

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of the Arbitration Between: *

TOWN OF BRAINTREE *

-and- *

AFSCME, COUNCIL 93 *

ARB-12-2272

Arbitrator:

Timothy Hatfield, Esq.

Appearances:

David Jenkins, Esq. - Representing Town of Somerset

Philip Brown, 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

There was not just cause for the imposition of a five-day suspension. 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 and replaced with a written warning for poor job performance on May 2, 2012.

Timothy Hatfield, Esq.
Arbitrator
July 30, 2014

INTRODUCTION

On October 12, 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 the Department's Boston office on September 4, 2013

The parties filed briefs on December 30, 2013.

THE ISSUE

Whether there was just cause for the imposition of a five-day suspension for Mr. Sweeney?

If not what shall be the remedy?

RELEVANT CONTRACT LANGUAGE

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

Article III – The Rights and Responsibilities of the Town of Braintree (In Part)

The management's rights and functions, except those which are clearly and explicitly abridged by the specific terms of this Agreement, shall remain vested exclusively within the Town. These exclusive rights include but are not limited to the following:

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](#)."

1. To be responsible for the executive management and administrative control of the town and its properties and facilities.
2. To determine and to apply the standards of service to be provided.
3. To determine the methods, means and personnel by which its operations are to be conducted.
4. To appoint, promote, assign, direct, and transfer personnel pursuant to terms of the Agreement.
5. To suspend, demote, discharge or otherwise discipline any employee for just cause.
6. To lay off any employee because of lack of work or funds.
7. To establish and enforce rules relating to the operation of the Town.
8. To determine operational and other policies, methods and procedures.
9. To maintain discipline, order and efficiency.
10. To require necessary overtime work in cases of emergency.
11. To take such actions as it may deem necessary for carrying out its mission in emergencies. ...

FACTS

The Union and the Town are parties to a collective bargaining agreement. Dennis Sweeney (Sweeney) is a foreman in the Cemetery Division of the Department of Public Works (DPW) and is a twenty-six year Town employee. Thomas Whalen (Whalen) is the Director of the DPW. Walter Sullivan (Sullivan) is the Assistant Superintendent and Sweeney's direct supervisor.

Prior to May 2, 2012, vaults at cemeteries in Braintree had been unintentionally exposed due to ground/backfill settlement around recently dug

grave sites. The DPW rectified these issues and did not discipline any employees for the unintentional exposures.

On May 2, 2012, Sweeney, assisted by David Thompson (Thompson), was tasked with digging a grave for the funeral of Robert Louis. Sweeney operated the backhoe and excavated the grave site. Sweeney dug the grave to a depth equal to the neighboring grave, and lowered the vault² into the ground. Sullivan then asked Sweeney to leave the cemetery to assist him in checking on the Town's ball fields to see if they were too wet to play on. Sweeney and Sullivan returned to the cemetery after the conclusion of the funeral. Thompson, with the assistance of Ed Mason (Mason) and William Malone (Malone) had placed the cover on the vault prior to Sweeney and Sullivan's return. Sullivan returned to the grave site with Sweeney and voiced no concern about the depth of the vault before leaving. Sweeney and Thompson then backfilled the grave with leaf mulch as there was no gravel or loam present on site, though additional materials were available at the DPW yard.

On May 3, 2012, Carolyn MacDonald (MacDonald), daughter of the deceased, visited the grave and did not observe anything unusual. On May 4, 2012, Sweeney checked the grave for poison ivy growth, and did not observe the vault to be exposed. On May 7, 2012, Sullivan also checked the grave for poison ivy growth and did not observe the vault to be exposed.

On May 11, 2012, MacDonald and her mother returned to visit the grave site and found the vault exposed on the side due to ground/backfill settlement.

² The vault purchased by the Louis family differed in size and shape from the vault commonly used for burial.

MacDonald called the Mayor's office to complain and spoke to Karen Shanley (Shanley), Human Resource Director for the Town. Shanley notified the DPW of the issue, and Sullivan arrived on the scene. Sullivan and MacDonald had a verbal disagreement. MacDonald and her mother left the cemetery, and the sealed vault was then lifted out of the ground and the hole was dug to a deeper depth and the vault was placed back into the ground and backfilled.

On May 23, 2012, the Town scheduled a meeting with the Louis family so that they could talk to the DPW employees involved. Sweeney notified Sullivan on May 21, 2012 that he would not be able to attend this meeting due to a wake he was attending with his daughter. This information was not transmitted to the Louis family prior to their arrival at the meeting and they were upset that Sweeney was not at the meeting. Sullivan did attend the meeting and apologized for his role in the incident. Sullivan's discipline for his role in this issue was that he was required to use two weeks of his paid vacation time, and he received a written warning in his personnel file.

