

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of the Arbitration Between:

CITY OF LOWELL

-and-

AFSCME, Council 93

ARB-21-8641

Arbitrator:

Timothy Hatfield, Esq.

Appearances:

Kerry Jenness, Esq. - Representing City of Lowell
Nicholas Anastasi, Esq.

Jared Kelly, Esq. - Representing AFSCME, Council 93

The parties received a full opportunity to present testimony, exhibits and arguments, and to examine and cross-examine witnesses at a hearing. I have considered the issues, and, having studied and weighed the evidence presented, conclude as follows:

AWARD

The City did not have just cause to suspend Therese Cooper for ninety days. The City did have just cause to suspend Therese Cooper for fifteen workdays. The City is hereby ordered to make Cooper whole for all losses above the level of a fifteen-workday suspension.



Timothy Hatfield, Esq.
Arbitrator
August 23, 2022

INTRODUCTION

On May 24, 2021, AFSCME, Council 93 (Union) filed a unilateral petition for Arbitration. Under the provisions of M.G.L. Chapter 23, Section 9P, the Department appointed Timothy Hatfield, Esq. to act as a single neutral arbitrator with the full power of the Department. The undersigned Arbitrator conducted a virtual hearing via Web Ex on October 4, 2021.

The parties filed briefs on December 3, 2021.

THE ISSUES

Did the City of Lowell have just cause to suspend Therese Cooper for a period of ninety days in light of her involvement in the events that took place on June 23, 2020? If not, what shall be the remedy?

RELEVANT CONTRACT LANGUAGE

The parties' Collective Bargaining Agreement (Agreement) contains the following pertinent provisions:

Article VI Grievance Procedure and Arbitration (In Part)

Section 1. Matters Covered

As provided in M.G.L. c. 150E, §8, the grievance procedure hereinafter set forth shall only be involved in the event of any dispute concerning the interpretation or application of this collective bargaining agreement. No other matters shall be the subject of the grievance procedure.

Where a grievance, as defined herein §1 involves suspension, dismissal, removal or termination it shall be processed beginning at the second (2nd) step, Article 6, §4. If the case reaches arbitration, the arbitrator shall have the power to suggest a resolution of the grievance up to and including restoration to the job with all compensation and privileges that would have been due the employee.

Section 2. Suspension and Dismissal

A. General

As provided in M.G.L. c.150E, §8, in case of suspension or dismissal of an employee with more than ninety (90) days of service, if such employee elects, grievance arbitration shall be the exclusive procedure, and accordingly, an employee shall not have recourse to the Civil Service Commission, Retirement Board, or any other administrative procedure precluded by the election of grievance arbitration under §8. ...

B. Progressive Discipline Program

In an effort to provide more uniform attendance and equal and impartial enforcement by management, the following progressive discipline program shall remain in force for employees covered by this agreement:

Level 1 - Oral Warning - For the first infraction an oral warning shall be given with the steward present. It shall be reduced to writing and placed in the employee's file for six (6) months. If no similar infraction occurs within the ensuing six (6) months from the date the oral warning was given, it shall be removed from the employee's file.

Level 2 - Written Warning - If a similar infraction occurs during the above mentioned six (6) month period, the employee who received the oral warning shall receive a written warning with the steward present. If no similar infraction occurs within the ensuing twelve (12) months from the date of the written warning both the oral and written warnings shall be removed from the employee's file.

Level 3 - Other Discipline - If a similar infraction occurs within the above mentioned twelve (12) month period, such infraction may lead to discipline which involves suspension or ultimate discharge.

Level 1 and 2 are grievable through the grievance procedure. If the employee's civil service status so permits, Level 3 actions are appealable through the civil service procedure, or the employee may elect to process a suspension or discharge through the grievance procedure.

