

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of the Arbitration Between:

CITY OF LOWELL

-and-

AFSCME, Council 93

ARB-21-8644

Arbitrator:

Timothy Hatfield, Esq.

Appearances:

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

Abigail Geier, 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 Jacqueline Fernandez for sixty days. The City did have just cause to suspend Jacqueline Fernandez for five days. The City is hereby ordered to make Fernandez whole for all losses above the level of a five-day suspension.



Timothy Hatfield, Esq.
Arbitrator
July 6, 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 September 8, 2021.

The parties filed briefs on October 27, 2021.

THE ISSUES

Did the City of Lowell have just cause to suspend Jacqueline Fernandez for sixty days? 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, Jacqueline Fernandez (Fernandez / grievant) is a dispatcher in the City's Police Department. Fernandez had worked as a dispatcher for approximately twenty-four years, as of June 30, 2020.

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 30, 2020, Fernandez was assigned as a call-taker and back-up fire dispatch on her shift. The Dispatch Center was busy that day with multiple emergencies, and one hundred and sixty-five calls between 2:15 p.m. and 3:35 p.m. At 2:44 p.m. Dispatcher Den Kuoy (Kuoy) received a call on the non-emergency line for a suspicious vehicle outside 21 Coral Street. Kuoy 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.¹

At 3:19 p.m. Lead Dispatcher Lori Neville (Neville) attempted to call the initial caller back 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, but she received no response. At 3:20 p.m., at Neville's request, 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 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," and a police cruiser would be sent as soon as possible, but there had been a few emergencies. The caller and Fernandez continued to talk and the caller stated:

If I were you [I] 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."

¹ Dispatch calls are pre-coded into the CAD system by priority. Generally, lower priority numbers are more urgent than higher priority numbers.

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. Additional calls to the Dispatcher Center were received concerning Coral Street but are not relevant to this arbitration. Ultimately, there was a shooting at 21 Coral Street that resulted in a fatality.

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. None of the police officers on duty that day were interviewed. Fernandez was interviewed on July 24, 2020, and October 2, 2020. Lieutenant Nobrega issued a report of her findings on October 5, 2020. Lieutenant Nobrega concluded that Fernandez violated Department General Order 400.01 (Communications) and the Lowell Police Department’s Rules and Regulations when she did not update the CAD system. Lieutenant Nobrega noted that while the caller did not provide any new information to Fernandez during the call, she did express an urgency that should have resulted in an update in the CAD system. The CAD system, as noted by Lieutenant Nobrega, 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.

Based on the information contained in Lieutenant Nobrega report, City Manager Eileen Donoghue (City Manager Donoghue) suspended Fernandez for sixty working days,² 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 Fernandez for sixty 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 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, Fernandez was suspended for just cause pursuant to M.G.L. c. 31, §41. While Fernandez elected to contest her suspension via grievance arbitration under the

² The City unsuccessfully attempted to justify the discipline of Fernandez with evidence of analogous lengthy suspensions of other dispatchers. The evidence was unpersuasive.

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 in order to warrant dismissal. 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.

Fernandez'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, Fernandez put responding police officers and members of the public at risk, and ultimately a woman was fatally injured. A dispatcher of Fernandez's experience should have been able to recognize the urgency of the call at issue, identify that new and material information was being conveyed, and should have updated the CAD and the priority of the call accordingly.

Fernandez 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. Fernandez admits that the caller's statements that her neighbor was crying and scared and that she had told her own children to get out of the area did not resonate with her or cause her to update the priority of the call. Fernandez offered no explanation for why a dispatcher with decades of experience would not take further action based on the fear conveyed in the call, and her lack of action constitutes malfeasance and/ or nonfeasance that constitutes just cause for her suspension.

The City had just cause to suspend Fernandez for sixty days. In similar cases, severe discipline was imposed by the City, including termination in one instance. It can hardly be said that Fernandez's acts constituted something other than substantial misconduct which adversely affected the public interest. Accordingly, a sixty-day suspension was justified.

For all the forgoing reasons, the City requests the arbitrator to 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. Most arbitrators apply the preponderance

of the evidence standard to ordinary discipline and discharge cases. However, in cases involving criminal conduct or stigmatizing behavior, many arbitrators apply a higher burden of proof, typically a clear and convincing evidence standard.

