- Hower suspension
)	GR #18-02-45181 -- Implementation of
Employer.)	Discipline

For the Employer:

Peter Kramer
Elizabeth Glick
Sheriff of Cook County

For the Union:

Jeffrey Burke
Fraternal Order of Police Labor Council

Hearing Date: May 9, 2019

Location: Cook County Sheriff's Department, Maywood, Illinois

INTRODUCTION

The Sheriff of Cook County (“Sheriff”) and the Fraternal Order of Police Labor Council (“Union” or “FOP”) are parties to a collective bargaining agreement (“CBA” or “Contract”) for the Cook County Sheriff’s Police Department (“Department”). Grievant, Sheriff’s Police Officer Eduardo Hower, Star 494, was issued a 29-day suspension. The bargaining unit was represented by AFSCME Council 31 when the original grievance was filed on June 2, 2017. The matter had progressed through the grievance procedure and an arbitration hearing had been set for September 6, 2018. On March 8, 2018, the Fraternal Order of Police Labor Council prevailed in a union election. On March 9, 2018, AFSCME notified the arbitrator to cancel the September arbitration hearing. On April 4, 2018, the FOP filed a grievance over the 29-day suspension that had been the subject of the earlier AFSCME grievance. The matter was set for an arbitration hearing on May 9, 2019. The instant arbitration followed.

At the hearing, the parties presented: witnesses, documentary evidence, opening statements, and closing arguments. The arbitrator kept the record of the hearing.

FACTS

Sergeant John Sullivan initiated a Complaint Register with the Office of Professional Review against Grievant and Officer Christopher Calhoun, Star 411, alleging a June 3, 2015, verbal altercation between Officer Calhoun and Inspector Sullivan during which grievant allegedly yelled “That’s racist.” Officer Calhoun filed a Complaint Register against Inspector Sullivan for harassment. That matter was administratively closed.

The internal investigation was assigned to Investigator James Singletary, Jr., Star 5025, assigned to OPR. Investigator Singletary concluded his investigation on September 26, 2016, concluding that the allegations against Officer Calhoun were Not Sustained. He also classified a finding against Grievant as Sustained for Conduct Unbecoming and Being Less Than Truthful. The pertinent portion of Investigator Singletary’s findings state:

There is insufficient evidence to support the allegation that Hower was insubordinate. However, there is sufficient evidence that Hower acted in an unprofessional manner when he interjected himself in the conversation between Calhoun and Sullivan. Many of the witnesses stated Hower yelled, “That’s racist” which was a comment directed at Sullivan. Also, Hower

stated in his interview that he did not yell “That’s racist” which is contrary to several statements by witnesses.

Investigator Singletary testified that the recording of Grievant’s interview was not recorded. Investigator Singletary stated that he sustained a finding against Grievant because “Officer Hower allegedly made the comment that was in the case file pertaining to the situation between Sergeant Sullivan and Officer Calhoun.” Grievant denied making the complained-of comment.

According to Investigator Singletary, some of the witnesses stated that Grievant made a comment about Sergeant Sullivan’s conduct being racist. It is those witness statements that caused the Investigator to conclude that Grievant lied during the OPR interview.

Investigator Singletary testified that he interviewed a dozen people who were on-scene. He got the witness names from the CR report filed by Sergeant Sullivan. He did not recall if he interviewed Officers Driscoll or Ugarte. They do not appear in the OPR report.

Lieutenant Arthur Jackson is a Commander in the Patrol Division. Patrol was assisting a gang suppression initiative on June 3, 2015, in Harvey, Illinois. There were approximately forty uniformed and plainclothes Department personnel in a vacant lot in advance of the mission. Commander Jackson was talking with Commander Tabb and saw the disagreement between Officer Calhoun and Sergeant Sullivan. He heard Grievant say something like: “That’s not right.” He did not recall Grievant making any comments about something being racist.

