

PROCEDURAL BACKGROUND

The above-referenced matter was processed through the grievance procedure contained in the collective bargaining agreement (CBA) between the parties. Remaining unresolved, it was submitted to final and binding arbitration. The undersigned was selected as the arbitrator, from a list provided by the City of Los Angeles Employee Relations Board, by mutual agreement of the parties. The matter was heard on May 11, 2016 in Los Angeles, California.

The parties stipulated that the matter was properly before the arbitrator and that all steps of the grievance procedure had been met or waived. The parties also stipulated that the arbitrator retains jurisdiction for the purpose of the implementation of the remedy in the event that the arbitrator grants in whole or in part the remedy sought by the union.

Both parties were afforded full opportunity to present documentary evidence and to examine and cross-examine witnesses. Both parties were ably represented by their respective representatives. At the conclusion of the hearing, the parties chose to conclude their presentations by oral closing argument. Closing statements were made and the matter was submitted for decision.

ISSUE

The issue in this matter is formulated as follows:

1. Was the five-day suspension issued to [Grievant] for proper cause?
2. If not, what is the proper remedy?

RELEVANT CONTRACT PROVISIONS AND RULES

Memorandum of Understanding No. 21 – Technical Rank and File Unit July 2, 2013 – June 22, 2019 – City of Los Angeles and Engineers and Architects Association

Article 1.9 – Management Rights

As the responsibility for the management of the City and direction of its workforce is vested exclusively in its City officials and department heads whose powers and duties are specified by law, it is mutually understood that except as specifically set forth herein no provisions in this MOU shall be deemed to limit or curtail the City officials and department heads in any way in the exercise of the rights, powers and authority which they had prior to the effective date of this MOU. The Association recognizes that these

rights, powers and authority include but are not limited to the right to...take disciplinary action for proper cause...

Article 3.3 Grievances Regarding Suspension

Grievances involving suspensions of five days or less in the aggregate during a 12 month period may be filed, by mutual agreement, at any Step of the Grievance Procedure, but at no Step lower than Step 2.

City of Los Angeles Department of Animal Services Policies and Procedures

Discipline and Disciplinary Standards

POLICY

The Department of Animal Services agrees that the primary goal of discipline is to correct behavior or performance. In most cases, the Department will attempt to correct behavior or performance of employees through established progressive discipline techniques.

Oral Warning

- The first step in progressive discipline.
- Meet privately with employee to discuss the performance problem(s).
- Explain the standards or requirements that must be met in the future relative to the performance problem(s) and the potential consequences for failure to meet those standards or requirements.
- Provide the employee a memo confirming your discussion. The memo would include a statement regarding imposing further disciplinary action for failure to improve performance in the area(s) identified.

Suspension or Discharge

- This level of discipline is imposed either in response to a very serious infraction or performance expectations or multiple and continual infractions of a less serious nature where previous progressive corrective actions have failed to produce a change in performance.

Any corrective action in the Department will be considered in conjunction with the Disciplinary Standards on the following pages. The specific offenses listed are examples of some of the more common types of violations of the standards.

Offense

First Offense

A violation of departmental rules

Oral warning to 5-day suspension

Euthanasia Guidelines

Policy

When it is necessary to euthanize an animal, the Department requires its employees to do so in a humane, professional manner.

A. Euthanasia – Overview

5. Euthanasia shall be performed in a designated area and out of public view or the view of other animals.

Volunteer Handbook

14. Restricted Areas. Volunteers are never allowed in the Euthanasia Room...

FACTS

The Grievant is a Veterinary Technician with 27 Years of Service with the Department and No Prior Discipline: The Grievant is a registered veterinary technician (RVT) with the Department of Animal Services. He was hired into his position in 1999. The City maintains four animal shelters. The Grievant works at the North Central Animal Care Center. He had no prior discipline in his file at the time of the incident that led to his suspension. His most recent evaluation (2010) included the following comment from his supervisor:

[Grievant] is a conscientious RVT whose concern for the welfare of the animals is shown in the care he takes when performing his daily rounds of the shelter. In general, he is reliable and punctual in adhering to his assigned work schedule. He is also polite and patient when interacting with the public and has received praise from animal control officers for his professionalism when assisting them in the field. However, [Grievant] can definitely improve upon one aspect: he can better prioritize his tasks so as to make more productive use of his time. I have noticed in the past year that [Grievant] seems to concentrate an inordinate amount of time on his treatment and grooming of animals, and while these are extremely important components of shelter care, there are times when his fellow colleagues may need his assistance in more urgent tasks such as adoptions and intake exams, at which time I expect him to rise to the task. I have no doubt that [Grievant] has the ability to take constructive criticism and the potential to constantly improve himself, thus continuing to be an even more valuable RVT to this department.

