AMERICAN ARBITRATION ASSOCIATION ("AAA")

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In the Matter of the Arbitration between:

AFSCME LOCAL 159, ("Union"),

OPINION and AWARD

-and-

AAA Case No. 01-17-0006-1308

CITY OF PHILADELPHIA ("City" or "Employer")

Grievance:
Discharge – CO Jamal Bouwie and CO Eric Thompson

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BEFORE: Robert A. Grey, Esq., Arbitrator

HEARING DATE: November 5, 2018, and June 28, 2019, at American Arbitration Association, 230 South Broad Street, Philadelphia, PA 19102

APPEARANCES:

FOR THE UNION:

Willig, Williams & Davidson
By: Richard G. Poulson, Esq.
Thomas M. Gribbin, Jr., Esq. (successor advocate)

FOR THE EMPLOYER:

City of Philadelphia Law Department
By: Frank E. Wehr II, Esq.
Benjamin Patchen, Esq. (successor advocate)

INTRODUCTION

The Philadelphia Department of Prisons ("PDP") terminated Corrections Officers ("COs") Bouwie and Thompson ("Grievants", "Bouwie", or "Thompson") for alleged improper on-duty conduct during their respective shifts, [redacted], at the Curran-Fromhold Correctional Facility ("CFCF"). In a joint grievance, the Union seeks that the discipline for both Grievants be completely rescinded. The City seeks denial of

the grievance in all respects.

Consistent with the parties' Collective Bargaining Agreement ("CBA"), the hearing of this grievance took place on November 5, 2018 and June 28, 2019. Both parties appeared by counsel and were afforded full, fair and ample opportunity to present and challenge evidence, examine and cross-examine witnesses, and argue their positions. Both parties did so. Neither party questioned the fairness of the proceedings. The City challenges the arbitrability of the Bouwie grievance. This is discussed in a separate section below.

The parties submitted intra-hearing briefs and supporting documents on the arbitrability issue. The November 5, 2018 hearing was not transcribed, and no official transcript of it was produced. The June 28, 2019 hearing was transcribed, with an official transcript produced. The record was closed upon receipt of the parties' post-hearing submissions, and receipt of all exhibits.

This Opinion and Award is based upon detailed and thorough review and analysis of the entire record, including video evidence. All party positions have been considered in rendering this Opinion and Award, whether or not specifically addressed herein.

STIPULATED ISSUES

The parties submitted the following stipulated issues for final and binding determination:

Is the Bouwie grievance arbitrable?

If the Bouwie grievance is arbitrable, did the City have

just cause to terminate Grievant Bouwie? If not, what shall be the remedy?

Did the City have just cause to terminate Grievant Thompson? If not, what shall be the remedy?

BACKGROUND and RELEVANT FACTS

The following salient background facts are not materially in dispute, unless noted otherwise. They are presented in chronological order where practicable. **All dates refer to the year 2017 unless stated otherwise.**

Bouwie was appointed to PDP as a Correctional Officer in or about April 2013. Thompson was appointed to PDP as a Correctional Officer in or about January 2011. At all relevant times both Grievants were assigned to work as COs at CFCF. Of the two (2) dates at issue here, [redacted], Bouwie was off on [redacted]. On [redacted] Bouwie was assigned as a block officer on [redacted] ("[redacted]") on the 7am-3pm shift. On [redacted] and [redacted] Thompson was assigned as a rover on [redacted] on the 3pm-11pm shifts. It is undisputed that [redacted] is within a [redacted] rover's work area.

On or about [redacted], "*a grievance was received from inmate C[redacted] W[redacted] alleging that he was refused medical attention by correctional staff after an altercation with another inmate that occurred on [redacted]. Inmate W[redacted] alleged he was given medication by correctional staff and kept in his cell against his will, opposed to his request for a supervisor or medical treatment.*" City Exhibits 4 and 5.

PDP's Office of Professional Compliance, Internal Affairs Unit, commenced an investigation under Case # 17-00037. Sgt. Alicia Abbott conducted the investigation.

On an unspecified date in May, Sgt. Abbott issued a 256-page report. City Exhibit 3.

On May 31, Sgt. Abbott issued Employee Violation Reports to Bouwie and Thompson. City Exhibits 4 and 5.

On August 10, Bouwie and Thompson had formal disciplinary hearings. They each denied their respective charges.

On August 14, Bouwie filed an "Appeal to [the City of Philadelphia] Civil Service Commission". On the form's "Date of Dismissal" line mid-page appears: "8-10-17". City Exhibit B.[1]

On August 15 PDP Deputy Commissioner for Administration Robert Tomaszewski issued a Memorandum to PDP Commissioner Blanche Carney regarding Bouwie's formal disciplinary hearing, under Case No. 810-04. The Memorandum concluded that: "*After deliberations, based upon the evidence presented and the employee's record, the [Board] sustained the violation of General Orders/Policies 01, 03, 37, 45, 67 & 1.C.11.1. The Board recommends a Thirty Calendar Day Suspension and dismissal from employment with the City of Philadelphia*." City Exhibit 2.

On August 17 Deputy Commissioner Tomaszewski issued a Memorandum to Commissioner Carney regarding Thompson's formal disciplinary hearing, under Case No. 810-10. The Memorandum concluded that: "*After deliberations, based upon the evidence presented and the employee's record, the Board sustained the violation of General Orders/Policies: 01, 03, 37, 38, 67 and 1.C.11.1. The Board recommends a thirty (30)*

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[1] The City's arbitrability exhibits are lettered.

calendar day suspension and dismissal from employment with the City of Philadelphia." City Exhibit 1.

On September 14 the City served Bouwie with Notice of Intention to Dismiss, and Notice of Suspension Without Pay for 30 calendar days, from "*August 10, 2017 to September 9, 2017*." Joint Exhibit 3.

On September 19 the City served Bouwie with Notice of Dismissal, effective September 19. Joint Exhibit 3. Also on September 19 the Civil Service Commission issued notice of hearing for November 7 for Bouwie's CSC appeal, under CSC Case No. 5408. City Exhibit C.

On October 4 the Union's law firm at the time (not the same law firm now representing the Union in this arbitration) issued Entry of Appearance for Bouwie's CSC appeal.

On October 6 the Union's law firm at the time (not the same law firm now representing the Union in this arbitration) informed CSC that it was representing the Union in a grievance arbitration, the issues of which substantially overlap with Bouwie's CSC appeal. The law firm asked CSC to hold the CSC appeal in abeyance pending conclusion of the arbitration. City Exhibit D.

On October 11 the Union filed a Demand for Arbitration with AAA. Union Exhibit 1.

On October 14 AAA issued to the parties an arbitration case-opening letter along with an arbitrator selection strike-list. Union Exhibit 2 [case-opening letter only; strike-list not in evidence].