Detective Sergeant Michael Dwyer, Star 907, testified that he was a police officer in June 2015. He attended the roll call in Harvey and saw the disagreement between Officer Calhoun and Sergeant Sullivan. He heard Grievant in an elevated voice say “that’s racist man” or “something to that effect.”

Commander Terrance Tabb testified that he was at the gang suppression roll call in June 2015. He saw and heard the disagreement between Officer Calhoun and Sergeant Sullivan. He did not recall Grievant stating “That’s racist.” Commander Tabb did not recall anything Grievant said on-scene.

Sergeant Christopher Imhoff, Star 74, testified that he has been on the Gun Team since 2013. His team was at the Gang Suppression mission roll call in June 2015. He heard the commotion between Officer Calhoun and Sergeant Sullivan from a distance of 20 yards.¹ They were having a loud disagreement. Sergeant Imhoff heard Grievant yell “That’s racist.”

Inspector John Sullivan testified that he was a sergeant in Special Services working the gang suppression initiative in Harvey. He was having a disagreement with Officer Calhoun regarding removing what he later learned was a kuffi – a religious article of headwear. During the disagreement, he heard Grievant say “That’s racist” or “he’s a racist.” Grievant was twenty feet away from Sergeant Sullivan when he made the statement.

Sergeant Sullivan prepared an initiation report to OPR regarding the disagreement with Officer Calhoun and Grievant’s comment.

Officer Terrance Driscoll, Star 282, worked with Grievant on the Gangs Team in June 2015. He knew Officer Calhoun from North Gangs and Sergeant Sullivan from the Patrol Division. Officer Driscoll and other members of the team were standing near the disagreement between Officer Calhoun and Sergeant Sullivan. He heard Grievant say “It’s a religious symbol.” Grievant never used the word ‘racist’ on-scene.

Officer Driscoll continued that he was interviewed on the telephone regarding the disagreement between Sergeant Sullivan and Officer Calhoun. He was never asked about what Grievant said while on scene. He heard Grievant tell Commander Zykowski “It’s a religious symbol” and the Commander yell at Grievant.

Officer Robert Mousel, Star 388, testified that he was working in Street Crimes South and was at the gang suppression mission in Harvey on June 3, 2015. He was standing with other team members when Sergeant Sullivan got into an argument with Officer Calhoun. He knows both of them. During the disagreement he heard Grievant say “something like ‘that’s his religion.’”

¹ Investigator Singletary’s report indicates that Sergeant Imhoff was approximately 100 feet away from the disagreement.

Officer Teresa Ruiz, Start 390, has been assigned to the Gangs North since 2012. She was involved in the suppression mission in June 2015 and was at the roll call in Harvey. She knows Sergeant Sullivan, Officer Calhoun, and Officer Hower. Grievant was her partner and Officer Calhoun was on her team.

Officer Ruiz saw and heard the argument between Officer Calhoun and Sergeant Sullivan. She was standing with Grievant and other team members when Grievant said: "He wears that for religious purposes." Commander Zykowski then approached Grievant and shouted: "Mind your own fucking business" to which Grievant replied: "I am minding my own fucking business." Commander Zykowski threatened to send Grievant home and Grievant stayed quiet. According to Officer Ruiz, there were a number of officers and command staff immediately on scene who saw and heard the argument.

Sergeant Chris Calhoun, Star 64, testified that he was involved in the disagreement with Sergeant Sullivan at the roll call in Harvey. He heard Grievant tell Sergeant Sullivan: "he wears it for religious purposes."

Grievant testified that he had been an Investigator in Gangs since 2007. He began working for the Department in Spring 1997 and moved to the Sheriff's Police in 2005. He was working the suppression mission in June 2015 and was one of thirty to forty Department members from Patrol and Investigations meeting in a vacant lot in Harvey. Officer Calhoun was on his team. Grievant did not know Sergeant Sullivan.

