

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of the Arbitration Between: *

TOWN OF FALMOUTH *

-and- *

ARB-12-1771

AFSCME, COUNCIL 93 *

Arbitrator:

Timothy Hatfield, Esq.

Appearances:

Joshua Coleman, Esq. - Representing Town of Falmouth

Joseph DeLorey, 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

I find that the grievant, Brian Bourque was not justly suspended and the grievant is to be made whole for his losses and all references to a five-day suspension shall be removed from his personnel file.



Timothy Hatfield, Esq.

Arbitrator

March 31, 2014

INTRODUCTION

On April 4, 2012, 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.¹ The undersigned Arbitrator conducted a hearing at Falmouth Town Hall on January 30, 2013 and August 13, 2013.

The parties' filed briefs on October 18, 2013.

THE ISSUE

Was the grievant, Brian Bourque, justly suspended; if not what shall the remedy be?

RELEVANT CONTRACT LANGUAGE

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

Article 10 – Discipline and Discharge

Each employee is responsible for meeting or exceeding job requirements and for observing regulations necessary for the proper operation of Town departments. Individuals may be disciplined for actions not in accordance with conduct of town employees. Among the actions that may be causes for disciplinary action are: Neglect of duty, incompetence or inefficiency, insubordination, possession of alcohol or illegal substances on Town property or during work hours, intoxication, chronic or excessive absenteeism or tardiness, disorderly or immoral conduct, violation of MGL c268A (Conflict of Interest Law),

¹ 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."

falsifying documents, conviction of any criminal act or offense. If discipline is required, it shall be discharged with the utmost concern for the individual involved. The following disciplinary actions are designed for everyone's protection and for the interests of the Town. All warnings will be documented.

1. Informal Verbal Warning-minor infractions
 - a. Problem will be discussed between employee and supervisor and union steward if requested by employee
 - b. More severe action for a second offense
 - c. Depending upon the infraction, the warning shall be removed from the file after six (6) months

2. Formal Written Warning-second offense or more serious infractions
 - a. Discuss documented infraction with supervisor
 - b. State time period for correction
 - c. Severe action for next offense
 - d. Employee to supply written comment if desired and sign warning form

3. Suspension of Five days or Less-repeated infractions or major offenses
 - a. No prior hearing required
 - b. Notice to employee stating the reason and amount of discipline

4. Suspension of More than Five Days, Demotion or Discharge
 - a. Prior hearing required
 - b. Three days notice of date and location of hearing
 - c. Hearing officer decision given within five working days of the hearing

5. Immeadiate Suspension-flagrant infractions: stealing, personal injury to others, gross dereliction of duty, etc.
 - a. Procedure same as items 3 or 4, depending upon length of suspension

Any employee who alleges that he has been dismissed, suspended or otherwise disciplined unjustly may use the grievance procedure.

Whenever any employee covered by this Agreement is subject to disciplinary action by the Town, such disciplinary action shall not take place before the employee and Steward are advised of the nature of the charge or possible charge against him.

RELEVANT POLICIES

Town of Falmouth Policy Against Sexual and General Harassment (In Part)

It is the policy of the Town of Falmouth that it will not tolerate verbal or physical conduct by any employee, which harasses, disrupts or (sic) interferes with another's work performance or which creates an intimidating, offensive or hostile work environment.

Town of Falmouth Employee Handbook (In Part)

Policy Against Violence in the Workplace (In Part)

Violence, threats, harassment, intimidation and other disruptive behavior in our workplace will not be tolerated; that is all reports of incidents will be taken seriously and will be dealt with appropriately. Such behavior can include oral or written statements, gestures, or expressions that communicate a direct or indirect threat of physical harm. Individuals who commit such acts may be removed from the premises and may be subject to disciplinary action, criminal penalties, or both.