The Grievant's immediate supervisor would normally be the veterinarian assigned to the shelter. However, at the time of the incident, there was no assigned veterinarian at North shelter. Therefore, the chief veterinarian for the Department of Animal Services, [Employee A], was his supervisor.

The Incident of January 22, 2015: [Employee B] is the Director of Field Operations for the Department's Shelter Operations. He is [Employee A]'s supervisor. On the afternoon of January 22, Commander [Employee B]¹ was making his rounds of the shelters. He used his key to open the door to the Holding Room at North Central.

There, he witnessed the Grievant apparently in the process of euthanizing a chicken.² He also witnessed a young woman whom he did not recognize. He asked the Grievant who she was. The Grievant explained that she was his 18-year old daughter, a shelter volunteer and a pre-veterinary college student. [Employee B] told the Grievant that his daughter could not be in that room. He then left the room.

[Employee B] wrote a brief statement about the incident and called [Employee C]³ at the department's personnel office to report the incident. He also recalls that the Grievant approached him in his truck in the parking lot of the shelter later that afternoon. The Grievant asked him not to tell [Employee A] about the incident. [Employee B] recalls that he told the Grievant "we'll talk about it later."

For his part, the Grievant recalls that he was assigned three chickens to euthanize that afternoon. The three birds had been picked up as strays⁴ and been made available for adoption, as per City policy. When they were not adopted, they were designated for euthanasia, also per City policy.

That afternoon, the Grievant wheeled in a cart containing the three chickens in separate cages. As per policy, he removed each one from its cage by holding it by its wings. Using a designated needle with a euthanizing agent, he injected the birds one by one, killing them instantly. After he was finished, he placed their bodies in a cooler for later pick up and disposal.

Some time that afternoon, he received a text message from his daughter [redacted]. Her message stated that she was in the shelter and available to give him a ride home at the end of his shift. He told her where he was and told her to come find him. When she came to the locked door and knocked, he was holding the third chicken, still alive. He had already completed the first two euthanizations. Still holding the bird, he went to the locked door to let his daughter in.

¹ The basis for his "Commander" title was not part of the record of the hearing.

² The animals were variously referred to as "chickens", "roosters", and "fighting cocks" throughout the proceeding. I have chosen "chicken" since the paperwork placing the birds in the shelter referred to them as chickens.

³ [Employee C] did not testify at the hearing.

⁴ There was no testimony on the issue of how the chickens came to the shelter. However, documentation in the record indicated that they were "strays."

The Grievant testified that he went back to his procedures table, turning his back to his daughter, and completed the procedure. He recalled that his body was between the chicken and his daughter, so that she could not see the procedure. After the bird was dead, he showed the bird to his daughter. She wanted to know what the characteristics of a fighting chicken were, so he showed her the “dew claw” on the dead bird.

The Grievant also recalls [Employee B] entering the room while he was in the process of euthanizing the chicken. He testified that he attempted to engage [Employee B] in conversation, but [Employee B] left. He does not recall asking [Employee B] not to tell [Employee A], but did concede that his “main concern” was that he did not want to upset “upper management.”

[Grievant’s daughter] also testified at the hearing. She stated that she did not see her father euthanize the chicken. “I wasn’t paying attention,” she testified. She also testified that she had been a shelter volunteer for three years. As a shelter volunteer, she testified, she was not aware of any rule stating that she could not be in that holding room.

The Department Conducts an Investigation and Decides to Suspend the Grievant for Five Days: In the aftermath of the incident, the Department conducted an investigation. The above-cited euthanasia policy was referenced, volunteer guidelines were reviewed, and the Grievant was interviewed.

[Employee A] met privately with the Grievant to get his side of the story. The Grievant followed up that meeting with a written statement. His February 21, 2015 statement includes, in relevant part, the following:

I was not aware at time of any rules / regulations preventing me from allowing volunteers into the holding room. It is worthy to note that at no time was volunteer [Grievant’s daughter] involved / participated in the process of euthanizing the roosters.