Officer Calhoun was wearing a kuffi for religious reasons. Grievant heard Sergeant Sullivan say: "Take off the do-rag" to Officer Calhoun. Officer Calhoun replied: "It's not a do-rag." The two became involved in a heated argument that went on for a few minutes. Grievant tried to de-escalate the situation by telling Sergeant Sullivan: "He wears it for religious reasons."

After Grievant said: "He wears it for religious reasons," Commander Zydowski approached him and said: "Mind your own fucking business" to which Grievant replied: "I am minding my own fucking business." The Commander said: "Shut up before I send you home" and "Stay the fuck out of it."

Grievant testified that he was truthful in his conversation with Investigator Singletary. He never said anything about racism or used the word ‘racist’. He was trying to de-escalate the situation.

ISSUES

Whether there was just cause to issue a 29-day suspension to Grievant and, if not, what remedy?

Whether the Department violate the Agreement by requiring Grievant to serve the suspension prior to the third step arbitration hearing?

POSITIONS OF THE PARTIES

The Employer

The Department argues that there is just cause to issue a 29-day suspension to Grievant. A dozen witnesses were interviewed and a number of them heard Grievant say that Sergeant Sullivan was a racist. According to the Department, it is a serious allegation to call a supervisor a racist. Calling a supervisor a racist has important implications for the Department and the Department cannot tolerate undermining authority by shouting that supervisors are racist.

The testimony of Inspector Sullivan and Officer Dwyer prove that Grievant made the statement during the argument between Sullivan and Calhoun.

The Union

The Union argues that there was only one person who could recall what was said – Sergeant Sullivan. There is no way Sergeant Sullivan could clearly have heard Grievant say anything because Sergeant Sullivan was in the midst of an argument with Officer Calhoun. None of the other witnesses knew what exactly was said. Rather, the testimony indicates that they either did not clearly hear it or did not recall.

The testimony and the investigation clearly show that Grievant was truthful in his interview with Investigator Singletary. The Department cannot show that Grievant was untruthful. Rather, the Department’s investigation was flawed. The witness list came from the Complainant Sergeant Sullivan– the same person who was the accused in a complaint

about the argument. Sergeant Sullivan was covering for his own misconduct by alleging misconduct by others.

The Union continues that the investigation was far too long and the investigator spoke with people who were not documented in his report. Further, he did not interview people from Grievant's team who were at the argument and standing with Grievant. Moreover, at least one witness testified that what was recorded by the investigator was not what the witness said during the interview. In addition, the officers on scene at the argument specifically stated that Grievant said that Calhoun's headwear was religious. He never was heard by them to say anything about racists or racism. The other witnesses were far away, unsure of what they heard, and confused 'racist' for 'religious.'

The Department cannot prove the allegation that Grievant was untruthful. The only people who said they heard something was the Sergeant engaged in the argument and a witness who was a considerable distance from the altercation in a group of dozens of police personnel. Grievant made the comment about the headwear being 'religious' and never said 'racist'. He was honest with the investigator and the Department cannot prove otherwise.

ANALYSIS

In a discipline grievance, the burden is on the Employer to establish just cause for the assessed discipline. In a grievance examining just cause, the Employer must prove the existence of a known rule, the grievant acting in violation of that rule, an investigation into the offense, and discipline commensurate to the misconduct.

Investigator Singletary found that Grievant committed the following violations of Department policies and Merit Board Rules and Regulations:

Policy No. 321.2(k)

Discourteous, disrespectful, or discriminatory treatment of any member of the public or any member of the CCSO.

Policy 321.5.5(j)

The making of disparaging remarks, or a member's conduct concerning duly constituted authority, to the extent that such remarks and/or conduct disrupts the efficiency of the CCSO, or subverts the good order, efficiency, and discipline of the CCSO, or which would tend to discredit any member thereof.

The above Department policies are obvious and necessary rules regarding inappropriate language, conduct, and disobedience or insubordination.