On October 20 the City served Thompson with Notice of Intention to Dismiss, and Notice of Suspension Without Pay for 30 calendar days, from "*October 19, 2017 to November 17, 2017*." Joint Exhibit 2. On October 20 the City *again* served Bouwie with Notice of Intention to Dismiss. City Exhibit G.

Also on October 20 PDP Human Resources issued what is referred to as the "glitch letter". City Exhibit E. This letter is the root cause of the arbitrability issue, and is discussed below, in the Bouwie Arbitrability section.

On October 31 the City served both Bouwie and Thompson with Notice of Dismissal, both effective October 31. City Exhibit G and Joint Exhibit 2, respectively.

On November 3 the CSC dismissed Bouwie's appeal under Case No. 5408 as "*moot without prejudice*" based upon PDP's "*procedural glitch*" and PDP's "*reissuing the disciplinary paperwork initially served on 9/14/17 and 9/19/17.*" City Exhibit F.

On November 8 the undersigned was appointed as arbitrator of the Union's Bouwie and Thompson grievance, pursuant to mutual selection by the parties, via AAA's arbitrator selection process. Union Exhibit 3.[2]

On November 20 Bouwie filed another "Appeal to [the City of Philadelphia] Civil Service Commission". On the form's "Date of Dismissal" line mid-page appears:

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[2] Six (6) other COs were disciplined regarding the same incident. They each received suspensions without intent to dismiss. The discipline issued to these six (6) other COs was grieved by the Union and heard by Arbitrator Darby under AAA Case No. 01-17-0006-1314. Arbitrator Darby held hearings on September 17, 2018, and February 26, 2019, and issued his Opinion and Award on August 19, 2019. Union Exhibit 1. While not binding on the undersigned arbitrator, many of the same conclusions are reached.

"*9-20-17*", and, "*10/31/17*". In the "Issues" section at the bottom of the form, Bouwie wrote: "*I was fired on Aug 10, 2017 I received paperwork stating it was a procedural glitch that is being corrected . . .*" City Exhibit H.

On December 21 the Civil Service Commission issued notice of hearing for January 23, 2018 for Bouwie's CSC appeal, under CSC Case No. 5431. City Exhibit I.

On January 19, 2018 the City requested a continuance of the January 23 CSC hearing due to unavailability of a necessary witness. City Exhibit J.

On February 1, 2018 the Civil Service Commission issued notice of hearing for April 3, 2018 for Bouwie's CSC appeal, under CSC Case No. 5431. City Exhibit J.

On February 27, 2018 AAA issued Notice of Hearing for this arbitration to take place on April 10, 2018. This hearing date was cancelled.

On April 3, 2018 the City appeared at CSC for the noticed hearing. Neither the Union, Bouwie, nor anyone on his behalf, appeared.

On April 6, 2018 the CSC dismissed Bouwie's appeal under Case No. 5431 "*for want of prosecution with prejudice*". City Exhibit L.

On June 7, 2018 AAA issued Notice of Hearing for this arbitration to take place on August 3, 2018. This hearing date was cancelled.

On July 24, 2018 AAA issued Notice of Hearing for this arbitration to take place on November 5, 2018. City Exhibit M. The first of two days of hearing took place on November 5, 2018. The second of the two days of hearing took place on June 28, 2019. In the interim, the parties engaged in motion practice regarding two procedural issues, one of which eventually became moot. The remaining procedural issue, which

the parties briefed intra-hearing, is whether the Bouwie grievance is arbitrable.

BOUWIE ARBITRABILITY

The City has maintained from the outset of this matter, that Bouwie's grievance is not arbitrable. The City renews its motion for a ruling of non-arbitrability. The Union opposes the motion and continues to maintain that Bouwie's grievance is arbitrable. Party positions on the issue of arbitrability are excerpted below from their respective intra-hearing briefs. They are set forth in *italics*, single spaced, to denote they are the words of the parties, not the arbitrator.

City Position – Bouwie Arbitrability

Local 159 seeks to arbitrate a termination that the Grievant, Jamal Bouwie, already submitted to the Philadelphia Civil Service Commission, which rendered a final decision. The parties' collective bargaining agreement provides for an election of remedies between the arbitration and Civil Service processes. The Union's grievance of Mr. Bouwie's dismissal from employment is not arbitrable due to the fact that Mr. Bouwie already proceeded to hearing before the Civil Service Commission and final decision on the merits was issued by the Commission.

In the instant case, Mr. Bouwie and his Union filed both a grievance and a Civil Service appeal, and the Civil Service appeal, Case No. 5431, was heard first on April 3, 2018. After the April 3, 2018 hearing the Commission dismissed the appeal with prejudice for failure to prosecute. At no time before or after the April 3, 2018 hearing did Mr. Bouwie or his Union notify the Commission that they wished to put Case No. 5431 in abeyance so they could pursue grievance arbitration instead. As such, the Commission's April 6, 2018 order constitutes a final decision on the merits, and, prohibits the Union and grievant from seeking a second bite at the apple through this grievance.

A similar issue of arbitrability was presented to Arbitrator Robert Light, where the grievant appealed her suspension to the Philadelphia Civil Service Commission, failed to appear at the Civil Service hearing, and then sought to arbitrate her grievance. The Commission dismissed the grievant's appeal with prejudice for failure to prosecute. Mr. Light ruled in favor of the City and held that the matter was not arbitrable. Arbitrator Robert Light's award should be considered precedent on this issue.

Therefore, the Union's grievance contesting Mr. Bouwie's dismissal from employment

with the City of Philadelphia is not arbitrable and this grievance should be dismissed with prejudice.

Union Position – Bouwie Arbitrability

The City seeks to preclude an evidentiary hearing on the merits of its unjust termination of Jamal Bouwie because it cannot meet its heavy burden to prove that it terminated Officer Bouwie for just cause.

The CBA's Election of Remedies provision is intended to promote efficiency and to prevent either party from experiencing a windfall in a discipline grievance. The intent is that discipline disputes are litigated either at arbitration or the Civil Service Commission, not both. As the City has correctly noted, the goal is to provide "one bite at the apple," not two. We agree.

The problem in this case is that the City seeks to prevent any bite at the Bouwie discipline. There is no dispute that neither this arbitrator nor the Civil Service Commission has conducted an evidentiary hearing on the merits of the Bouwie termination.

It is also not disputed that the Union proceeded to arbitration in the Bouwie matter in October 2017. The City was notified of this fact. The Commission was notified of this fact.

The CBA does not specify which party is required to notify the Commission. Here, the Union notified the Commission in early October 2017 of its intention to arbitrate the Bouwie grievance, thus satisfying the Election of Remedies provision and ending this inquiry.

