

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS

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In the Matter of the Arbitration Between: \*

CITY OF LOWELL \*

-and- \*

ARB-005-2011

AFSCME, COUNCIL 93 \*

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Arbitrator:

Timothy Hatfield, Esq.

Appearances:

Gina Atwood, Esq. - Representing City of Lowell

Wayne Soini, 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 discharge of Ronald Mercier was appropriate under the just cause standard, and the grievance is denied.



Timothy Hatfield, Esq.  
Arbitrator  
March 31, 2014

## INTRODUCTION

On July 23, 2010, AFSCME, Council 93 (Union) filed a unilateral petition for Arbitration. Under the provisions of M.G.L., Chapter 23, Section 9P, the Department of Labor Relations (Department) appointed Timothy Hatfield Esq. to act as a single neutral arbitrator with the full power of the Department.<sup>1</sup> The undersigned Arbitrator conducted a hearing at the Department's Office in Boston on September 30, 2013.

The parties' filed briefs on December 6, 2013.

## THE ISSUE

Under just cause, was the discharge of Ronald Mercier on May 13, 2010 appropriate discipline for his offenses? If not, what shall be the remedy?

## RELEVANT CONTRACT LANGUAGE

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

### Article V – Management Rights of Employer (In Part)

The Employer shall not be deemed to be limited in any way by this Agreement in the performance of the regular and customary functions of municipal management, and reserves and retains all powers, authority and prerogatives including, but not limited to: ... discipline, suspend, demote and discharge employees for just cause; ...

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<sup>1</sup> Pursuant to Chapter 145 of the Acts of 2007, the Department of Labor Relations "shall have all of the legal powers, authorities, responsibilities, duties, rights, and obligations previously conferred on the ... the board of conciliation and arbitration ... including without limitation those set forth in chapter 23C, chapter 150, chapter 150A, and chapter 150E of the General Laws."

**STIPULATIONS OF FACT**

The parties agreed to the following stipulations of facts:

1. That, on or about January 28, 2008, Mercier was hired for the provisional position of Operator in Training with the Lowell Regional Water Utility for the City of Lowell (Water Utility).
2. That, effective November 3, 2008, Mercier was transferred to the position of Motor Equipment Repairman/Helper/Laborer for the Water Utility.
3. That, on or about April 23, 2010, Mercier was interviewed by the Lowell Police Department (LPD) as part of an investigation into alleged gasoline thefts at the Water Utility.
4. That a videotaped recording was made of the April 23, 2010 LPD interview, the admissibility and authenticity of which the Parties hereby stipulate in the above captioned action.
5. That, during his April 23, 2010 interview, Mercier admitted, after first denying that he knew of anyone taking City-owned gasoline for their own personal use, to pumping gasoline for his own personal use "once", which answer he later amended to admit pumping gasoline for himself a "couple of times," before finally admitting to pumping gasoline from the Water Utility's gas pumps "five or six times" for his own personal use and, on one occasion, for his co-worker Keith Murphy (Murphy).
6. That Mercier admitted during the same April 23, 2010 interview to taking approximately twenty (20) gallons of City-owned gasoline for his own personal use.
7. That Mercier further admitted during the interview to taking part, along with Murphy, in the removal and theft of a surveillance camera that had been installed on Water Utility property.
8. That, on or about April 27, 2010, Mercier was placed on paid administrative leave from his position as Motor Equipment Repairman/Helper/Laborer pending the conclusion of the City's investigation.
9. That Mercier was terminated from his position of Motor Equipment Repairman/Helper/Laborer effective May 13, 2010
10. That Mercier was thereafter charged in the Middlesex District Court for the Commonwealth of Massachusetts, Docket No. 1011-CR-

003144, with one count of Larceny Under \$250 in violation of M.G.L. c. 266, §30(1), for theft of gasoline owned by the City.