THE FACTS

The Union and the Town are parties to a collective bargaining agreement. The grievant, Brian Bourque (Bourque) is a Building Inspector for the Town. Gary Stubbins (Stubbins) is also a Building Inspector for the Town. The Town has issued an Employee Handbook (Exhibit 1) which contains a Policy Against Violence in the Workplace. The Town has also issued a Policy Against Sexual and General Harassment (Exhibit 2).

On August 18, 2011, Stubbins spoke with his supervisor, Eladio Gore (Gore) regarding incidents of harassment and intimidation by Bourque. On August 19, 2011, at Gore's suggestion and before leaving for vacation, Stubbins sent an email to Bourque. The email stated:

On Friday August 12th, you approached me regarding a foundation inspection I was going to perform on Dove Cottage Road; you chose to stand close to me and state your displeasure with me doing inspections in

a hostile tone. You also approached me on July 1 when I questioned taking in inspections over a long weekend in the same manner. We work in a professional environment and I would expect everyone to act accordingly. Therefore consider this e-mail notification that you need to respect my personal space and talk to me in a professional tone. Invading my space for any reason will not be tolerated.

On Monday September 12, 2011, Stubbins' first day back from vacation, Bourque and Stubbins had a verbal altercation in the parking lot concerning the email Stubbins sent to Bourque. Stubbins reported the verbal altercation to Gore on September 13, 2011, believing that Bourque was attempting to provoke him into a physical confrontation.

On September 30, 2011, Bourque and Stubbins had another altercation. This altercation centered on whether Stubbins let the door close and/or slammed the door on Tariesa Reine (Reine). Reine is the current girlfriend of Bourque and had previously dated Stubbins. Bourque and Stubbins had a heated conversation, and both individuals used profanity. In addition Bourque closed Stubbins' truck door after Stubbins entered the vehicle.

In October 2011, the Town Manager requested that Equity/Affirmative Action Officer George Spivey (Spivey) investigate Stubbins' harassment complaints against Bourque. Stubbins provided Spivey with copies of his written complaints against Bourque. Spivey interviewed Stubbins about his complaints and asked him to answer some follow-up questions.

On November 4, 2011, Spivey requested that Bourque respond in writing to Stubbins claims. Spivey summarized the complaints in a letter:

1. "Intimidating me by violating my personal space, trying to 'stare me down' and even (using) his pocket knife to 'clean his nails' at work while staring down." (September 25, 2009)

2. Confronting and "verbally assaulting me" in the parking lot upon my return from vacation: "You are nothing but a fucking pussy...man up." The assault was in response to an e-mail citing expectations of a "professional tone" in language and "respect personal space." (September 12, 2011)
3. "Verbally attacking me as I was leaving the office to do my inspections...accusing me of slamming a door in his girlfriend's face...yell(ing) at me telling that I was a fucking pussy...slamming my truck door shut as I was getting into my truck." (September 30, 2011)

On November 23, 2011, Spivey received a letter dated November 8, 2011

from Bourque in response to Stubbins allegations. The letter stated:

I always address Mr. Stubbins politely and professionally, and over the years I have made many sacrifices and concessions to try to accommodate Mr. Stubbins; relocating my work station, removing personal pictures, limiting my contact with him as much as possible, anything to help ease tension while Mr. Stubbins resolves his issues. Yet even with all my efforts to accommodate him, he still treats me different than anyone else in the office, unfortunately he dislikes me and makes this well known. I have never done anything intimidating or harassing to Mr. Stubbins, and I am terribly bothered that he feels this way. I wish he could overcome his issues, let go of his begrudging ways and contribute to a harmonious work environment.