The confusion here is that after the Union had already filed its arbitration demand in this matter, the City re-disciplined Bouwie in order to cure a procedural error. This apparently led the Commission to issue the November 3 correspondence inviting Bouwie to file another appeal despite the fact that his grievance had already been sent to arbitration and the Commission had already been notified of this fact.

Thus, to the extent that there is fault here, it lies with the City and/or the Commission, not Officer Bouwie or the Union. The second Civil Service matter should not have been invited or accepted by the Commission based on the Union's October 12, 2017 referral to arbitration. And the City should not have continued to prosecute the Civil Service matter in light of the referral to arbitration.

The CBA sets an obligation to notify the Commission when a discipline grievance has been submitted to arbitration. That obligation rests with both parties. Here, not only did the City ignore that obligation, it sought to somehow exploit that obligation by attempting to litigate a pro-se Civil Service appeal in a case that had already been sent to arbitration. For the City to now seek to further distort the negotiated Election of Remedies provision is not

only patently incorrect on the law, it also demonstrates bad faith.

The Union asks that the City's request be denied.

RELEVANT CBA PROVISION – BOUWIE ARBITRABILITY

> *Where a timely Civil Service appeal and a grievance are filed, the parties agree to defer the scheduling of the Civil Service hearing until the Union or the employee opts to seek a review by the Civil Service Commission or go to binding grievance arbitration.*
>
> *Should the Union elect to proceed to arbitration, the Commission shall be notified and the Civil Service appeal dismissed. Where the Union elects not to go to arbitration, the Commission shall be notified and the appeal scheduled for a hearing.*

City Exhibit A (MOU dated October 15, 1992; referred to by the parties as the "Election of Remedies" provision).

RULING – BOUWIE ARBITRABILITY

The parties agree that the intent of their Election of Remedies provision is to prevent "*two bites of the apple*". Thus, either a grievance arbitration hearing, or, a Civil Service Commission ("CSC") appeal hearing, but not both. By the terms of its first words, the provision clearly and unambiguously demonstrates that the parties anticipated situations with *filings* for *both*. The remainder of the provision sets forth the parties' procedure for going forward with one, instead of the other.

On August 14, Bouwie filed a CSC appeal. City Exhibit B. By letter dated October 6, and stamped "*Received OCT 10 2017 CIVIL SERVICE COMMISSION*", Union counsel notified the CSC that the Union was proceeding with grievance arbitration. City Exhibit D. Thus, the Union satisfied the Election of Remedies provision.

Additionally, on October 11 the Union filed a Demand for Arbitration with AAA. Union Exhibit 1. In response, on October 14 AAA issued an arbitration case-opening letter to both parties. The parties subsequently engaged in the AAA arbitrator selection process. Union Exhibit 2. This constituted further notice that grievance arbitration was the *"bite of the apple"* being taken.

The record shows that what upset the applecart was the City's unilaterally-issued "glitch letter" dated October 20. **But for** the "glitch letter", there would be no arbitrability issue. The letter begins by stating: "*Due to a procedural glitch that is now being corrected, the PDP is compensating you with your full Correctional Officer salary from August 10, 2017 through October 18, 2017. The suspension, intention to dismiss and dismissal paperwork that were served to you on Sept. 14, 2017 and September 19, 2017 are now being reissued. The corrected suspension and intention to dismiss are enclosed.*" City Exhibit E.

Notably, the "glitch letter" – printed on official PDP letterhead – concludes with the following unconditional language: "*As a result of these corrective actions, the appeal that you filed with the Civil Service Commission will be rejected and* ***you will need to file a new appeal within thirty (30) days*** *of the effective date of dismissal on the forthcoming Notice of Dismissal. . . .*". City Exhibit E [***Emphasis*** added].[3] Faced with this strong,

[3] The first Notice of Dismissal (Joint Exhibit 2) was served on Bouwie on September 19, effective September 19. The second Notice of Dismissal (City Exhibit G) was served on Bouwie on October 31, effective October 31. Otherwise, the two documents are identical word-for-word, from the first word to the last word. They both explicitly set forth the same exact allegations arising from the same exact incident.

quasi-mandatory language, Bouwie filed the second appeal (City Exhibit H), on November 20, to protect his rights. T143-145 at 145.

Neither Bouwie, the Union, nor Union counsel made any attempt to advance either of the two CSC appeal filings. T145. It is undisputed that on October 6 Union counsel notified CSC of the arbitration, two (2) full weeks before the City issued the October 20 glitch letter. Thus, it is persuasive that Bouwie filed the second CSC appeal solely because of the City's glitch letter. Further, it is undisputed that neither the Union, Bouwie, nor anyone on his behalf, appeared at CSC on any of the CSC hearing dates. Indeed, CSC dismissed the post-glitch-letter appeal for ***want*** *of prosecution.*

To the extent that a prior arbitration award submitted by the City (City Exhibit N [not involving Bouwie]), may have any precedential or arbitral notice effect, it is readily distinguishable. It does not refer to the existence in that case of a unilaterally issued City "glitch letter", or a re-dated and re-issued Notice of Dismissal, otherwise completely identical to the first Notice, with both Notices arising from the same exact alleged incident and conduct. These are critical distinctions. Moreover, Arbitrator Light in his 2016 award found that, "*the grievant clearly sought the remedy before the Civil Service Commission.*" City Exhibit N. The record demonstrates this is not the case with Grievant Bouwie.

As stated above, by letter dated October 6, and stamped "*Received OCT 10 2017 CIVIL SERVICE COMMISSION*", Union counsel notified the CSC that the Union was proceeding with grievance arbitration, thus satisfying the Election of Remedies provision. There is no evidence that the Union, Bouwie, nor Union counsel were

gaming the Election of Remedies provision, gaming the system, or trying to get "*two bites of the apple*". Additionally, under these facts and circumstances, ruling that Bouwie's grievance is not arbitrable would frustrate the parties' intent expressed in their Election of Remedies provision, by giving *no* bites of the apple rather than one bite.

Based upon the foregoing, this arbitrator finds that the "*remedy*" of arbitration was "*elected*" in compliance with the parties' Election of Remedies provision. Therefore, Bouwie's grievance is arbitrable. We turn now to the merits.

SUBSTANTIVE MERITS

RELEVANT CHARGED GENERAL ORDERS ("GO")

GO 37. *Any employee who fails to take the 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.* [Charged against both Bouwie and Thompson].

GO 38. *All employees are required to cooperate in investigations conducted by the PPS or by other law enforcement officials.* [Charged only against Thompson, not Bouwie].

GO 45. *Any employee who violates rules regarding contraband is subject to disciplinary action as well as prosecution for violation of the appropriate Sections of the PA Crime Code.* [Charged only against Bouwie, not Thompson].