Here, the City suspended Fernandez for sixty days based on a subjective conclusion that her failure to pass information along in the CAD system contributed to a delay in police response to the call. The Lowell Police Department's Office of Professional Standards launched an investigation and made no finding that Fernandez's actions or inactions, while carrying out her job duties contributed to a person's death or an officer safety issue. Yet the City still chose to impose a lengthy, punitive discipline against Fernandez. It is only appropriate to review the City's case under the clear and convincing evidentiary standard.

Moreover, the City failed to prove that Fernandez committed a wrongdoing. It failed to prove that a sixty-day suspension was for just cause because the investigation was not fair and objective, the investigation failed to produce substantial evidence of guilt, and the penalty was not reasonably related to the seriousness of the offense and Fernandez's lack of disciplinary record.

The City has not satisfied its burden of proving Fernandez committed a wrongdoing. The internal investigation did not demonstrate that Fernandez violated any City policy. The lone solitary act that the City cites is that Fernandez did not update the CAD system. Yet, Lieutenant Nobrega's internal report states:

[a]lthough it should be the normal practice to update the CAD anytime a call is received for service and any additional pertinent information to an existing call is learned, that did not happen. Additionally, the CAD is not always repeatedly updated for consecutive calls for the same address and nothing in the policy pointedly mandates that it must be, however it is implied.

Dispatchers have the option of utilizing the CAD Alert or Transaction Function to update information.

The policy indicates a process for "Initial Incident Recording," however it does not provide any specific mandated protocol for any additional calls for service from the same location. Notwithstanding this, failure to update the CAD system was the City's reason for citing Fernandez with misfeasance and violation of the Communications policy. The recording of the call Fernandez took establishes that it did not warrant an update in the system because the caller did not indicate any additional firsthand knowledge or articulate facts that would have changed the call code from what it already was - a "suspicious motor vehicle." This is not an act of misfeasance or evidence of proof of guilt because there is no policy that requires dispatchers to update calls in the CAD system. Moreover, Fernandez acted in accordance with the Communications General Order when she spoke to the caller. Fernandez did not feel there was any heightened or new information received that would warrant a potential update in the CAD system. Fernandez judged the call using characteristics to assess the caller in accordance with the policy. She asked follow up questions to further assess and probe the caller's statements during the call. As such, Fernandez's failure to update the call is insufficient evidence of proof of guilt based on either an act of misfeasance or a violation of the Communication policy.

Based on the foregoing, the City has not satisfied its burden, by clear and convincing evidence, that Fernandez committed any wrongdoing. Therefore, the City lacked just cause to suspend Fernandez for sixty days.

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

The decision to suspend Fernandez for sixty days is not in line with progressive discipline because it was not reasonably related to the seriousness of the offense charged, and Fernandez's past record with the City. Fernandez has been employed as a dispatcher with the City for over twenty years and has an unblemished record. Given this and the fact that the City produced no evidence of wrongdoing, punitive discipline is inconsistent with progressive discipline. Fernandez's handling of the call at 3:21 p.m. did not impact any of the events that would transpire and certainly did not have any bearing on the shots being fired at 3:33 on Coral Street.

Nothing about the call Fernandez took heightened the original call already logged in by Dispatcher Kuoy at 2:44 p.m. for a suspicious motor vehicle. Lieutenant Nobrega acknowledges this fact in her internal investigation report stating:

The caller did not provide any additional firsthand knowledge of the situation nor did she express any articulable facts as to why she believed the situation to be more urgent in nature.

Fernandez did not interpret any alarming safety threat that would have prompted her to update the CAD system. She did not commit an act of misfeasance as cited in her suspension letter because there are no policies mandating dispatchers to update the CAD system for calls already logged that produce no new or additional information.

The City also alleges a violation of Section IV of the Communications policy. A(2) of this section lists call characteristics that dispatchers should use when

attempting to judge the characteristics of the call. This is used to determine whether an emergency or nonemergency response is required. The characteristics include: tone of voice, nature of call, whether incident is in progress, any injuries, threat of violence, prior experience with the caller, and background noise. Fernandez complied with the policy and used the suggested characteristics to judge the nature of the call that had already been logged in to the CAD system. Moreover, she explained the delay to the caller and confirmed that the original call had been logged into the CAD system. Fernandez did not feel a sense of urgency during the call. The caller was not even calling from 21 Coral Street and was merely relaying information from a friend. Given these facts she was not required to update the CAD system.

