

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of the Arbitration Between: *

TOWN OF FRAMINGHAM *

-and- *

MASSACHUSETTS LABORERS' DISTRICT COUNCIL *

ARB-15-4381

Arbitrator:

Timothy Hatfield, Esq.

Appearances:

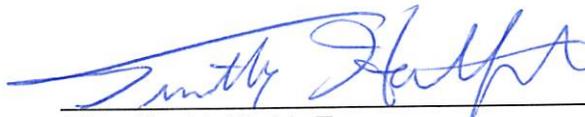
Christopher Brown, Esq. - Representing Town of Framingham

Salvatore Romano - Representing Massachusetts Laborers' District Council

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 Town did not have just cause to terminate Susan Wigglesworth. The termination shall be forthwith adjusted to a ten (10) day suspension, and Wigglesworth shall be reinstated and made whole for all lost wages and benefits consistent with this decision.



Timothy Hatfield, Esq.

Arbitrator

October 19, 2015

INTRODUCTION

On March 16, 2015, the Massachusetts Laborers' District Council (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. The undersigned Arbitrator conducted a hearing at Framingham Town Hall on May 13, 2015.

The parties filed briefs on July 10, 2015.

THE ISSUE

Was there just cause for the termination? If not what shall be the remedy?

RELEVANT CONTRACT LANGUAGE

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

Article II – Management Rights (In Part)

a) Among the management rights that are vested with the Town are the right to hire, promote, transfer, suspend, demote, discharge and to relieve employees from duty with just cause. ...

d) "Swapping" or shift/assignment may only be done at the discretion of the Chief and/or his/her designee. Notice of "swapping" of shift/assignment must be given to the Chief or his/her designee, in writing, at least twenty-four (24) hours in advance of the affected shift/assignment.

Article VI – Arbitration (In Part)

Any grievance that cannot be settled through the regular grievance procedure shall be submitted for arbitration before the Commonwealth of Massachusetts Department of Labor Relations, whose decision shall be final and binding on the parties. ...

Article XII – Leaves (In Part)

Section 2. Each employee shall be entitled to one and one-quarter (1 ¼) sick days per month for each month of the school year from September to June to be earned after the completion of each month's employment, with unlimited accumulation for unused sick leave. ... The Provisions of the Personnel By-Law, Section 18 will be followed. ...

RELEVANT PERSONNEL BYLAW

Article IV of the Town's Personnel Bylaw's (Bylaws) contains the following pertinent provisions:

Section 2. Application

All Town departments and positions shall be subject to the provisions of the article except positions under the supervision of the School Committee and positions which are filled by direct election. Employees subject to the Massachusetts Civil Service Laws or collective bargaining agreements are subject only to those provisions in this article which are not specifically regulated by Civil Service Law or bargaining agreement. Nothing in this article shall be construed to limit any rights of employees pursuant to M.G.L. Chapter 150E. This article is intended to be in accordance with all applicable state and federal laws. In the event of inconsistencies, the state or federal law shall apply.

Section 18 Sick Leave

18.1 Sick Leave may be granted as outlined in the Town's policy on sick leave.

18.2 Any employee who fraudulently reports illness or injury in order to secure the benefit of sick leave with pay shall be subject to disciplinary measures up to and including discharge.

18.3 Accrued personal sick leave may be used to supplement Workers' Compensation benefits.

FACTS

The Town of Framingham (Town) and the Union are parties to a collective bargaining agreement that was in effect at all relevant times to this arbitration.

The grievant, Susan Wigglesworth (Wigglesworth/grievant) had worked as a

crossing guard for the Town since 2000, and was assigned to the intersection of Normandy Road and Flagg Drive in November 2014. Her shifts consisted of 7:30 AM to 8:15 AM and 2:10 PM to 2:40 PM. Under the parties' collective bargaining agreement, Wigglesworth earned paid sick leave.

Prior to November 12, 2014, Wigglesworth requested to swap shifts on November 12, 2014 so she could take her brother to the hospital for an appointment. Assistant Safety Officer Tessicini notified Wigglesworth that the request had been denied by Lieutenant Downing (Downing), the Department's Safety Officer and commander of the crossing guard unit. Wigglesworth did not request a swap for November 19, 2014.

On November 19, 2014, Wigglesworth called in sick claiming to be too ill to work her crossing guard shift. Patrol Division Lieutenant Ruiz took the call and notified Downing. A patrol officer was reassigned to cover Wigglesworth's post.