GO 67. *It shall be the duty of any employee supervising inmates to look after the inmates' welfare and ensure that inmates obtain proper and sufficient food, clothing, and medical attention.* [Charged against both Bouwie and Thompson].

RELEVANT CHARGED PDP POLICY AND PROCEDURE

Policy Number 1.C.11.1; Employee Code of Conduct:

XIII *Each employee shall cooperate fully and truthfully in any inquiry or investigation conducted by the PDP and any other law enforcement or regulatory agency. Each employee will be afforded the full protection of the law as applicable (refer to General Order# 38).* [Charged against both Bouwie and Thompson].

POSITIONS OF THE PARTIES – MERITS

The positions of the parties are excerpted below from their respective post-hearing briefs. They are set forth in *italics*, single spaced, to denote they are the words of the parties, not the arbitrator. Footnotes and citations may be omitted.

City Position – Merits

It is undisputed that, on the Wednesday, [redacted] 7:00 a.m. to 3:00 p.m. shift, inmate C[redacted] W[redacted] ("W[redacted]") was involved in a fight with another inmate in the barbershop. Tr. at 24:17-24 and City-3 at 004 and 080. It is also undisputed that, as a result of the fight, W[redacted] suffered severe injuries. City-3 at 154-157 and 183-224. Because of the grievants' actions, W[redacted] did not receive medical treatment until the afternoon of January 19, 2017.

The grievants put forth two primary arguments: first, they had no knowledge that W[redacted] needed medical care, and second, Sgt. Alicia Abbott's investigation was flawed because supervisors allegedly engaged in similar conduct but were not disciplined. Despite the grievants' testimony at the hearing that they were unaware of any visible injuries to W[redacted], there was indisputable evidence that he was visibly injured. He had visible swelling immediately after the fight and was seen on videotape the evening of the fight, at 8:52:25 p.m., with a severe black eye. City Exhibit 7, [redacted] at 8:52:25p.m. A screenshot of the video is attached hereto as "Exhibit 1." This video shows Thompson escort W[redacted] back to his cell with the black eye. Additionally, pictures taken after he was brought for medical attention, approximately 24 hours after the injuries occurred, show the extent of his visible injuries. City-3 at 154-157. Finally, the evidence and testimony presented at the hearing demonstrated clearly that the supervisors did not engage in conduct similar to the grievants.

At the time of the hearing, Sgt. Abbott had been employed with the Department of Prisons for almost 20 years. Tr. at 19:14-16. She had been conducting investigations into employee misconduct for approximately three years. Tr. at 19:19-20:3. As part of her investigation, Sgt. Abbott spoke with 18 prison employees, reviewed hours of videotape footage, obtained medical records and reviewed employee rosters and logs. City-3. Altogether, Sgt. Abbott prepared an investigatory report that consisted of 253 pages. While

the grievants may not have agreed with the outcome of her investigation or would have liked to see others disciplined instead of them, there was no evidence presented that showed Sgt. Abbott was biased in any manner.

Although the grievants testified that they were unaware of any visible injury to W[redacted] that required medical attention, there is an overwhelming amount of evidence that W[redacted]'s injuries were immediately apparent. Thus, he should have been taken to the medical unit by any officer that came in contact with him.

No one disputes that inmates are required to be sent to medical immediately after they are involved in a fight. Here, it is undisputed that W[redacted] was involved in a fight and was not sent to the medical unit immediately. Additional corroboration of the easily visible extent of W[redacted]'s injuries is provided by the photos taken the following day, [redacted], and his medical records from the Prison medical unit and when later admitted to Temple Hospital on the [redacted].

The medical notes stated that W[redacted]'s [redacted], prompting Prisons to send him to Temple University Hospital. C-3 at 187. At Temple, W[redacted] was [redacted]. C-3 at 196. W[redacted] was [redacted] and [redacted]. C-3 at 197.

Additionally, W[redacted] stated that he asked Officers R[redacted] and Officer Thompson to go to medical. C-3 at 036. After they declined to take him to medical, W[redacted] asked for "something for the pain" and R[redacted] gave him what she believed to be Motrin. C-3 at 036. At the hearing, R[redacted] reluctantly testified that W[redacted] informed Officer Thompson and her that W[redacted] was involved in a fight and asked for Tylenol. Tr. at 82:10-83:11 and C-3 at 177. R[redacted] testified that Officer Thompson retrieved the pills from medical and gave them to Officer R[redacted], who passed them along to W[redacted]. Id. Officer R[redacted] testified that she was unsure of what the pills were but gave them to W[redacted]. Id.

On [redacted], W[redacted] stated that he told W[redacted] that he needed help as his eye and nose were bleeding and he was in pain. C-3 at 037. Instead of taking him to medical, W[redacted] returned with ice. Video surveillance showed that Bouwie observed W[redacted] attend to W[redacted] with the ice. City-4 and City-7. Throughout the 24-hour period, W[redacted] asked multiple officers, including Officers Thompson and Bouwie, to take him to medical. C-3 at 041. These officers all refused to take W[redacted] to the medical unit.

It is clear that W[redacted] suffered severe injuries and needed immediate medical attention. Based on the overwhelming amount of evidence that W[redacted] was visibly injured and needed medical attention, the grievants' testimony that they did not observe visible injuries should be rejected, as it is unreasonable to believe that W[redacted]'s injuries were not obviously apparent to anyone who encountered him.

Upon completion of the investigation both Grievants each received an Employee Violation Report and was given an opportunity to hear the charges and evidence against them at a formal disciplinary board hearing. The disciplinary board found both Grievants guilty and recommended termination, which were the appropriate penalties.

For these reasons, the City had just cause to terminate the employment of the grievants, and it requests that the grievance be denied.

Union Position – Merits

The City failed to show that the grievants committed any misconduct. The City failed to show (1) how inmate C[redacted] W[redacted] ("W[redacted]") sustained his injury; (2) when inmate W[redacted] sustained his injury; (3) that inmate W[redacted] exhibited any outward signs of bruising on his face on either [redacted] or [redacted]; (4) and, if he did, when it was clear that inmate W[redacted]'s face exhibited noticeable bruising which required medical attention; (5) that if indeed inmate W[redacted] sustained his injury during a fight with another inmate, whether the grievants were aware of that fight; and, (6) that the grievants are lying about what, if anything, they observed.

Grievants had no knowledge of inmate W[redacted]'s alleged fight, had only minor contact with him during their shifts, and at no time did inmate W[redacted] request for them to send him to medical.

None of the Supervisors involved in this incident received any discipline. The City conducted a biased and inadequate investigation, relied on unsubstantiated hearsay, and failed to apply its rules and discipline evenhandedly.