RELEVANT LOWELL POLICE DEPARTMENT RULES AND REGULATIONS (IN PART)

K. ACCOUNTABILITY AND DISCIPLINE

7. Other Punishable Offenses - Any violation of rules, regulations, policies or procedures of the Department shall subject an officer or employee to discipline, as well as any of the following offenses: ...

b. Any malfeasance, nonfeasance, misfeasance of official duties.

RELEVANT LOWELL POLICE GENERAL ORDER (IN PART)

IV. **COMMUNICATIONS EQUIPMENT AND RESOURCES (IN PART)**

A. Initial Incident Recording and Officer Status Tracking [81.2.3] ...

2. Dispatchers should attempt to judge the characteristics of the call to determine whether an emergency or non-emergency response is required. Characteristics of importance include, but are not limited to: [81.2.6 (a)]

- a. Tone of voice / demeanor of caller.
- b. Nature of the call.
- c. Whether the incident is in progress.
- d. Are there any injuries?
- e. Is there a threat of violence, injury, or death?
- f. Prior experience with the caller or suspects.
- g. Type of background noise if any.

3. As much relevant information as possible should be obtained by Communication Center personnel. Once determined they shall inform the caller of the agency's response, including direct service or referral to other agencies.

4. Communications Center personnel shall always seek to enhance officer safety and assist officers in anticipating the conditions to be encountered at the scene. Communications Center personnel should take care to obtain as much relevant information as possible during in-progress or potentially serious incidents and this information should be promptly relayed to responding patrol units.

FACTS

The City of Lowell (City or Employer) and the Union are parties to a collective bargaining agreement that was in effect at all relevant times to this arbitration. The grievant, Therese Cooper (Cooper / grievant) is a dispatcher in the City's Police Department. Cooper has worked as a dispatcher for approximately twenty-nine years.

Dispatchers can be assigned numerous roles depending on a particular shift, including call-takers, lead police dispatcher, back-up dispatcher, fire dispatcher, or Law Enforcement Alerting Portal (LEAPS). The Dispatch Center is staffed with between four and six dispatchers on all shifts. Call-takers answer calls from the main business line for the police department, as well as 911 emergency calls. The lead police dispatcher is responsible for dispatching available units for police calls, and fire dispatcher is responsible for dispatching available units for fire calls. The back-up police dispatcher will serve as a call-taker or at the LEAPS station and will serve as acting police dispatcher if the lead dispatcher is unavailable. The LEAPS dispatcher is responsible for uploading information requested for department warrants or background checks, as well as running all the motor vehicles, stolen cars, and license plates.

On June 23, 2020, Cooper was assigned as the LEAPS dispatcher on her shift. The Dispatch Center was busy that day with multiple emergencies, and received one hundred and sixty-five calls between 2:15 p.m. and 3:35 p.m. At 2:44 p.m. Dispatcher Kouy (Kouy) received a call on the non-emergency line for a suspicious vehicle outside 21 Coral Street. Kouy entered the call into the

Computer Aided Dispatch System (CAD) as a suspicious motor vehicle. The call was pre-coded into the system as a Priority 2 call.

At 3:19 p.m. Lead Dispatcher Lori Neville (Neville) attempted to call back the initial caller to check if the suspicious vehicle was present and to let the caller know that the call had been logged into the system and not forgotten about, but she received no response. At 3:20 p.m., at Neville's request Jacqueline Fernandez (Fernandez) attempted to call the initial caller and she too got no response. At 3:21 p.m., the initial caller called back and Fernandez answered. Fernandez asked the caller if the suspicious vehicle was still present outside 21 Coral Street. The caller reported that she did not know as she was not at that location. She reported that she had been asked by her neighbor to call. Fernandez assured the caller that the call was in "the stack," a police cruiser would be sent as soon as possible, but there had been a few emergencies. The caller and Fernandez continued to dialog with the caller stating:

If I were you would really look into this because from what they're saying it's not good, so if I was you I would not take this for a joke either, you know what I mean?