In direct response to Mr. Stubbins allegations:

1. I have never knowingly "violated" Mr. Stubbins space. I have never "stared him down" although I often look up and see Mr. Stubbins (sic) glaring at me. We work in the same small office space and I have the same job description, so we are required to communicate and interact in the office, which means I must look at Mr. Stubbins and converse with him. Unfortunately Mr. Stubbins does not communicate with me, and this makes our work environment a very uncomfortable one. I have no idea how "cleaning my nails" is offensive or intimidating, and I am totally unaware of this specific date of Sept. 25, 2009. I find this accusation completely absurd and unfounded.
2. I have never "verbally assaulted" Mr. Stubbins, I did speak with Mr. Stubbins concerning an e-mail he sent before our vacations. This is the first time Mr. Stubbins has ever sent me an email, I was

concerned as he had said nothing to me directly, I honestly wasn't sure he was being serious. On his return to work I approached Mr. Stubbins, he smelled of alcohol as he often does in the morning. I greeted him, asking how his vacation was, and if he enjoyed himself. I politely stated that I did receive his e-mail, and I was completely unaware that he felt this way, I apologized and let him know that he should by all means feel free to speak with me if this was something bothering him; to which his reply was "just stay out of my fucking face." I calmly responded, Gary you've got to let this go, whatever it is you have against me, it's been almost three years...I wish you could get past it, we work together, man up and get over this grudge you have. This is incidentally the first mention Mr. Stubbins has ever made of a violation of person (sic) space. But this mention has made me quite aware...and I have noticed the EVERY person in the office is allowed to stand within 6-12 inches of Mr. Stubbins (sic), even make contact with him while speaking with him...so I do feel quite discriminated against. I conscientiously keep a greater distance.

3. I did not "verbally attack" Mr. Stubbins and did not "accuse" Mr. Stubbins of anything. That morning my girlfriend told me how Mr. Stubbins let the door close in her face, that she was standing directly behind him with her arms full when he opened the door, went inside, and did not hold the door, rather let it close on her. I thought this to be very rude behavior, and I felt I should speak to Mr. Stubbins concerning this. At 10 am, before Mr. Stubbins was leaving the office, I politely asked Mr. Stubbins if I could speak with him for a moment, he grumbled something, I politely repeated, "if you have a minute I would like to speak with you please", he grunted ok, but kept walking to the door and stepped outside. When we were outside the door to the basement I said, "maybe you didn't notice Tariesa behind you with her arms full this morning when you came in, but she mentioned that when you unlocked and opened the door this morning, you let the door close in her face?" His reply was, "yea...she can open the door herself!" I do not believe this is a socially acceptable behavior in or out of the workplace, to anyone, especially a female, and fellow town employee. I told Mr. Stubbins I did not think this was appropriate behavior, and that he should treat people with more decency...however he felt toward me, he should not take it out on innocent women. Mr. Stubbins began uttering replies which were mostly profanity and name calling. We were walking as we were 'talking', basically he could not give me the decency and respect of a civil conversation. I again expressed that this type of behavior should not be happening in the workplace, how much I was offended, and what I thought of it. When Mr. Stubbins entered his

vehicle as a display of common courtesy I closed the door for him, showing him it's not hard to be polite and courteous. I stood there while he sped away yelling out his open vehicle window.

Mr. Stubbins has NEVER made any comment to me that he had felt afraid, threatened, "stared" at or that I have at any time "invaded his personal space"...never. Rather Mr. Stubbins dislikes me, and has been persecuting me with this assault of fraudulent, unfounded accusations for years now...when is enough enough...Mr. Stubbins is unable to communicate with me in or out of the workplace. My efforts to be cordial have been met with inappropriate, antisocial behavior: If I say hello or good morning he just glares and grunts at me, making animal like noises as I pass by, if I wave when we pass on the street he just stares and does not return the greeting. Even Mr. Martis, god rest his soul, had spoken to Mr. Stubbins, following his earlier complaints of both Mr. Gore and myself, with the same sediment (sic) that Mr. Stubbins needed to conduct himself better, and move past whatever his problems are. John even said to me, "I told him he needs to just get over it, it's ridiculous." This continual unwarranted, unfounded harassment and discrimination I receive from Mr. Stubbins, is unprofessional, and unacceptable. I am quite frankly astonished that the Town allow (sic) this to continue for so long. I guess my belief in the good in everyone, and not complaining about this, has in some way facilitated its perpetuity. I can only hope he will one day be able to put his negativity aside, and can return to having an enjoyable workplace.