At approximately 7:40 AM on November 19, 2014, Downing and Tessicini, while out monitoring a bus stop, decided to drive by Ken's Steakhouse to see if Wigglesworth was present at the restaurant. Tessicini was aware that Wigglesworth sometimes worked there. Upon arrival, Wigglesworth's car was observed to be in the parking lot. Downing and Tessicini entered the restaurant and Downing asked to speak with Wigglesworth. Wigglesworth was asked why she was not at her post and allegedly responded that a request to swap shifts on November 12th was not allowed and that she was sorry.

Downing notified Deputy Chief of Police Trask (Deputy Chief Trask) of the situation including his belief that Wigglesworth had attempted to get the day off

via swap and when that was denied, she called in sick. Deputy Chief Task placed Wigglesworth on paid administrative leave pending a disciplinary hearing on November 24, 2014. Chief of Police Kenneth Ferguson (Chief Ferguson) held the disciplinary hearing on November 24, 2014 and terminated Wigglesworth for "feigned illness by reporting that you were sick when, in fact, you were not." Chief Ferguson acted upon the recommendation of Deputy Chief Task, who had relied upon Downing's report submitted on November 19, 2014.

On December 15, 2014, Wigglesworth filed a grievance over the termination, which was denied at all steps by the Town and resulted in the instant arbitration.

POSITIONS OF THE PARTIES

THE EMPLOYER

The Town maintains that the well-settled principles of just cause fully support the Town's termination of the grievant. The grievant was working at another job at the same time as she would have been working at her crossing guard post for the Town, and was there within an hour or so of calling in sick for her Town job.

The Town's policies regarding sick leave and potential discipline for fraudulent use of sick leave were clearly set forth in the collective bargaining agreement, which incorporated the provisions of Section 18.2 of the Town's Personnel Bylaws, as well as the provisions of the state Conflict of Interest Law. Lt. Downing further emphasized those policies and the potential consequences of

violating them when he assumed command of the crossing guard unit and met with bargaining unit members and union officials.

After discovering that the grievant was working at Ken's Steakhouse, and questioning her there, the Town gave her the opportunity at a disciplinary hearing to explain any mitigating circumstances to Chief Ferguson. The grievant and the Union did not refute that the grievant was caught working at a second job after she had called in sick to her crossing guard post.

The testimony at the arbitration hearing showed that while there have been other absenteeism issues in the crossing guard unit, this was the first circumstance in which a crossing guard had called in sick and then had been caught working at a second job. Thus, the Town had no past discipline of other unit members to rely upon as a comparison. Even in the absence of prior disciplinary precedent, the level of discipline imposed was appropriate. The undisputed conduct, which the grievant engaged in by calling in sick for her crossing guard post and then showing up to work at an outside employer's place of business within an hour of calling in sick, fits squarely within the type of conduct that justifies discharge.

The Town has established that based on the grievant's conduct, Chief Ferguson plainly had just cause to terminate the grievant's employment with the Town. Accordingly, the Arbitrator should find for the Town and deny the Union's grievance.

THE UNION

The Town has failed to establish just cause by a preponderance of the evidence. The grievant's performance reviews consistently showed either "excellent" or "very good" ratings when evaluating her attitude, quality of work, judgment, job knowledge, skills, dependability and initiative. Additionally, the Town presented no evidence of any prior discipline against the grievant. The absence of a disciplinary record is extremely relevant when considering whether termination was appropriate.

Turning to Chief Ferguson's termination letter, the letter does not make any specific reference, nor does it contain any evidence supporting the allegation of sick leave abuse. The sole reason given for Wigglesworth's termination was the "feigning of illness when you were not sick." Chief Ferguson based his belief on Downing's report. Downing's report, as well as his testimony, was vague and ambiguous. Downing admitted that he never interviewed anyone beside the grievant to corroborate his assumption that Wigglesworth actually was a Ken's Steakhouse employee, who was scheduled to work and was, in fact, working on November 19th. Without supporting credible evidence establishing this fact, the Town's conclusion that Wigglesworth was working on November 19th is pure speculation and conjecture.

The Town also has failed to demonstrate that Wigglesworth was feigning illness. Wigglesworth's explanation that she was suffering from a migraine headache has remained consistent and credible. She has never admitted "feigning illness." In fact, Downing never asked her whether she called in sick in

order to work somewhere else. Because Downing believed crossing guards often abused their sick leave, he prematurely concluded that Wigglesworth had feigned illness without conducting a proper investigation.