A follow-up interview with the Grievant was held on February 20, 2015. This time, the City representatives were [Employee A] and personnel representative [Employee D]. Representing the Grievant was Union representative Geoffrey Garfield. [Employee A] recalled that, in the beginning of the meeting, the Grievant denied that his daughter had been in the room when he euthanized the chicken. However, when asked again later in the meeting, he admitted that she had been there during the procedure.

[Employee D] concluded that the Grievant had “lied” at this meeting about what had happened on January 22, and he testified to that effect at the hearing.

After the investigative meeting, the Grievant wrote a February 25 email to [Employee A]. It reads as follows:

After our interview with Personnel last week investigating the charge that I violated a rule while performing an euthanasia procedure, I wanted to write to you to offer my apology.

As I am not in the habit of having anyone other than appropriate Animal Services personnel present during the procedure, I inadvertently allowed my adult daughter, who is in college studying veterinary medicine, and is a volunteer at the facility, access to the procedure.

While I turned my back to her when I applied the sedative so it was out of her view, then I turned back around to instruct her on the markings of the rooster to show her the fighting characteristics evident, I took liberties as she is very familiar with the care of many kinds of animals we enjoyed in our household as pets. This was an educational opportunity for her, but it is still a violation.

I hope this clarifies my testimony to you. It is with great regret that I violated this important policy, and I pledge never to repeat it in the future.

[Employee D] testified that it was he, along with his supervisor [Employee C], who determined that the five-day suspension was the appropriate penalty. For his part, [Employee A] testified that “Personnel determined the penalty.” He declined to state at the hearing whether or not he agreed with the five-day suspension penalty.

[Employee D] concluded that the Grievant had been aware of the euthanasia policy. There was the following exchange on direct examination:

Q: How do you know he was aware of the policy?

A: He acknowledged having seen that policy and being aware of it.

However, this testimony is not supported by the investigative report [Employee D] drafted [Employee A]. In that report, [Employee A] indicated that the Grievant 1) stated that “it is his understanding that anyone is allowed in the Holding Room as long as a Veterinarian Technician or Veterinarian approved it,” 2) was “unaware of any policies that prevented volunteers from being in restricted areas,” and 3) did not “believe there was anything wrong with Pre-Veterinary student being present in the holding room.”

No other evidence was introduced that the Grievant had been provided a copy of the above-cited Euthanasia Guidelines or Volunteer Handbook, prior to the incident.

The Grievant, during the investigation, indicated that he did not realize there was a strict policy barring the public from viewing euthanasia, in part due to his prior experiences on the job. Those experiences included participating in cock-fighting raids in the field. He told the investigators that he had been instructed to euthanize birds at the locations where the birds were seized by animal control officers. Some of these euthanasia procedures were performed in public view.

General Manager [Employee F], during her testimony, made the business case for the department's euthanasia rule:

We respect the animals need to be alone. It should be a quiet and serene thing. We respect the animal to that level.

[Employee D] also testified that he recommended the maximum possible penalty for the Grievant due to the fact that he lied during the investigation. There was this exchange on cross-examination:

Q: What is the reason that [credibility] has relevance to the 5-day determination?

A: Because part of corrective discipline is to correct the behavior. When an employee doesn't recognize, and is lying about the violation of a policy, then it's not going to correct the behavior if you just have an oral notice or notice to correct.

None of the other management witnesses admitted to initiating the recommendation for a five-day suspension for the Grievant. [Employee B] testified that he was not involved in that decision.

[Employee F] testified that she will "usually go with the recommendation of personnel" in these cases, and she agreed with the recommendation of five days in this case. She did not recall that five days was the maximum penalty under the guidelines for a first offense of violating a department rule. She also testified as follows:

I think there's probably something in the file where he's signed off that he's received these instructions.

[Employee G] was the City's liaison from labor relations to the Department at the time of the incident. She was called by management to testify at the hearing. She testified that she reviewed the investigative report and recommendation. But she does not recall being a part of any discussion with anyone about the appropriate penalty in this case. She did testify that, when she acted as an analyst on a

case like this, she would “look at mitigating factors, look at the employee’s history, look at how egregious the charge was” in deciding the penalty to recommend.