Spivey did not personally interview Bourque during his investigation.

Spivey, also did not personally interview or in any way contact Reine during the course of his investigation into this matter.

On November 30, 2011, Spivey issued his report. In the analysis and finding sections of the report Spivey states that:

The analysis of these claims is based on the "Town Policy Against Sexual Harassment" and the elements of a hostile work environment. The Town Policy states in part: "The Town of Falmouth will not tolerate sexual harassment, or any other conduct that substantially interferes with an individual's work performance or creates an intimidating, hostile or offensive working environment." To establish a claim of a hostile work environment, the following conditions must be considered: Are the behaviors or acts of the alleged perpetrator severe or pervasive, unwelcome, unreasonable (in the eyes of a common person), or

substantially interruptive to a person's ability to perform the essential employment functions. When interpreting these behaviors or acts, the perception of the claimant, Gary Stubbins, and not the intent of the alleged perpetrator, Brian Bourque, is the key factor in determining harassment or a hostile work environment.

Point 1: There is corroboration by Building Commissioner Eladio Gore that Brian Bourque did, in fact, possess a pocket knife, immediately accessible and used to open a box, which contradicts an assertion of non-ownership (during a previous inquiry) and makes plausible the claim of Gary Stubbins that Brian Bourque used a pocket knife to clean his finger nails in 2009. Given the period of time between the alleged act and receipt of the letter of complaint by Brian Bourque (September 25, 2009 and November 7, 2011), the inability to recall this specific action is understandable, however, the perception of Mr. Stubbins, that a pocket knife and a "stare" were unwelcome, is creditable.

Point 2: Responding to the alleged use of profanity, Brian Bourque admits to asking Gary Stubbins about his vacation, to acknowledging the "first-ever" e-mail about "personal space," to uttering the words "man up," but excludes any reference to the use of expletives directed toward Mr. Stubbins – "fucking pussy."

Point 3: Both Gary Stubbins and Brian Bourque agree to a "minute" conversation about a "slamming"/ let the door close" incident involving the "third-party, female Town employee"; a comment about "she can get her own door"/"yea...she can open the door herself"; profanity by Mr. Stubbins – "Fuck off"; the door of Mr. Stubbins truck – "slammed the driver's side door of my truck closed"/"a display of common courtesy I closed the door for him"; and an open truck window "I rolled down my windows as I pulled out of the parking lot. He (Bourque) yelled, 'If you have something to say to me, say it to my face'" / "I stood there while he sped away yelling out his open vehicle window." Messrs. Stubbins and Bourque disagree on the use of profanity. Mr. Stubbins states Mr. Bourque referred to him as a "Fucking Pussy" to which Mr. Stubbins declares he responded, "I am not going to take your crap." Mr. Bourque, in his written response, makes no mention of his own profanity. A reasonable person could conclude there was an emotional, verbal exchange between Mr. Stubbins and Mr. Bourque, including profanity by both parties.

Findings:

Brian Bourque admits sufficient facts, specifically behaviors and actions noted above, to conclude that harassment, based on the standards of the "Town Policy Against Sexual Harassment," was committed and a hostile work environment was created. A reasonable person experiencing the

claims of Gary Stubbins would find them "intimidating, hostile or offensive." Persuasive, unwelcome, and interruptive to the daily performance of essential employment functions. Of special note are the efforts, though unsuccessful, of Mr. Stubbins, i.e., meetings since 2009 with Building Commissioner Eladio Gore, Personnel Director John Martis, and Equity/Affirmative Action Officer George Spivey, to improve the work environment. The stranded (sic) relationship between Mr. Stubbins and Mr. Bourque has had a negative effect on the morale of colleagues within the Building Office. The stranded (sic) relationship and its effects have also been noted in the community, especially among contractors seeking assistance in the Building Office.