11. That Mercier was also charged with one count of Larceny over \$250 in violation of M.G.L. c. 266, §30(1) for theft of a surveillance camera installed on City property which charge was converted by the District Court to one count of Larceny under \$250 in violation of M.G.L. c. 266, §30(1).
12. That on or about August 29, 2012, Mercier was found guilty after a jury trial of one count of Larceny under \$250 in violation of M.G.L. c. 266, §30(1), for theft of City-owned gasoline.
13. That, upon conviction for that offense, Mercier was sentenced to one year probation and restitution of \$75, and was also ordered by the District Court to stay away from the Water Utility's facilities; order expired August 29, 2013.
14. That Mercier, in the course of his employment as a Motor Equipment Repairman/Helper/Laborer for the City of Lowell, did in fact take City-owned property, ie. gasoline, for his personal use.

#### **ADDITIONAL FACTS**

Daniel Lahiff (Lahiff) is the Executive Director of the City of Lowell Water Department. On two occasions in December 2008, and February 2009, Lahiff borrowed a Water Department generator for use at his home without authorization. During each instance, Lahiff borrowed the generator for about twenty-four hours and paid City employee Doug Collupy (Collupy) to perform the installation on Collupy's private time. Lahiff returned the generator to the Water Department after each use.

On June 16, 2011, the Commonwealth of Massachusetts Ethics Commission (Ethics Commission) began an investigation of Lahiff for violations of the State's conflict of interest law (M.G.L. c. 268A). The Ethics Commission

investigated Lahiff for the two instances of using the generator and for paying a City employee to assist in the installation of a wooden floor at his home.

On March 20, 2012, the Ethics Commission and Lahiff entered into a Disposition Agreement. Lahiff was fined \$5,000 as a civil penalty for his use of the generator on two occasions, for solicitation of a subordinate to connect and disconnect the generator on two occasions, and for solicitation of a subordinate to install a wood floor.

### **POSITIONS OF THE PARTIES**

#### **THE EMPLOYER**

The City argues that 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. Applying this standard, the City had just cause to terminate Mercier's employment. Mercier, by his own testimony, and stipulations:

1. admitted to stealing City-owned gasoline for himself and a co-worker during the course of his municipal employment;
2. admitted to knowingly lying to police officers when first confronted about gasoline thefts;
3. admitted, after finally owning up to the thefts, that he took the gasoline because he "thought [he] could get away with it"; and
4. admitted to telling police officers he had assisted with the removal and theft of a hidden camera that he believed was intended to film his gasoline thefts.

On these undisputed facts, which involve the theft of City property, lies to law enforcement officers, an eventual criminal conviction, and other conduct unbecoming a City employee, it can hardly be said that Mercier's acts constituted

something other than "substantial misconduct which adversely affect[ed] the public interest." Accordingly, termination was justified in the first instance.

The City also maintains that the termination of Mercier would survive an analysis under Carroll Daugherty's "Seven Tests of Just Cause." (Seven Tests) While not admitting that analysis under this criteria is appropriate, the City states that: most of the questions must be answered in the affirmative as it is uncontested that the City's rule against theft of City property was reasonable; there was an investigation into Mercier's alleged thefts; and substantial proof of Mercier's guilt was obtained during the course of the investigation. Accordingly, without conceding the propriety of applying these guidelines to the instant case, the City submits that a ruling in its favor must nonetheless issue even applying those guidelines.

The City disputes the Union's claim that there was disparate treatment of Mercier in his termination for theft. As Mercier cannot dispute the uncontroverted fact that he stole City property, he instead alleges that his termination was unjustified because the City purportedly treated Mercier differently than other similarly situated employees, specifically Lahiff. The evidence presented at the hearing however demonstrates that: (1) all City employees found to have stolen City property during Lynch's seven-plus years in office have been uniformly terminated or made to resign; and (2) Lahiff was not similarly situated to Mercier as Lahiff was found only to have borrowed, and then returned, City equipment.

The City concludes by requesting that the DLR issue a ruling in the City's favor and uphold the May 13, 2010 discharge.

**THE UNION**

The Union begins by stating that Mercier committed several counts of offenses and unquestionably deserved discipline. The parties' dispute at arbitration is whether discharge was the appropriate level of discipline.