Fernandez inquired what the caller meant by "it's not good." The caller stated:

I don't know. My neighbor called me. She's like crying. She's like scared. ... She has a baby, I'm at work, I live downstairs and they're calling me like freaking out. So I think they're like really scared that they know who these people are and it's for them. ... I had my kids in there and told my kids to get out of there, out of the first floor. I have no idea what's going on, but I'm just letting you guys know it might be something that you guys should really look into as soon as possible."

Fernandez responded with “we are, we just had a couple of emergencies going on.” Once the call ended, Fernandez continued answering calls in her assignment as call-taker. Fernandez did not update the CAD system or add a CAD alert.

At 3:27 p.m. Cooper answered a call on the 911 emergency line from a resident of Coral Street. Cooper had difficulty hearing and/or understanding the caller when she was attempting to ascertain where he was calling from. After mistakenly believing he was calling from Groves Street, she eventually was able to confirm that he was calling from Coral Street. The caller reported that a car was being towed. When questioned by Cooper about the car being towed, the caller reported that it was a black Chevy Tahoe that belonged to the resident of 21 Coral Street. The caller also stated that some kid had pulled up to him and he was not sure if the kid had a gun. Cooper did not hear the caller say anything about a gun and did not follow up on that statement. Cooper asked the caller for additional information about the owner of the car and whether the caller was outside. The caller responded that he would go outside once the police arrived. He also provided Cooper with the phone number of the car’s owner and again requested that the police be sent right over. Cooper informed the caller that there was already a call in the system for 21 Coral Street but that she would update them. At 3:32 p.m., Cooper called the car owner and received no answer. Cooper then informed Neville that there was another call about Coral Street before excusing herself to use the restroom. At 3:33 there was a 911 call for shots fired on Coral Street. Ultimately, there was a shooting at 21 Coral Street that resulted in a fatality. The

Dispatcher Center received additional calls concerning Coral Street but they are not relevant to this arbitration.

Subsequently, the Lowell Police Department's Office of Professional Standards conducted an internal investigation. Lieutenant Marisol Nobrega (Lieutenant Nobrega) conducted the investigation. Five dispatchers, along with the Director of Communications were interviewed. Lieutenant Nobrega did not interview any of the police officers on duty that day. Lieutenant Nobrega issued a report of her findings on October 5, 2020. She concluded that Cooper violated Department General Order 400.01 (Communications) and the Lowell Police Department's Rules and Regulations when she did not update the CAD system after receiving a call that expressed urgency about the underlying situation, including the mention by the caller of a possible gun. Lieutenant Nobrega noted that the urgency expressed, the mention of a possible gun and the fear stated by the caller of going outside, should have resulted in an update in the CAD system.

Lieutenant Nobrega also notes in her report that the CAD system is not always updated for consecutive calls for the same address, and no policy exists mandating that the CAD system must be updated for all calls, unless new or additional information is obtained about an ongoing call. Lieutenant Nobrega also documents that the call for shots fired came into the 911 emergency line approximately 1½ minute after Cooper finished attempting to call the vehicle's owner. Lieutenant Nobrega concluded by stating:

[T]he timeframe from the end of the call Dispatcher Cooper receives and the shots fired call is approximately less than 1½ minute. Therefore, even if Dispatcher Cooper had entered an update in the CAD, an officer would potentially still not have had enough time to

respond prior to the shots being fired. However, it cannot be overlooked that Dispatcher Cooper missed important parts of the conversation and stated that she never heard the caller say them. Dispatcher Cooper should have heard them and there is no evidence that explains why she did not hear them other than Dispatcher Cooper saying that the call was muffled. However, the recording in the ACORN System sounds extremely clear to anyone reviewing the tape.

Based on the information contained in Lieutenant Nobrega's report, City Manager Eileen Donoghue (City Manager Donoghue) suspended Cooper for ninety working days,¹ for failing to update the CAD system, for failing to properly judge the characteristics of the call, and for failing to update Dispatcher Neville. The Union filed a grievance over the suspension that was denied at all Steps of the grievance procedure, resulting in the instant arbitration.