Accordingly, the Union respectfully requests that the grievance be sustained.

DISCUSSION AND OPINION – MERITS

This Opinion and Award is based upon detailed and thorough review and analysis of the entire record, including the documentary and video[4] evidence, and the parties' post-hearing briefs with their supporting documents. All party positions have

[4] The City provided the arbitrator with a USB drive containing five (5) video files. Each file contained multiple camera views of CFCF [redacted] during the following: [redacted]: 1:25pm-2:00pm and 8:20pm-8:40pm; [redacted]: 7:20am-8:00am, 8:00am-8:20am, and 9:55am-11:00am. City Exhibit 7.

been carefully considered in rendering this Opinion and Award, whether or not specifically addressed herein.

As recited above, the Union takes strong issue with the City's alleged reliance on *"unsubstantiated hearsay"*, and alleged *"fail[ure] to apply its rules and discipline evenhandedly*." The Union's contentions have merit.

Inmate W[redacted] did not testify at this arbitration, thus denying the Union the opportunity to cross-examine him. Likewise, the arbitrator did not have the opportunity to observe him testify, and thus be in a position to assess his testimonial credibility. W[redacted]'s statements in the record are hearsay, not sufficiently corroborated, and therefore deemed unreliable.

Similarly, none of the supervisors who observed or interacted with W[redacted] on the dates in question, or had the opportunity to do so, testified at this arbitration. The Union did not have the opportunity to cross-examine them, and the arbitrator did not have the opportunity to observe them testify, and assess their testimonial credibility.

The City did establish that W[redacted]'s facial injuries were patently visibly to those who may have observed his face on the same shifts Grievants were working during this incident. This includes the supervisors in the ranks of Sergeant, Lieutenant, Captain and Major who may or should have been aware of W[redacted]'s injuries, none of whom sent W[redacted] to medical, none of whom were charged or disciplined for this incident, and some of whom were not interviewed about it. While the City contends that COs and supervisors have different roles, W[redacted]'s injuries were patently visible, regardless of rank. GO 37 and GO 67 undisputedly apply to "*any* [represented] *employee"*,

regardless of rank. Joint Exhibit 1A.

Thus, under the facts and circumstances of this record, finding Grievants in violation for observing W[redacted]'s injuries but not sending him to medical based upon such observation would constitute disparate treatment and violate principles of just cause.

As non-binding background, Arbitrator Darby's decision holds that:

> *The City has presented no policy demonstrating that COs are required to send any inmate who looks injured to medical. While it appears it would be a good practice to inform a supervisor that an inmate appears injured, the evidence showing that supervisors/managers saw W[redacted] on [redacted] and did not send him to medical detracts from any assertion that an enforceable medical referral policy exists.*
>
> *Based on the language of GO 67, common sense dictates that if an inmate appears injured and requests medical assistance a CO would be derelict in his or her duties for failing to at least notify a supervisor or send the inmate to medical. However, there is no reliable evidence in the record before me demonstrating that W[redacted] was ever denied the right to go to medical. Again, I must assume that if W[redacted] was requesting the COs for medical assistance as alleged, he would have certainly done the same when supervisors/managers were in contact with him (like when he was conversing with Major C[redacted]). It is undisputed that no one other than COs C[redacted] and H[redacted] sent W[redacted] to medical.*

Union Exhibit 1, pp20-21. I concur.

The record does not establish that W[redacted] asked Bouwie or Thompson to go to medical, or, that Bouwie or Thompson denied or refused W[redacted] to go to medical. Logically, if W[redacted] was asking COs to go to medical and they were not letting him go, it is highly likely that he would have asked the supervisors to go to medical when they did their respective cell block tours during the same shifts, and/or, would have complained to any of the supervisors that his alleged requests to go to medical were

being denied or refused. W did neither.

We turn now to the other charges preferred against Bouwie, and then to the other preferred against Thompson.

GRIEVANT BOUWIE

"Officer Bouwie's employment was terminated for his role in the 'lock in' of inmate W, failure to take W to medical and having contraband inside the prison. Bouwie was found guilty of General Orders 1, 3, 37, 45, 67 and 1.C.11.1., which included his actions pertaining to inmate W and his possession of contraband in the prison." City Brief 7. As noted above, the Union disputes all the charges and maintains that the City did not prove that Bouwie committed any misconduct. As held above, the record does not support the City's charge that Bouwie failed to take W to medical.

It is undisputed that Bouwie did not work on . There is not sufficiently persuasive direct evidence, nor sufficiently reliable hearsay evidence, to establish that Bouwie was aware on during his shift that W was involved in a fight on , and would have thus been required to send W to medical. The circumstantial evidence in the record is insufficient to establish the City's position that the only reasonable conclusion is that Grievant was aware of same.

Lock-In (Bouwie)

There is also insufficient persuasive direct evidence, nor sufficiently reliable hearsay evidence, to establish that Bouwie was involved in a lock-in of W in his cell on The circumstantial evidence in the record is also insufficient to establish the City's position that the only reasonable conclusion is that Grievant did so.

The City alleges that, "*Video surveillance revealed that while Bouwie opened all of the other inmates' cells, but in W's case, he simply looked into W's cell and did not let him out. C-7 8:08:33 a.m. and 8:15:06 a.m.*" City Brief 8.

However, the video shows that Bouwie did the same thing at W's upper tier cell as Bouwie did at three (3) lower tier cells (8:08:41 - 8:08:46), and at another upper tier cell (8:13:33 - 8:13:38). City Exhibit 7. Moreover, it is undisputed that inmates can, and often do, remain in their cells by choice. There is not sufficiently persuasive direct evidence, nor sufficiently reliable hearsay evidence, to establish that W asked Bouwie to be let out of his cell at 8:15:06 or any other time, with Bouwie instead locking him in. Nor does the circumstantial evidence in the record establish the City's charge to be the only reasonable conclusion.

Ice Provided by Another CO to Inmate W (Bouwie)

The City alleges that, "*Video surveillance also established that Bouwie watched another correctional officer bring ice to W*." City Brief 8. However, the video evidence is insufficient to support the City's conclusion. There is not sufficiently persuasive direct evidence, nor sufficiently reliable hearsay evidence, to establish that Bouwie was aware of ice being brought to W in his cell on . The City alleges that CO W brought ice to W in his cell. It is undisputed that CO W was a rover, and therefore could legitimately go to and from , including W's cell. As will be discussed in the next section, the record establishes that Bouwie did see CO W go to W's cell on . But, the record does not establish that Bouwie was aware of ice being brought by CO W to W.

The circumstantial evidence in the record is insufficient to establish that the only reasonable conclusion is that Bouwie was aware of same.