The Union points to Lahiff's Disposition Agreement with the Ethics Commission that highlighted instances of malfeasance. Specifically, the unauthorized use of the utility generator, the solicitation of a subordinate to connect and disconnect the generator on two occasions, and the solicitation of a private commercial relationship with a subordinate to install a wood floor. The Union finds the lack of discipline from the City to be a red flag.

The Union continues that Mercier did not bring stealing into the City of Lowell, nor is his defense that "everyone does it." Mercier became an accomplice and enabler of a top boss's earlier corruption. The Arbitrator should replace termination with the same second chance that the City gave Lahiff who erred identically, confessed and paid. The City believes in punishing Mercier's gasoline theft for his own use, while it refuses to believe or prosecute another admitted gasoline theft for the Director's use.

As it relates to the Seven Tests, the Union states that the City failed in three areas: namely, a fair investigation, notice of consequences, and appropriate sanction. Specifically, when Lahiff was not disciplined, the City signaled from on high that minor pilferage will not cost you your job. Also, Mercier has no prior discipline and lived within the City's tacit pilferage standard. Taking pieces of City equipment "on loan," borrowing the services of a City

worker for a few hours, and taking a can or two of gasoline from the City pumps in City cans, was accepted practice in the City, and was traceable back to the Director.

The Union concludes that termination circumscribes the offenses that no employee can commit without losing his/her job. But the City's message, which is that a boss may steal gas and keep his job while a lower-level worker will be fired, is a hypocrisy and sham that the Arbitrator ought not to reaffirm or condone.

### OPINION

The issue before me is: Under just cause, was the discharge of Ronald Mercier on May 13, 2010 appropriate discipline for his offenses? If not, what shall be the remedy? For the reasons stated below, I find that the discharge of Ronald Mercier was appropriate under the just cause standard, and the grievance is denied.

It is undisputed that Mercier stole gasoline from the City of Lowell. Mercier reluctantly admitted as much during his police interview and again more freely in the parties' stipulations in this case. Theft is routinely defined as a "capital offense" from which termination can be an appropriate consequence regardless of any prior disciplinary history. The Union, well aware of this standard, attempts to move the discussion towards a form of equitable relief.

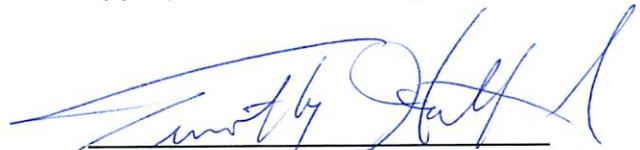
The Union repeatedly points to the City's failure to discipline Lahiff for his admitted ethical violations as the basis for the undersigned Arbitrator to fashion a different remedy for the grievant other than termination. I decline to do so. As

much as the Union attempts to portray the actions of Lahiff and Mercier as one in the same, they are distinguishable. Lahiff admitted in his March 20, 2012 Disposition Agreement with the Ethics Commission to the use of the generator on two occasions, for solicitation of a subordinate to connect and disconnect the generator on two occasions, and for solicitation of a subordinate to install a wood floor. Significantly there was no finding by the Ethics Commission that Lahiff stole anything, including gasoline. Notwithstanding the Union's unhappiness with the City's decision to accept the Ethics Commission's Disposition Agreement and Lahiff's subsequent civil fine of five thousand dollars, the Union was unable to provide any further evidence during the hearing of theft by Lahiff. The Union's attempts to claim otherwise are based solely on Mercier's unsupported conjectures. Absent a finding that Lahiff stole from the City, I do not find the Mercier and Lahiff situations to be similarly situated and I can find no compelling reason to deviate from the axiom that theft is a terminable offense.<sup>2</sup>

For all the reasons stated above, the grievance is denied.

### AWARD

The discharge of Ronald Mercier was appropriate under the just cause standard, and the grievance is denied.



Timothy Hatfield, Esq.

Arbitrator

March 31, 2014

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<sup>2</sup> Having found Mercier's termination for stealing gasoline permissible under the just cause standard of the collective bargaining agreement, I need not comment on the allegations surrounding the missing video camera and what role, if any, Mercier had in its disappearance.