POSITIONS OF THE PARTIES

THE EMPLOYER

The central question is whether, under the just cause standard, the City was justified in suspending Cooper for ninety days for her serious breach of her duties and of City policies including: (1) failing to update the CAD as required when new or additional information is obtained with respect to an ongoing emergency call; (2) failing to pass new or additional information obtained from an ongoing emergency call to the scheduled lead dispatcher; and (3) failing to appropriately judge the characteristics of an ongoing emergency call when determining whether

¹ The City unsuccessfully attempted to justify the discipline of Cooper with evidence of analogous lengthy suspensions of other Dispatchers. The evidence was unpersuasive.

to update the CAD and/or otherwise relay new or additional information to responding patrol units.

Just Cause

As a provisional employee under Massachusetts' civil service laws, Cooper was suspended for just cause pursuant to M.G.L. c. 31, §41. While Cooper elected to contest her suspension via grievance arbitration under the collective bargaining agreement, that agreement does not define just cause. Accordingly, the City submits that it is appropriate to look to the relevant definitional standards as applied in the civil service context when assessing the City's just cause determination in this case.

Just cause has been judicially defined in the context of M.G.L. c. 31 as substantial misconduct which adversely affects the public interest by impairing the efficiency of the public service. In determining whether just cause exists, the conduct in question need not rise to the level of criminal misconduct. Thus, the appropriate inquiry is whether the employee has been guilty of substantial misconduct which adversely affects the public interest. There is no requirement to speculate as to whether a less severe disciplinary measure would have secured appropriate employee behavior.

Cooper's serious breach of duty constitutes substantial misconduct that adversely affects the public interest. By failing to adequately assess the urgency of an emergency call, and thus failing to update the CAD, enter a CAD alert, or update the priority of the call, Cooper put responding police officers and members of the public at risk, and ultimately a woman was fatally injured. A dispatcher of

Cooper's experience should have been able to recognize the urgency of the call at issue, especially when it is undisputed that she knew that people on the scene were afraid to go outside and the situation had been pending for almost forty-five minutes with no response. She should have been able to identify that new and material information was being conveyed and should have updated the CAD and the priority of the call accordingly.

Cooper violated multiple City policies by failing to update CAD or alert the lead dispatcher of the newly obtained information from the call. First, she violated Section K 7 regarding accountability and discipline by contributing to the delay in the police response to the call, which is an act of misfeasance. Additionally, she violated General Order 400.1 by failing to effectively judge the characteristics of the call to determine whether an emergency response was required. Cooper acknowledged that she understood that the caller was afraid to go outside, and agreed that whether a caller is afraid is material to the urgency of a call. In spite of this, Cooper did not feel the need to update the CAD or her colleagues to this new and pertinent information and offered no explanation for why a dispatcher with decades of experience would not take further action based on the fear conveyed in the call. Cooper's lack of action constitutes malfeasance and/ or nonfeasance that constitutes just cause for her suspension.

The City had just cause to suspend Cooper for ninety days. In similar cases, severe discipline was imposed by the City, including termination in one instance. It can hardly be said that Cooper's acts constituted something other than

substantial misconduct which adversely affected the public interest. Accordingly, a ninety-day suspension was justified.

For all the forgoing reasons, the City requests that the arbitrator rule in the City's favor and uphold the City's January 21, 2021 just cause suspension.

THE UNION

There are two proof issues in the arbitration of discipline and discharge cases. The first issue involves proof of wrongdoing; the second, assuming the guilt of wrongdoing is established, concerns the question of whether the punishment assessed should be upheld or modified. In essence, this case involves Cooper being disciplined for incidents that unjustifiably implicate and impugn her moral character. It is well established that a high quantum of proof, that of clear and convincing evidence, is required in cases involving matters of personal reputation.