Also, the grievant had no prior offenses or discipline that would buttress the Town's administration of industrial capital punishment, i.e. termination. The Town failed to consider the theory of progressive discipline, and they failed to produce any egregious circumstances that support termination. Progressive discipline is an element of just cause, which is based on the premise that employees can be rehabilitated and remain a productive member of the work force. The imposition of progressive discipline also corrects an employee's unacceptable behavior without the loss of employment.

The Town has failed to meet its burden to establish the existence of just cause, and has failed to provide reliable, credible or convincing facts to support Chief Ferguson's finding that Wigglesworth feigned her illness. Accordingly, the Union requests the restoration of Wigglesworth's employment as a crossing guard along with all other lost benefits.

OPINION

The issue before me is: Was there just cause for the termination? If not what shall be the remedy? For all the reasons stated below, the Town did not have just cause to terminate Susan Wigglesworth.

There is no dispute that Wigglesworth called in sick for her crossing guard shift on November 19, 2014 and that she sought to use paid sick leave for the same time that she was working at Ken's Steakhouse. It is uncontroverted that

the Town is within its rights to discipline her for her actions. The crux of the issue before me is whether the Town had just cause to support its decision to terminate her employment.

Wigglesworth has been a crossing guard since 2000. There is no evidence on the record of any prior disciplinary history, and no evidence of any prior accusations of sick leave abuse. Additionally, the Town failed to prove that Wigglesworth had requested to swap shifts on November 19th. The evidence presented and the testimony at the hearing clearly establishes that Wigglesworth sought a swap for November 12th and was denied. There was never a request to swap shifts on November 19th, and any belief on the part of the Town that there had been such a request is unproven. The testimony of Downing and Deputy Chief Task unequivocally shows that they mistakenly believed that Wigglesworth had asked for a swap on November 19th and when denied, took a sick day. Their erroneous beliefs played a significant role in the decision to terminate the grievant. Accordingly, the Town cannot rely on this incorrect fact as a foundation for just cause for the grievant's termination.

The Town, in its post hearing brief, attempts to downplay the assertion that it made in its opening statement that Wigglesworth had requested a swap for November 19th. Instead, the Town submitted arbitration decisions that it claimed were support for its decision to terminate Wigglesworth. These cases are distinguishable, however, as they involve either instances of long-term abuse of worker's compensation, or sick leave abuse where dishonesty and/or sick leave falsification is directly written into the collective bargaining agreement as a

terminable first offense. Here, in comparison, Section 18.2 of the Personnel Bylaws states that employees who fraudulently report illness to secure sick leave with pay shall be subject to disciplinary measures up to and including discharge. Discharge is not the contractually mandated outcome.

The essence of the case before me involves a fifteen year employee with no disciplinary history, or a history of sick leave abuse, who clearly misused sick leave by working at another job after calling in sick. I am not convinced by the Town's argument that one instance of inappropriate use of sick leave for an otherwise clean fifteen-year work history is worthy of termination. Although the Union's arguments about whether Downing's investigation was flawed and whether Wigglesworth was actually sick that day are not compelling, the Union has made a persuasive argument that the punishment is not proportional to the offense committed. Further, the Town erroneously concluded that Wigglesworth sought to swap shifts on November 19th and that she called in sick when her swap request was denied.

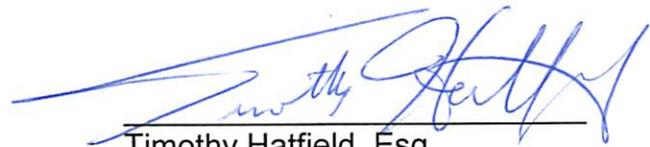
For the reasons stated above, I find that while the Town did have just cause to discipline Susan Wigglesworth for her actions on November 19, 2014, it did not have just cause to terminate her employment. A reduced penalty of a ten (10) day suspension is more appropriate based upon her fifteen years of service, and her unblemished disciplinary record. A ten (10) day suspension balances the need for meaningful discipline with an opportunity for the employee to correct her actions.

REMEDY

I order the Town to rescind the termination of Susan Wigglesworth, remove all references to the termination from her personnel file, and order the Town to make her whole for all lost wages and benefits that resulted from her termination minus the ten (10) day suspension now imposed.

AWARD

The Town did not have just cause to terminate Susan Wigglesworth. The termination shall be forthwith adjusted to a ten (10) days suspension, and Wigglesworth shall be reinstated and made whole for all lost wages and benefits consistent with this decision.



Timothy Hatfield, Esq.
Arbitrator
October 19, 2015