The Grievant served the five-day suspension June 2 – 6, 2015. The Union filed a grievance, citing Article 3.3 and any other applicable provisions of the CBA. It is that grievance that is before the arbitrator.

EMPLOYER’S POSITION

The City argues that the Grievant’s long service should have made him more aware of the rules. And that City contends that he was aware of the rules – otherwise, he would not have attempted to shield the procedure from his daughter’s view.

The Employer concedes that the Grievant should not be held responsible for knowing the contents of the volunteer handbook. However, he should have been aware of the department’s euthanasia policy.

The mitigating factors cited by the Grievant and the Union – [Grievant’s daughter]’s status as a family member, pre-veterinary student, and volunteer – are not valid as mitigation.

The Employer contends that there was potential harm from the Grievant’s actions. Euthanasia is in the news, and the City does not want bad publicity about its euthanasia practices.

The City asserts that the primary factor in selecting the highest possible penalty is the failure of the Grievant to fully accept responsibility for his actions. He continued to offer justifications and excuses throughout the investigation. And he did not admit his guilt until pressed during the interview.

The Employer requests that the arbitrator uphold the suspension.

UNION’S POSITION

The Union contends that the Grievant did, in fact, acknowledge his error and apologize for it. But the Union also argues that the Employer did not make the case that the Grievant was aware of the rule. Besides, the Union contends, the rule is vague. The euthanasia rule does not specifically define volunteers as members of the public.

The Union asserts that it is inappropriate to claim dishonesty as an aggravating factor, since the Grievant was not charged with lying.

The Union disputes the City’s contention that there was potential harm to the City in the Grievant’s conduct. No such potential harm was identified.

The Grievant’s long years with a clean record are significant mitigation. The Union asks that the arbitrator remove the discipline and make the Grievant whole. Even if the arbitrator finds that some discipline is justified, the Union questions why the maximum penalty is necessary.

DISCUSSION

The Employer Has Established a Reasonable Guideline About Euthanasia, But the Rule Lacks Specificity: The Department’s euthanasia guideline for employees is reasonable. While there was little in the record addressing the broader policy implications of this issue, the City did make a seemingly valid point in its closing argument about the potential for bad publicity surrounding the euthanasia of animals under its care. This seems entirely plausible to the undersigned, given that undoubtedly some organizations oppose the very idea of animal euthanasia and would be eager to publicize perceived abuses.

Unfortunately for the City’s case in the instant matter, the written euthanasia policy lacks precision. On the important point of whether volunteers are considered members of the public in this regard, the policy is silent. And the second part of the rule, about procedures being conducted “out of the view of other animals” was not even referenced during this incident. The rule is vague and incomplete.

Even had the City established that the Grievant had been provided a copy of the guidelines, this would not be determinative given the ambiguity in the policy.

The Record Is Devoid of any Evidence that the Grievant Was Aware of the Euthanasia Rule: The Employer introduced no evidence that the Grievant was aware of the “out of public view” rule concerning euthanasia procedures. Nothing in the record indicated that the Grievant had received the policy or received training about this aspect of the work. The City investigator’s claim that the Grievant admitted knowledge of the policy during the investigation is not backed up by the written investigative report.

Nor was evidence presented that the Grievant had previously been orally instructed, counselled, or otherwise received prior communication from his supervisor(s) about privacy requirements during the euthanasia procedure.

The Grievant's self-described behavior on January 22 – attempting to shield the procedure from his daughter's view – does indicate some awareness on his part that this may not have been something she should view. However, this conduct on his part is not tantamount to an admission that he was aware of the rule or that volunteers were covered by the rule. It could just as readily be explained as an instinctive reaction on his part due to the nature of the procedure he was performing.

As for the volunteer guidelines, they were initially cited by the Employer as having been violated by the Grievant and as an additional cause for discipline. However, at the hearing the Employer conceded that these guidelines were for the volunteers, not the employee. The City does not, in the final analysis, hold the Grievant responsible for knowing these guidelines.

In sum, the Employer's case falls short on a critical element of just cause analysis.⁵ The preponderance of the evidence is that the Grievant had been not aware of the existence of the rule prior to the incident leading to his discipline for violating that rule.