Moreover, citing a violation of the Communications policy is based on a subjective belief. There is nothing Fernandez did that was not in compliance with the policy. Knowing after the fact about the events that would eventually transpire at 21 Coral Street, it is easy for the City to look back at what could have been done in hindsight. Yet, to place blame on Fernandez for wrongdoing is unjust because she did not violate the policy.

Finally, Fernandez is an employee with over twenty years of discipline-free work for the City. These allegations and the level of discipline are out of line with Fernandez as an employee and with progressive discipline.

Conclusion

For all the foregoing reasons, the City violated the collective bargaining agreement when it suspended Fernandez on January 21, 2021 for sixty days. The

Union requests that the Arbitrator find there to be no just cause for the suspension and asks for an order removing the suspension and requiring the Employer to make Fernandez whole for all lost wages and benefits.

OPINION

The issue before me is: Did the City of Lowell have just cause to suspend Jacqueline Fernandez for sixty days? If not, what shall be the remedy?

For all the reasons stated below, the City did not have just cause to suspend Jacqueline Fernandez for sixty days. The City did have just cause to suspend Jacqueline Fernandez for five days 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 Fernandez 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 Fernandez's limited role in the events of the day. Ultimately, it must be acknowledged that Fernandez was not the initial call taker who entered the call from the non-emergency line as a call for a suspicious vehicle. Fernandez was also not the person responsible for dispatching police officers to respond to the call. Fernandez was simply assisting in reaching out to the caller after the caller did not respond to a call back from Neville who was attempting to contact her after a delay in police response due to some emergency situations and a large call volume.

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. As Lieutenant Nobrega noted in her investigative report, the caller whom Fernandez spoke to was not at the scene and was unable to provide any new or additional information that was not already conveyed and entered into the CAD system during her initial call to the non-emergency line. The City's claim that Fernandez's failure to update the CAD system after this call was akin to misfeasance is wholly unsupported and cannot be used as a basis for discipline.

The next issue to address is whether Fernandez should have relayed to Neville the caller's level of concern. Fernandez followed protocol during the call when she attempted to solicit further information from the caller concerning some of her statements about the situation being "not good." At this point, Fernandez needed to make a judgment call about whether the caller expressed any sense of urgency that should have been passed on to Neville to assist in dispatching priority. Whether Fernandez deliberately decided that the caller's level of urgency did not rise to a level necessary to inform Neville, or whether she failed to pass the information along due to the high volume of calls into the dispatch center that day is unclear. In either event, the information about the caller's level of concern should have been passed on to Neville to factor into the dispatch priority, and Fernandez's failure to do so, whether intentional or not, is worthy of some discipline.

The final issue to address is the appropriate level of discipline. The City's issuance of a sixty-day suspension is wildly excessive and is not supported by just cause. Fernandez is an employee with over twenty years' experience, and no prior discipline.³ Even if all the facts presented in this case fully supported the City's arguments, they would still not support the level of discipline imposed. Removing the unsupported charge of misfeasance further undermines the City's rationale for such a lengthy suspension. Finally, the City's purported evidence of similarly disciplining other bargaining unit members was unpersuasive. However, I find that Fernandez should have passed on the caller's level of concern to Neville, and her failure to do so warrants disciplinary action.

Based on the facts presented at the hearing, the testimony of the witnesses, and Fernandez's cumulative work record, I find that the City has just cause to suspend Fernandez for five days. The City is hereby ordered to remove from Fernandez's personnel file all references to a sixty-day suspension and replace it with a five-day suspension. The City shall make Fernandez whole for all losses sustained above the level of a five-day suspension.⁴

AWARD

The City did not have just cause to suspend Jacqueline Fernandez for sixty days. The City did have just cause to suspend Jacqueline Fernandez for five days.

³ The City failed to prove by a preponderance of the evidence that Fernandez's record contained any prior discipline.

⁴ I shall retain jurisdiction until such time as the parties have reached agreement on the make whole remedy.

The City is hereby ordered to make Fernandez whole for all losses above the level of a five-day suspension.



Timothy Hatfield, Esq.
Arbitrator
July 6, 2022