Here, the evidence shows that Sergeant Sullivan and Officer Calhoun were having a heated argument regarding Officer Calhoun's headwear. The witnesses stated that it was an intense argument and that lasted for at least five minutes. According to Sergeant Sullivan, he clearly heard Grievant say "that's racist" or "he's a racist" from approximately twenty feet away - despite being in the midst of a heated exchange with Officer Calhoun. The argument between Sullivan and Calhoun was face-to-face in a lot with dozens of police officers. Sergeant Sullivan offers two versions of what Grievant which indicates that Sergeant Sullivan did not clearly hear what Grievant said. Given the nature of the argument, the number of people on scene, and the distance from Grievant, it is hard to believe that Sergeant Sullivan could clearly hear any bystander comments during a heated argument.

Sergeant Imhoff testified that he was approximately sixty feet from Grievant during the argument. The lot was full of police personnel and their vehicles. He testified that Grievant stated "that's racist" during the argument. He thought Grievant was talking about Sergeant Sullivan. Given the nature of the scene and the distance, Sergeant Imhoff could not have clearly heard the statement "that's racist" during all the commotion.

The only corroboration for the alleged comment is from Officer Dwyer. He heard Grievant in an elevated voice say: "that's racist man" or "something to that effect." Officer Dwyer's testimony of 'something to that effect' indicates he was not certain about what he heard.

Commander Jackson does not corroborate the allegations. He testified that Grievant said something like 'that's not right.' He did not hear Grievant make any comments similar to 'racist' or 'racism.'

Commander Tabb was also on scene and talking with Commander Jackson when the argument ensued. He did not hear Grievant make any comments about racist or racism.

The personnel who were in the immediate vicinity of the argument were all clear in their testimony that Grievant never said 'racist' or 'racism.' Some of them were

interviewed by Investigator Singletary and some were not. In their testimony at the hearing, they all agreed that Grievant made a statement on scene. They all agreed that it was a statement that Officer Calhoun's kuffi was 'religious'.

Grievant also explained the situation. He testified that the argument was quite heated, with Sergeant Sullivan demanding that Officer Calhoun remove the kuffi. Grievant was concerned that the situation would escalate. He said that it was a religious symbol in an effort to de-escalate or diffuse the situation. Given that Officer Calhoun was wearing headwear consistent with his faith, that Officer Calhoun was on Grievant's team and well-known to him, and that the situation was escalating over a mistaken assumption that Calhoun was simply wearing some type of hat, Grievant's explanation is logical and consistent with the testimony of the officer immediately on scene and the two commanders who were also on scene. Further, from a distance or during a commotion, the words 'racist' and 'religious' are similar enough to cause some confusion.

There is no evidence in the record that Grievant lied to the OPR investigator. To the contrary, the evidence establishes that Grievant's statement about the kuffi being religious was corroborated, consistent with the evidence, and logical. The evidence establishes that Grievant did not make a statement about 'racist' or 'racism' and did not lie to the investigator when he denied making those statements.

The Department did not violate the Agreement when it suspended Grievant. The prior union lost an election to the FOP. The prior union indicated that it would not be proceeding with the scheduled grievances and withdrew them. The FOP did not alert the Department that it would be handling all the AFSCME grievances following the election. Although the Department could have inquired with the FOP, it was not required to do so. Accordingly, there was no violation of the Agreement when the Department had Grievant serve his 29-day suspension.

The Department has not proven that Grievant made the statement about 'racist' or 'racism.' The Department has not proven that Grievant lied to the investigator.

AWARD

GR #17-0902-01: Grievance sustained.

GR #18-02-45181: Grievance denied.

Grievant's 29-day suspension to be removed from his record.

Grievant to be made whole for the 29-day suspension.

The undersigned will retain jurisdiction for sixty days from issuance to resolve any issues involving the remedy.



Brian Clauss, Arbitrator

May 22, 2019