Code of Conduct (Bouwie)

The City alleges that, "*During his interview with Sgt. Abbott, Bouwie claimed that he did not see Officer W[redacted] go to W[redacted]'s cell at any time. C-3 at 80. Video surveillance, however, showed that Bouwie observed Officer W[redacted] come onto the unit several times and go to W[redacted]'s cell. C-7, [redacted] at 7:21:12, 7:21:51, 7:22:14, 8:01:26, and 8:06:04.*" City Brief 8.

As found above, the video evidence is sufficiently persuasive to establish that Bouwie was aware during his shift on [redacted] that CO W[redacted] went to W[redacted]'s cell during the shift. Contrary to this video evidence, in his investigation interview and related signed statement, Bouwie told Sgt. Abbott that he did not see CO W[redacted] go to W[redacted]'s cell at *anytime* during the shift. City Exhibit 3 at 80. Bouwie's testimony regarding CO W[redacted] being a rover (T139-141; T155-156) was insufficient to negate this violation of the Code of Conduct requirement to "*cooperate fully and truthfully in any inquiry or investigation conducted by the PDP.*" Thus, the City proved just cause to discipline Bouwie.

Contraband (Bouwie)

It is undisputed that on the morning of [redacted] Bouwie was in possession of a juice box and bag of chips while on duty in the cell block, and that while consuming them at the console he also read from an inmate's yet-to-be-delivered newspaper. It is undisputed that the juice box and bag of chips were provided by management, in the

Unit Management area, and that the newspaper was in the inmate mail pile on the console, to be distributed later that morning to its inmate addressee. Notably, there is no allegation that Bouwie provided any "contraband" to any inmate, and it is undisputed that the cells were not yet open for the morning when he consumed the juice box and bag of chips, and read the newspaper at the console.

The City argues that, "*Sgt. Abbot testified that illegal contraband such as cigarettes, marijuana and drugs are brought into the prison through chip bags and sandwiches. Tr. at 33:5-34:14. General Order 45 specifically prohibits employees from bringing contraband into prison facilities and officers are trained about the contraband rules during their time at the Academy. J-1A [Matrix] and Tr. at 34:3-14. Newspapers, chips, juice boxes all violate the rules against contraband.*" City Brief 7-8.

The City further argues that, "*Bouwie did not dispute that he was in possession of the contraband while on duty, rather he claimed that he did not consider those items contraband and other employees have not been disciplined for having contraband. Bouwie, however, provided no specific examples of comparators who had contraband and were not disciplined. Despite Bouwie's insistence that having chips in the Unit is acceptable behavior, Bouwie acknowledged that this was the first time he ever had chips in the Unit. Tr. at 153:15-20.*" City Brief 8.

The Union argues that, "*The City's case with regard to the alleged contraband Officer Bouwie had on the morning on* [redacted] *fails for numerous reasons. It is undisputed, as Bouwie and Thompson testified to, that unit management occasionally provides staff with juice boxes and chips, which officers are free to take. (Tr. 135,*

153-154)." . . . "*Further, glancing at a newspaper which is at the console and will be delivered to an inmate with their mail has likewise never been considered contraband in the past. (Tr. 135). Finally, both Thompson and Bouwie testified that no one at the prisons that they know, including supervisors, would consider any of those items to be contraband nor has anyone ever been written up for possessing any of those items. (Tr. 122, 136).*"

GO 45 states that "*Any employee who violates rules regarding contraband is subject to disciplinary action as well as prosecution for violation of the appropriate Sections of the PA Crime Code.*" [Emphasis added]. The PDP *"rules regarding contraband*" referred to in GO 45 are not in evidence. Nor is the PDP definition of "*contraband*" in evidence. Sgt. Abbott's testimony did not fill this gap. Black's Law Dictionary defines contraband as: "*In general, any property which is unlawful to produce or possess. Goods exported from or imported into a country against its laws. Articles, the importation or exportation of which is prohibited by law. Smuggled goods.*" (5th Edition, 1979) [Emphasis added]. New Webster's Dictionary and Thesaurus defines contraband as: "*Illegal traffic in goods, smuggling . . . forbidden by law, prohibited . . .*" (1992) [Emphasis added].

GO 45's inclusion of the phrase *"appropriate Sections of the PA Crime Code*" suggests that it contemplates *illegal* items. In the absence from the record of PDP "*rules regarding contraband*", and PDP's definition of "*contraband",* the common thread among these two dictionary definitions, *and GO 45*, is *illegality*. A juice box, bag of chips and newspaper are not "*illegal*" items. The City did not reference any "*appropriate Sections of the PA Crime Code*" which possession of same would violate.

The City's concern that, " . . . *marijuana and drugs are brought into the prison*

through chip bags and sandwiches . . ." is certainly valid. However, in this case, Bouwie was undisputedly in possession of a juice box and bag of chips *provided to him by supervision within the confines of the Unit Management area during his shift.* Additionally, there is no rule in evidence restricting the consumption of same to the Unit Management area.

The Union posits, and both Grievants testified subject to cross-examination, that no one has been disciplined for this conduct in the past. The Union's assertion, and Grievants' testimony, is unrebutted. The record contains no evidence of any such prior discipline of anyone. In light of the above, and without evidence of anyone ever being disciplined for the same or similar conduct, the record is insufficient to support the possession of contraband charge.

GRIEVANT THOMPSON

"*Officer Thompson's employment was terminated because he refused to take W to the medical unit after he was seen talking to, and laughing at, W, as well as giving Officer R Tylenol to give to W. The disciplinary board found him guilty of General Orders 1, 3, 37, 38, 67 and 1.C.11.1 . . .*". City Brief 5. As noted above, the Union disputes all the charges and maintains that the City did not prove that Thompson committed any misconduct.

Tylenol (Thompson)

The City argues that, "*At the hearing, there was no dispute that Officer R gave Tylenol to W. Officer Thompson admitted that correctional officers are not permitted to provide medical care to inmates, specifically, that they are not permitted to give inmates Tylenol. C-3 at 106 and Tr. at 111:5-17. He claimed, however, that he gave the Tylenol to Officer R because she had a headache. Tr. 96:16-20. Notably, during his*

interview with Sgt. Abbott, he did not offer this explanation. Instead, when asked "did you give C/O R Tylenol to give to i/m W ?" he said "no," and then said "I don't know" when asked "Why would an officer say you gave them Tylenol to give to W ?". C-3 at 105 and 109. He never claimed that he gave Officer R Tylenol for any reason, let alone her own headache. Officer Thompson also testified that he recalled going to W 's cell with Officer R but claimed that he could not recall what was said. C-3 at 117. He admitted that he had a fine working relationship with Officer R and could not think of any reason why she would lie. Tr. at 115:2-12 and 118:10-15." City Brief 6.