On December 9, 2011, at the request of Assistant Town Manager Heather Harper, Spivey was asked to conduct a follow-up investigation to determine if Bourque's behavior had affected other Building Office staff in a negative way. On December 15, 2011, Spivey interviewed Plumbing Inspector Tom MacConnell (MacConnell), and Office Assistant Gail Orphanos (Orphanos), On December 19, 2011 Spivey issued a follow up report which concluded that: "The behavior of Brian Bourque has had an extensive, negative effect on the personnel of the Building Office. The concerns of Gary Stubbins are supported."

On January 9, 2012, Town Manager Julian Suso (Suso) met with Bourque and his Union representative to provide them an opportunity to present any additional information.² On January 13, 2012, Suso issued a five day suspension stating that:

Based on my review of Mr. Spivey's reports, the rebuttal statements by both you and Mr. Stubbins, and your further comments/input at our meeting of January 9, I have determined that your conduct violates the Town's Workplace Violence policy (see pg. 10 of the Personnel By-Laws) as well as the Town's Harassment Policy for engaging in a pattern of verbally abusive conduct towards your co-worker including the use of profanity. These patterns of behavior have had a profound negative effect

² The record is devoid of details concerning any comments that Bourque allegedly made during the meeting.

on the conduct of business within the Building Department, including an impact on fellow employees. These same patterns of behavior are unprofessional and will not be tolerated. I expect that all occasions or circumstances of uncivil, unprofessional conduct within the Building Department will cease.

On January 31, 2012, the Union filed a grievance claiming the five-day suspension was without just cause. The Town denied the grievance at all steps of the grievance procedure resulting in the instant Arbitration.

POSITIONS OF THE PARTIES

THE EMPLOYER

The Town begins by stating that it had just cause to suspend Bourque for creating a hostile work environment by engaging in a pattern of aggressive behavior, by inciting confrontation, intimidating his co-worker Stubbins and using excessive profanity towards him.

The Town argues that Spivey conducted a thorough and reasonable investigation, which consisted of interviewing all relevant parties, conducting a site visit and performing a detailed comparison of Stubbins' and Bourque's written statements. The Town believes that the investigation shows that Stubbins' complaints of harassment were corroborated by Bourque's admissions concerning the events of September 12 and 30, 2011. With respect to the September 12th incident, Bourque admitted that he confronted Stubbins on his first day back from vacation about Stubbins' prior email, in which he requested that Bourque respect his personal space. Bourque admitted that he questioned Stubbins about this email, expressed his frustration that he did not come talk to him about it, and repeatedly telling Stubbins to "man up." Less than three weeks

later, Bourque admitted that he initiated a second verbal confrontation with Stubbins in the parking lot. Bourque admitted that he accused Stubbins of not holding the door for his girlfriend. Stubbins admitted that he told Bourque to “fuck off” and walked away in order to de-escalate the situation. Bourque followed Stubbins to his truck and then closed Stubbins door.

Furthermore, the Town stated that there was unrebutted testimony from two Building Department employees that Bourque’s conduct had a detrimental effect on the office environment. Spivey concluded that Bourque admitted sufficient facts, specifically behaviors and actions which created a hostile work environment.

Additionally, the Town argues that Bourque’s contentions that he was simply trying to resolve two personnel matters with Stubbins in a civil manner was not credible. Spivey concluded that Bourque initiated the verbal confrontation in the parking lot and told Stubbins to “man up.” Spivey also credited Stubbins’ claim that Bourque called him a “fucking pussy.” Spivey concluded that both individuals used profanities during the second verbal exchange. He also made a reasonable inference that Bourque had been upset with Stubbins for allegedly slamming the door on Reine and that Bourque retaliated by slamming Stubbins’ truck door shut.

Finally, the Town asserts that Bourque did not offer any evidence to support his theory that Stubbins hates him other than the testimony of his girlfriend who was a biased witness with an ax to grind.