Here, the City suspended Cooper for ninety days based on a unjustified conclusion that her inability to update the CAD system and to judge the characteristics of the call in question somehow contributed to a delay in police response to the call. There was no finding in Lieutenant Nobrega's investigation that Cooper's actions or inactions contributed to a person's death or posed a risk to officer safety. In fact, Lieutenant Nobrega noted that the timeframe between when Cooper completed the call and the call for shots fired was less than a minute and a half. Even if Cooper had entered an update into the CAD system, "an officer would potentially still not have had enough time to respond prior to shots being fired." Notwithstanding this, the City still levied serious allegations against Cooper and imposed lengthy, severe and punitive discipline upon her.

No Substantial Evidence of Proof of Guilt

The City has not satisfied its burden of proving Cooper committed a wrongdoing. This is because the internal investigation did not determine that Cooper violated any policy. The City cited Cooper for an act of misfeasance which was based purely on its subjective belief that Cooper violated a policy. Cooper's actions, or inactions, did not rise to the level of a policy violation. Lieutenant Nobrega stated in her investigation report that Cooper failed to update the CAD system, however, she also acknowledged that had Cooper entered the information she took from the call she answered into the CAD system, there would not have been enough time from when her call ended to when the shots were fired for an officer to respond.

Cooper was also cited for violating the Lowell Police General Order Communications Center Policy 400.01 for failing to properly judge the characteristics of the call she received. Specifically, Cooper was alleged to have not properly assessed the caller's fear and his use of the word gun. Cooper had difficulty understanding the caller, both because he spoke quickly and because of the poor listening conditions in the communication center. During her interview with Lieutenant Nobrega, Cooper acknowledged that the recording was clear, but she still had difficulty understanding the caller because of the noise in the room. Cooper further acknowledged that had she heard the caller mention a gun, she would have asked followed up questions of him. Cooper dealt with the call using characteristics to assess the caller in accordance with the Communications policy. She asked follow up questions to further assess and probe the caller's statements

during the call. She asked about the vehicle being towed and where the owner was. She even asked the caller for the owner's phone number and attempted to call him. Cooper made every effort to properly identify the characteristics of the call she answered.

Penalty Not Reasonably Related to the Seriousness of the Offense and Cooper's Past Disciplinary Record

Cooper's suspension was not reasonably related to the seriousness of the offense and her unblemished record. The discipline was out of step with the purposes of progressive discipline, was punitive rather than corrective, and ignored mitigating circumstances.

The City has not demonstrated that the discipline issued was based on the seriousness of the offense and Cooper's unblemished record. Cooper has been employed as a dispatcher with the City for over twenty-seven years with an unblemished record. Given that the City produced no evidence of wrongdoing by Cooper, punitive discipline is inconsistent with progressive discipline. Cooper's handling of the call she received did not impact any of the events that eventually transpired. As Lieutenant Nobrega noted, even if Cooper had updated the CAD system with the information from her call, there would not have been enough time for an officer to respond before the shots were fired. The call had already been logged into the CAD system, and Cooper did not interpret any alarming safety threat that would have prompted her to update the CAD system. Cooper did not commit an act of misfeasance because there were no policies mandating dispatchers to update the CAD system for calls already logged.

Conclusion

For all the foregoing reasons, the City violated the collective bargaining agreement when it suspended Cooper for ninety working days for unfounded allegations of misfeasance and violating policy. The Union requests that the Arbitrator find that Cooper committed no wrongdoing, and that there was no just cause for the discipline issued to her. The Union requests that Cooper be made whole in every way, and that the Arbitrator retain jurisdiction of this matter until completion of the make whole remedy.

OPINION

The issue before me is: Did the City of Lowell have just cause to suspend Therese Cooper for a period of ninety days in light of her involvement in the events that took place on June 23, 2020? If not, what shall be the remedy?

For all the reasons stated below, the City did not have just cause to suspend Therese Cooper for ninety days. The City did have just cause to suspend Therese Cooper for fifteen workdays for failing to update the CAD system with new information about the potential of an individual with a gun on scene and for failing to pass along information pertaining to the urgency expressed by a caller during the call in question.