The City further argues that, "*Simply put, Officer Thompson's testimony is not believable. While he disagreed with Officer R 's statement, he provided no reason or explanation for why she would make up her story. First, W stated that he informed Officer Thompson that he needed to go to medical. Second, Officer R testified that both Thompson and herself were aware that W was involved in a fight and requested Tylenol. Instead of taking the proper action of taking W to medical, Thompson obtained Tylenol from the medical unit, presumably by lying to the nurse and claiming that it was for an employee, and then giving the Tylenol to Officer R to give to W . Third, Officer Thompson admitted that he went with R to speak with W but conveniently claims that he could not recall anything W said. Given the extent of the injuries to W , it is noteworthy that Officer Thompson obtained Tylenol for W rather than take him for medical treatment.*" City Brief 6.

The Union argues that, "*Officer Thompson was never informed that inmate W was allegedly in a fight with another inmate earlier that day. (Tr. 92, 119). At some point during his shift, Officer Thompson and two (2) additional correctional officers responded to the sound of an inmate banging on their cell door on . (Tr. 93). Thompson testified that it was not inmate W banging on his cell door, but rather another inmate. (Tr. 94). On their way to respond to the inmate who was banging on his cell door, Thompson and the other officers encountered inmate W at his cell door and had a brief conversation with him. (Tr. 94). Thompson testified that he did not notice anything unusual with inmate W nor did inmate W request to go to medical. (Tr. 95). Video surveillance shows that this entire exchange at inmate W 's cell lasted less than one minute. Thereafter, Officer Thompson testified that he retrieved Tylenol from the nurse in unit management for Correctional Officer N R ("R "). (Tr. 96). Thompson testified that he believed the Tylenol was for R and was unaware that R ultimately gave the Tylenol to inmate W . (Tr. 96-97).*"

CO N R testified before this arbitrator, and was subject to cross-examination. On the date of the incident she had less than one (1) year of employment with PDP, during a few months of which she served at CFCF. On she

worked the 3pm-11pm shift at CFCF, assigned to [redacted]. As a result of this incident she received the first discipline of her employment. The City assessed her a ten (10) day suspension, which Arbitrator Darby reduced to five (5) days. T86; Union Exhibit 1, p23.[5]

During her testimony before this arbitrator, CO R[redacted] was asked about her typed and signed statement to Lt. M[redacted], dated [redacted] – created less than a month after the incident. City Exhibit 3 at 177; T80-83. This [redacted] signed statement of R[redacted]'s, her signed IA interview statement to Sgt. Abbott (City Exhibit 3 at 92-97), and her credible testimony, in conjunction with the entire record, establish it to be more likely than not that when she and Thompson were outside of W[redacted]'s cell, W[redacted] did not request to go to medical. Thus, the record does not support the City's position that Thompson refused to take W[redacted] to medical.

It is also more likely than not that W[redacted] asked out loud (to no one in particular) " . . . *for Tylenol because [according to W[redacted]] he was in a fight on the prior 7am-3pm shift.*" (City Exhibit 3 at 177); and, that Thompson obtained Tylenol intended to be given to W[redacted], and gave it to R[redacted] for that purpose. R[redacted] then gave the Tylenol to W[redacted] at approximately 4:15pm, at which time Thompson (who

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[5] Arbitrator Darby found: "*Finally, CO R[redacted] clearly had no authority to provide W[redacted] Tylenol (or worse, pills she only "assumed" were Tylenol). She also should have referred him to medical once finding out he had been in a fight, and she was not truthful when she claimed that W[redacted] had no injuries. However, she was also charged with refusing W[redacted]'s request for medical assistance and for not informing supervisors of his injuries, which as explained earlier were not a sufficient basis for the severe discipline imposed under the circumstances of this case. For these reasons, CO R[redacted]'s discipline shall be reduced to a five-day suspension.*" Union Exhibit 1, p 23.

was assigned as a rover) was no longer present near W[redacted]'s cell. T83, 86.

Thompson testified that he knew it was (and remains) against PDP policy for a CO to provide Tylenol to inmates. T111. The record does not support Thompson's assertion that R[redacted] requested Tylenol from him for her own headache. T96-99; T123-124; T82-83. Based on the above, the City proved that Thompson knowingly violated policy by providing Tylenol to R[redacted] to give to W[redacted].

The City also proved that Thompson had reason to be aware on his [redacted] 3p-11p shift that W[redacted] was allegedly involved in a fight, albeit on the [redacted] 7a-3p shift, and should thus have sent W[redacted] to medical on the basis of the alleged fight information. This is somewhat mitigated by the alleged fight being on the *previous* shift, as one might presume that the *previous* shift would have reported it. City Exhibit 3 at 97. However, there is no evidence that Thompson sought to ascertain whether a fight had been reported by the previous shift. Rather, Thompson implausibly denied knowing or hearing anything about a fight. T95; City Exhibit 3 at 107.

<u>Code of Conduct / GO 38 (Thompson)</u>

In addition to implausibly denying knowing or hearing anything about a fight, Thompson also implausibly denied seeing W[redacted]'s injuries. T102; City Exhibit 3 at 104, 108-109. Therefore, and based on the above, the record evidence is sufficiently persuasive to establish that Thompson's statement to IA violated the Code of Conduct requirement to "*cooperate fully and truthfully in any inquiry or investigation conducted by the PDP.*" City Exhibit 3, pp103-109.

REMEDY/PENALTY

The Union strenuously argued that the City had no just cause for any discipline of either Grievant Bouwie or Grievant Thompson, at all. However, having determined that the City did have just cause to discipline both Grievants, the arbitrator turns to quantum of penalty.

It is undisputed that the maximum disciplinary Matrix penalty potentially applicable to both Grievants, based on their respective disciplinary records, is Dismissal. Thus, the City contends that it had just cause to terminate both Grievants.

The disciplinary Matrix (Joint Exhibit 1A) is Appendix A to PDP Policy Number 1.C.13., entitled "*Represented Employee Disciplinary Procedures*". Joint Exhibit 1B. The Policy specifically states that the Department, "*is committed to progressive discipline.*" The Policy specifically states that, "*The concept [of progressive discipline] also carries with it the feature that the penalties which management may seek to invoke are appropriate given the circumstances of the employee's infraction.*" Furthermore, the Policy specifically states that, "*These disciplinary guidelines are guidelines only and shall be considered in conjunction with aggravating and mitigating circumstances surrounding each case. . . .*" Joint Exhibit 1B.