The Employer Has Not Met Its Burden of Persuasion That the Grievant Lied During the Investigation: The Employer has made an assertion that the Grievant's lack of candor during the investigation is an aggravating factor in determining the severity of the discipline. Employers have a valid expectation that employees will truthfully answer questions posed to them during investigatory meetings. Lack of candor, indeed, could be viewed by an arbitrator as an exacerbating factor in a just cause analysis, even when the employee is not directly charged with lying in the disciplinary notice.

The basis of the dishonesty charge comes from the observations of two participants in the investigatory meeting – [Employee A] and [Employee D]. Both testified that the Grievant initially denied having performed the euthanasia procedure with his daughter in the room. Both testified that he admitted that he had done this only when pressed by [Employee A]. The Grievant testified to the contrary, that he was consistent in his responses throughout the investigation.

The balance in this credibility dispute is tipped by the written statement provided by the Grievant after his initial conversation with [Employee A] and before the larger meeting with [Employee D] and the Grievant's Union representative. In that statement, the Grievant wrote "at no time was volunteer [Grievant's daughter] involved / participated in the process of euthanizing the roosters." By writing this,

⁵ The CBA uses the term "proper cause" in the management rights section rather than the more typical "just cause." In the view of the undersigned, these two terms are equivalent.

he did not deny that she was in the room when he performed the procedure, but instead stated that she did not participate.

It is most likely, in the view of the undersigned, that this written statement was consistent with what the Grievant told [Employee A] in the initial conversation and again during the opening of the investigative interview. It is understandable that such a statement might have been misconstrued by [Employee A] and [Employee D] as a denial that his daughter was in the room during the procedure.

The Grievant’s Supervisor, Among Other Management Officials, Would Not Go on Record as Supporting the Five-Day Suspension Penalty: Of the five City managers who testified in this hearing and were involved in the incident or the investigation, only one [Employee D] actually took responsibility for recommending a five-day suspension. One – [Employee F] – stated she supported the penalty. Two – [Employee B] and [Employee G] – stated that they had not been consulted in regard to the penalty. And the Grievant’s immediate supervisor, [Employee A], declined to state at the hearing whether or not he even agreed with the penalty of a five-day suspension.

This absence of a unified management approach to the case casts additional doubt on the correctness of the disciplinary decision.

The Appropriate Level of Discipline in the Instant Case is an Oral Warning: It is clear from the evidence that the Grievant violated a workplace rule by allowing his daughter in the holding room while he performed a euthanasia. The central problem for the Employer’s case is that the preponderance of the evidence is that the Grievant was not aware of this rule prior to the incident. He was certainly unaware that he could be disciplined for violating it.

This rule, while a reasonable one, is not the kind that arbitrators view as an obvious prohibition that an employee should know about without being told. It is the kind of rule that needs to be clearly communicated to an employee prior to holding the employee accountable for it.

The Employer has placed insufficient weight on the years of service (27) and clean record (no discipline) of the Grievant. The suspension penalty seems particularly excessive in light of his supervisor’s most recent assessment of the Grievant that he “has the ability to take constructive criticism and the potential to constantly improve himself.”

Also weighing in the neutral arbitrator’s decision on this matter is the lack of consistency from management witnesses on the appropriateness of the assessed penalty. Judging from the varied testimony on this score, the undersigned concluded that the management side lacked unanimity, or even clarity, on

the need for a five-day suspension in this case. What was especially telling was the reluctance of the Grievant's immediate supervisor, the Chief Veterinarian, to openly support the penalty in his testimony.

Within the Employer's disciplinary guidelines is a range of possible penalties for a first time rule violation. Given the totality of circumstances in this case – the ambiguity of the rule, the lack of awareness of the rule, the apology and promise by the Grievant not to do it again, the lack of a consistent management view of the matter, and the Grievant's long and clean record – it is apparent that the Employer has chosen too harsh a penalty.

The fact that the Grievant acknowledged breaking the rule, apologized to his supervisor for doing so, and pledged not to do it again should have been enough. The additional step of a five-day suspension was unnecessary. An oral warning, as described in the above-cited policy, will suffice.

AWARD

1. The five-day suspension issued to the grievant was not for proper cause.
2. The five-day suspension shall be reduced to an oral warning and removed from the Grievant's personnel file.
3. The grievant shall be made whole for all loss of pay and benefits resulting from the five-day suspension.
4. The arbitrator retains jurisdiction for the purpose of the implementation of the remedy.



Paul D. Roose, Arbitrator

Date: June 13, 2016