In conclusion, the Town states that it had just cause to issue a five day suspension as arbitrators have upheld significant discipline for employees who engage in harassment and workplace violence and noted an employer's affirmative obligation to take corrective action to create a safe working environment. Clearly, harassment of a co-worker is a major offense which negatively effects the whole Department. The Town asks that the grievance be denied.

THE UNION

The Union argues that there were two co-workers other than Stubbins who testified as to the working conditions in the Building Department. Tom MacConnell, who testified that his work relationship with the grievant was not a problem, and Gary Forbes (Forbes) who testified about an incident with Bourque when he first started, but then also stated that he never had another problem with Bourque. Forbes also testified that he was of the opinion that Bourque and Stubbins both engaged in conduct that would have diminished the amicable nature of the workplace. He testified that he could not wait to get out of the workplace in the mornings "because of both Brian (Bourque) and Gary (Stubbins)". Forbes' testimony supports the argument that both Stubbins and Bourque have contributed to disquiet in the workplace and to punish only Bourque is disparate treatment and should be set aside.

The Union also argues that the Arbitrator should draw an adverse inference from the fact that the Town declined to call three witnesses whose names came up in testimony about the office environment. Specifically, the

Union points to the Town's decision to not call Eladio Gore (Gore), the head of the Building Department. As head of the Building Department, Gore was responsible, under the Town's Policy against Sexual and General Harassment, for insuring any work place under his control is free of harassment. There is no record evidence that Gore did anything other than suggest that Stubbins send Bourque the email that resulted in the return from vacation exchange. The Union points to Exhibit Nine, an email from Stubbins to Gore dated 9/13/11 where Stubbins refers to a memo he gave to Gore outlining several incidents of harassment and intimidation that Gore gave back to Stubbins without acting upon it. The Union believes that it was Gore and his "laissez faire attitude" that allowed any hostile work environment to evolve.

In relation to the two instances between Stubbins and Bourque, the Union argues that Stubbins harbored enmity towards Bourque that was shown through witness testimony and Stubbins' own testimony. The record establishes that Stubbins harbored ill will towards Bourque, which supports the conclusion that Stubbins would concoct, or at least embellish, a version of facts designed to cause Bourque harm. The record also establishes that the Town's investigator ignored any such ill will of Stubbins towards Bourque.

The Union further points to Exhibit Thirteen which Bourque testified was a true and accurate statement of the facts in this case. In that statement, Bourque states that:

- He owns a knife and has never denied owning a knife;
- Has never menaced or berated Stubbins;
- Was not responsible for the "hurt feelings report";

- Has never been accused of engaging in abusive behavior towards any co-worker, other than Stubbins;
- Has never declined to participate in employee assistance or any other employer provided or suggested means of dealing with what Spivey characterized as a long standing personnel matter and in fact offered to do “anything I could to help alleviate the situation”;
- Has never used the phrase “slammed the door” in any document or conversation.

The Union believes that Bourque’s recollections of the events with Stubbins are consistent with his prior statements on the matter and that there is no record evidence that either exchange was witnessed by any other Town employee or member of the public. Additionally there was no behavior on Bourque’s part that caused Stubbins to seek either criminal or civil relief.

As for the Town investigation, conducted by Spivey, the Union believes that he made unfounded determinations. Specifically, the Union points to Spivey’s testimony in which he states that “when interpreting these behaviors or acts, the perception of the claimant, Gray Stubbins, and not the intent of the alleged perpetrator, Brian Bourque is the key factor in determining harassment or a hostile work environment.” It is clear to the Union that Spivey failed to consider any animus Stubbins had toward Bourque. Spivey testified that “I based my presentation in the letter to Mr. Bourque on the statements that Mr. Stubbins submitted to me. There could have been ill will based on past relationships, but I did not take that into consideration.” The Union argues that based on these statements alone, the investigation was neither fair nor objective. Additionally, the Union questions the existence of substantial evidence as to proof of guilt, arguing that there was equal evidence to proof of guilt or innocence. As the investigator failed to consider any evidence as to motive of the accuser to lie

outright or to embellish accusations, the investigation was neither fair nor objective and lacked substantial evidence as to proof of guilt. Would Spivey have reached the conclusion that Stubbins' version was to be credited if he had elicited information related to his enmity towards Bourque? That is very doubtful.