The incident at 21 Coral Street is a multifaceted event that involves multiple employees from the Dispatch Center. The focus of this arbitration hearing and decision is solely based on the actions of Cooper on the day in question, and not the actions of other employees. While acknowledging that there was a significant negative outcome that day, the analysis here must be focused on Cooper's role in

the events of the day. Ultimately, it must be acknowledged that Cooper was not the initial call taker who entered the call from the non-emergency line as a call for a suspicious vehicle. Cooper was also not the person responsible for dispatching police officers to respond to the call.

The City does not have a policy that mandates that the CAD system be updated for all calls. Routinely, dispatchers receive calls on both the non-emergency line and the 911 line that are repeat calls for an incident already logged into the CAD system. These calls are required to be logged into the CAD system only if there is new or additional information provided by the caller.

In this instance, as Lieutenant Nobrega noted in her investigative report, the caller who Cooper spoke to was at the scene and was able to provide new and additional information that was not already conveyed and entered into the CAD system during the initial call to the non-emergency line. Specifically, the caller expressed a new sense of urgency to the situation with the arrival of a tow truck, his reluctance to go outside until the police arrived due to being afraid for his safety, and finally, his concern about the possibility of an individual with a gun being present. While I credit Cooper's testimony that she didn't hear the caller mention the gun and would have reacted differently had she heard the comment, I also credit Lieutenant Nobrega's testimony that the recording reviewed during her investigation and submitted as evidence in this hearing is clear and unencumbered from any interference in the audio. Cooper's failure to hear the gun comment, however unintentional, can be used as a basis for some discipline.

The next issue to address is whether Cooper should have relayed to Neville the caller's level of concern. Cooper followed protocol during the call when she attempted to solicit further information from the caller and obtained the name and phone number of the car's owner. She also followed protocol by reaching out to the car owner trying to ascertain more information about the current situation. Cooper failed to follow protocol however, when she failed to pass on to Neville the urgency the caller was relaying when he spoke of the tow truck on the scene and his reluctance to go outside without the presence of the police for fear of his own safety. Cooper's ambiguous statement to Neville that "they're calling back about Coral Street" was inadequate given the information she had been provided by the caller and can be used as a basis for some discipline.

The final issue to address is the appropriate level of discipline. The City's issuance of a ninety-day suspension is excessive and is not supported by just cause. Cooper is an employee with twenty-seven years of experience and an exemplarily record lacking in any discipline. Additionally, while I find that Cooper erred in not updating the CAD system with the new information that the caller gave her, it must be noted that, as Lieutenant Nobrega stated in her investigation report:

[T]he timeframe from the end of the call Dispatcher Cooper receives and the shots fired call is approximately less than 1½ minute. Therefore, even if Dispatcher Cooper had entered an update in the CAD, an officer would potentially still not have had enough time to respond prior to the shots being fired.

While the timeframe outlined above does not absolve Cooper from discipline, it certainly serves as an important element in formulating the appropriate level of discipline to support just cause. Finally, the City was unpersuasive in

showing evidence of disciplining any bargaining unit member in the past with such a lengthy suspension.

Based on the facts presented at the hearing, the testimony of the witnesses, and Cooper's cumulative work record, I find that the City has just cause to suspend Cooper for fifteen workdays. The City is hereby ordered to remove from Cooper's personnel file all references to a ninety-day suspension and replace it with a fifteen-workday suspension. The City shall make Cooper whole for all losses sustained above the level of a fifteen-workday suspension. I shall retain jurisdiction until such time as the parties have reached agreement on the make whole remedy.

AWARD

The City did not have just cause to suspend Therese Cooper for ninety days. The City did have just cause to suspend Therese Cooper for fifteen workdays. The City is hereby ordered to make Cooper whole for all losses above the level of a fifteen-workday suspension.



Timothy Hatfield, Esq.
Arbitrator
August 23, 2022