Taking into account the above-quoted commitment to progressive discipline, and the Policy's "*Factors Considered When Determining Penalty*" to determine aggravating and mitigating circumstances surrounding each case, and considering the element of disparate treatment discussed above, the arbitrator finds that under the facts and circumstances of this particular record, while a significant penalty is warranted for

each Grievant, termination is excessive for either Grievant.

Grievant Bouwie – Remedy/Penalty

The City avers that, *"Prior to this incident, Office Bouwie had four disciplinary offenses within the reckoning period, including a five-day suspension and a 20-day suspension. City-6. Officer Bouwie has consistently shown that he will not abide by the policies and procedures established by the Department of Prisons, and thus, termination was the appropriate penalty based on his egregious actions as well as his extensive disciplinary history."* City Brief 7.

City Exhibit 6 consists of four (4) prior disciplinary incidents of record for Bouwie: a warning for "efficient performance" [lateness] in October 2015; a five (5) day suspension for "Efficient Performance" [excessive conversation with inmate] in October 2015; a reprimand for "Valid Order" [beard not in compliance] in November 2015; and a twenty (20) day suspension for "Proper Action" [failed to report to assigned post] in July 2016.

The Union objected to consideration of the reprimand incident. T148-151. City Exhibit 2 shows that for the instant matter the Board considered the five (5) day suspension for "Efficient Performance" [excessive conversation with inmate] in October 2015; the reprimand for "Valid Order" [beard not in compliance] in November 2015; and the twenty (20) day suspension for "Proper Action" [failed to report to assigned post] in July 2016. City Exhibit 2 also shows that for the instant matter the Board considered a warning for "Valid Order" in December 2016. However, this disciplinary item is not in City Exhibit 6. Further, the warning for "Efficient Performance"

[lateness] in October 2015, contained in City Exhibit 6 does not appear on City Exhibit 2 as having been considered by the Board. It is therefore disregarded.

In light of the above, and in view of the entire record, the arbitrator concludes that the City did not have just cause to terminate Grievant Bouwie, but did have just cause to suspend him for thirty (30) days, without pay. The question of back pay is discussed in the Back Pay section, below.

Grievant Thompson – Remedy/Penalty

The City argues that, "*Based on his past discipline and egregious conduct in this matter, serious discipline is warranted against Officer Thompson. After taking into account the fact that Officer Thompson lied during his interview with Sgt. Abbott, during his formal board hearing and during the arbitration hearing in this matter about W[redacted]'s injuries and the Tylenol, it is clear that Thompson is not fit for duty as a correctional officer with the City of Philadelphia.*" City Brief 7.

The City also avers that, *"The disciplinary board . . . recommended termination, which was the appropriate penalty. Thompson had two written warnings and one 5-day suspension on file prior to his termination from employment. C-1."* City Brief 5.

Thompson's prior disciplinary record undisputedly consists of a warning for "Lateness" in December 2015; a five (5) day suspension for "Leaving Post" in February 2017; and a warning for "Maintaining Security" in May 2017.

In light of the above, and in view of the entire record, the arbitrator concludes that the City did not have just cause to terminate Grievant Thompson, but did have just cause to suspend him for thirty (30) days, without pay. The question of back pay is

discussed in the following Back Pay section.

BACK PAY

The CBA provides that: "*Any back pay awarded or as the result of a settlement shall be less any unemployment compensation and compensation from other full-time employment that the aggrieved employee may have received from any source during the period for which back pay is claimed.*" For the reasons stated below, the existing record is insufficient to render a reasoned determination for what amount of back pay should be awarded, if any, to either Grievant.

The City dismissed Bouwie from service in September 2017, then issued the "glitch letter" and re-dismissed him from service in October 2017. The City dismissed Thompson from service in October 2017. The Union filed for arbitration in October 2017. AAA opened the arbitration case file in October 2017. The undersigned was selected by the parties and appointed by AAA in November 2017.

Immediately upon appointment, efforts to schedule this arbitration were undertaken. On February 27, 2018 AAA issued Notice of Hearing for this arbitration to take place on April 10, 2018. This hearing date was cancelled. Further efforts to schedule this arbitration were undertaken. On June 7, 2018 AAA issued Notice of Hearing for this arbitration to take place on August 3, 2018. This hearing date was cancelled. Further efforts to schedule this arbitration were again undertaken, including a conference call on July 16, 2018. On July 24, 2018 AAA issued Notice of Hearing for this arbitration to take place on November 5, 2018.

The first day of hearing did take place on November 5, 2018, at which PDP

Commissioner Carney testified. Intervening procedural issues were raised at the hearing, and an intra-hearing briefing schedule established. In the interim, one of the procedural issues became moot. Thereafter, the parties extended the intra-hearing briefing schedule on the remaining procedural issue (*i.e*, Bouwie arbitrability).

During the intra-hearing briefing period, efforts to schedule the second day of hearing were undertaken, including a conference call on February 8, 2019. On May 14, 2019 AAA issued Notice of Hearing for the second day of hearing to take place on June 28, 2019.

An Interim Award was issued on May 28, 2019 regarding the Bouwie arbitrability issue. The second (and final) day of hearing did take place on June 28, 2019. The parties subsequently submitted post-hearing briefs. Thereafter, the record closed completely in December 2019.

Given the unusual procedural history of this matter summarized above, in addition to retaining jurisdiction to resolve any disputes that may arise from the implementation of the Award, the arbitrator retains jurisdiction over the issue of back pay, if any, and remands same to the parties for good faith discussions for a period of forty-five (45) days. If the parties are unable to agree upon back pay, if any, within the said forty-five (45) days (and any mutually agreed extensions thereof), the hearing will be reconvened for the taking of testimony and receipt of evidence on the issue of what amount of back pay should be awarded, if any, to either Grievant.

Consequently, the following Award is issued:

AWARD

The Bouwie grievance is arbitrable.

The joint Bouwie and Thompson grievance is denied in part and sustained in part.

The City did not have just cause to terminate Grievant Bouwie, but did have just cause to suspend him for thirty (30) days, without pay.

The City did not have just cause to terminate Grievant Thompson, but did have just cause to suspend him for thirty (30) days, without pay.

The arbitrator retains jurisdiction to resolve any disputes that may arise from the implementation of this Award. Additionally, the arbitrator retains jurisdiction over the issue of back pay, if any, and remands same to the parties for good faith discussions for a period of forty-five (45) days. If the parties are unable to agree upon back pay, if any, within the said forty-five (45) days (and any mutually agreed extensions thereof), the hearing will be reconvened for the taking of testimony and receipt of evidence on the issue of what amount of back pay should be awarded, if any, to either Grievant.

Dated: February 7, 2020 Robert A. Grey, Arbitrator

AFFIRMATION

I hereby affirm that I executed this instrument as my Opinion and Award.

Dated: February 7, 2020 Robert A. Grey, Arbitrator