The Union concludes that management's failure to meet its obligations under the Town's policy, Spivey's failure to interview a critically necessary witness and to make no credibility determinations, and a record that is replete with uncontroverted statements about Stubbins' animosity toward Bourque shows that the Town has not met its burden of production and persuasion and the grievance should be allowed.

OPINION

The issue before me is: Was the grievant, Brian Bourque, justly suspended; if not what shall the remedy be? For the reasons stated below, I find that the grievant, Brian Bourque was not justly suspended and the grievant is to be made whole for his losses and all references to a five-day suspension shall be removed from his personnel file.

Town Manager Suso stated that he based his decision to suspend Bourque on: "my review of Mr. Spivey's reports, the rebuttal statements by both you and Mr. Stubbins, and your further comments/input at our meeting of January 9." Unfortunately, for the reasons I will discuss below, the investigation that Spivey conducted was fundamentally flawed. Thus, the Town cannot rely on Spivey's findings to support the issuance of a five-day suspension of Bourque.

Failure to Interview Bourque

Spivey's investigation was hampered by his decision to not interview Bourque in person. Spivey initiated the investigation by interviewing Stubbins and then had Stubbins put his concerns into written form. Spivey then summarized Stubbins' allegations and sent them to Bourque for a written response, which Bourque provided. In his response, Bourque repeatedly denied Stubbins allegations, and included some concerns of his own about Stubbins and his motives. Not only were Bourque's denials dismissed, his concerns were ignored. Spivey made no effort to follow up with the information submitted by Bourque and claimed that Bourque admitted to sufficient facts in his written response which is demonstrably untrue.

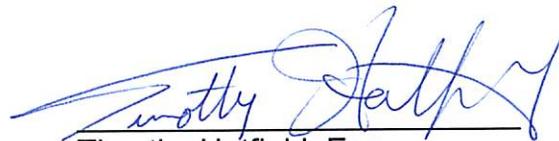
Failure to Interview Reine

Additionally, Spivey made the puzzling decision to not interview Reine. Reine is without question a person of interest, whom Spivey should have personally interviewed during this investigation. Many of the allegations by Bourque and Stubbins intersect, in some form or another, with Reine and her past and current association with each individual. To purposely omit Reine was destructive to the integrity of the investigation itself. Spivey needed to interview her because she had possibly relevant information about the events in question. However he also needed to assess whether any information that she provided to him was credible or was tainted because of her past and current relationships with Stubbins and Bourque. Clearly adding this witness to the investigation

would have made the investigation more difficult for Spivey, but failing to do so, and then admitting on cross-examination that "there could have been ill will based on past relationships, but I did not take that into consideration," undermines the sufficiency of the investigation. Bourque's concerns that Stubbins harbored ill will towards him and it was the basis of Stubbins' allegations needed to be investigated by the Town and was not. Crediting Stubbins' allegations without exploring the possibility of an ulterior motive behind these complaints is problematic. Unable to rely on the flawed investigation for support, the Town is left in the unenviable position of trying to prove just cause without having undertaken a comprehensive and fair review of the interactions of Bourque and Stubbins. Having failed to achieve the proper review of the interactions of Bourque and Stubbins, the Town has failed to satisfy the requirement that discipline be for just cause.

AWARD

I find that the grievant, Brian Bourque was not justly suspended and the grievant is to be made whole for his losses and all references to a five-day suspension shall be removed from his personnel file.



Timothy Hatfield, Esq.

Arbitrator

March 31, 2014