On June 22, 2012, Whalen held a disciplinary hearing to decide if there was just cause to discipline Sweeney for negligence, poor job performance, failure to properly supervise, and insubordination. On July 5, 2012, Whalen issued a decision that stated:

Based on your testimony at the hearing and the discussion with the Louis family, I find that you were responsible for digging and backfilling the grave. While you were away from the cemetery with Walter Sullivan, William Malone and Edward Mason assisted David Thompson in setting the vault cover, but no one else made the decision that the grave was deep enough to backfill. You stated that the funeral director was not there when the vault cover sealed, yet you were not present. If you had any question about the depth

of the vault, you should have called your supervisor, Walter Sullivan, before backfilling the grave. In addition, you made the decision to backfill the grave with compost instead of gravel and loam, because they were not available on the cemetery grounds. Those materials are available at the highway barn. You are a foreman and are responsible for making decisions regarding work methods. Lastly, I find it unacceptable that you did not attend the meeting with the Louis family. You were responsible for digging the grave and backfilling it, and they deserved an apology from you. I find that you were negligent in your job performance, you exhibited poor judgment, you failed to properly supervise your subordinate and you were insubordinate. The aforementioned lead me to my determination that there is just cause to discipline you. The level of discipline is a five day suspension without pay.

On July 12, 2012, Sweeney filed a grievance over the five day suspension. 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 argues that it has met its burden of proof that there was just cause to suspend Sweeney for five days. The role of the Arbitrator is to determine whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority. A decision maker must determine reasonable justification in a disciplinary appeal brought before it by inquiring whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of the public service.

In the present matter, Sweeney was assigned to dig a grave which would contain a vault and a casket. Sweeney did not dig the grave with sufficient depth to accommodate the vault. When the vault was placed in the grave, it extended

several inches over the surrounding ground. Sweeney ignored the protruding vault when he covered it with mulch. The Town asserts that Sweeney's violation of the Town's operating rules is self-evident.

The Town further argues that the imposition of a five-day suspension is appropriate under all circumstances here. While recognizing that Sweeney has no prior discipline, there are several reasons why the violation of policy requires the imposition of the higher penalty. First, even though this was a first offense, the effect of the violation on the Louis family was profound. Sweeney breached the family's trust in a most cavalier manner. Sweeney had a simple task and failed. Any observant person would have seen that the vault was exposed. Sweeney took to covering up his mistake with mulch. Secondly, the lengths to which Sweeney has gone to explain away his mistakes indicates that he still does not appreciate the wrongfulness of his conduct. The offering of fantasy explanations to explain his error evidences the fact that Sweeney just doesn't get it. The imposition of the five-day suspension is required to bring the message home.

The Town concludes that on the basis of the foregoing, there was just cause for the imposition of a five-day suspension on Sweeney. The Town requests that the suspension be affirmed and that the grievance be denied.

THE UNION

The Union argues that the Town did not have just cause to issue a five-day suspension for Sweeney. Specifically, the Union urges the Arbitrator to adopt Arbitrator Carroll Daugherty's Seven Tests for Just Cause:

- Was the employee adequately warned of the consequences of his conduct?
- Was the employer's rule reasonably related to the efficient and safe operations of the job?
- Did management investigate before administering the discipline?
- Was the investigation fair and objective?
- Did the investigation produce substantial evidence of proof of guilt?
- Were the rules, orders and penalties applied evenhandedly? And
- Was the penalty reasonably related to the seriousness of the offense and the past record?³

The Union asserts that a "no" answer to any of these questions signifies that just cause does not exist. In this case, the Union believes that there exists a no answer to many of the questions.

The Union begins by claiming that Sweeney was not warned that his conduct would result in discipline. While Sweeney was generally aware that improper performance of his duty may result in discipline, there was no reason to believe that his performance on May 2nd was flawed. The Town did not post rules providing for specific depth for graves, or for specific materials to be used when backfilling a grave. Further, there is no evidence that Sweeney was ever informed that a failure to attend the May 23rd meeting would result in discipline.

³ Grief Bros. Cooperage Corp. and United Mine Workers of America, 42 LA 555 (1964); See also Enterprise Wire and Enterprise Independent Union, 46 LA 359, 362-365 (1966).

As of May 2, 2012, there was a practice that the proper depth to dig a grave was as deep as necessary for the vault being placed to be at the same level as all neighboring vaults. This practice was established to avoid potential cave-ins. The testimony at the hearing showed that the Louis family vault was at the same depth as the neighboring vault. The vault was not above ground and was buried under four to five inches of backfill. Sullivan, Sweeney's supervisor, viewed the vault on three occasions over the course of ten days and raised no concerns about the depth of the vault or the height of its cover.

It is also alleged that Sweeney did not use the correct fill. Again, the Town has provided no written policy to its employees about what they are expected to use for backfilling a grave. The Town has merely provided multiple options for backfilling a grave, which include loam, gravel, mulch, or the dirt removed from the grave. On May 2nd, there was no loam or gravel on site, and the dirt removed from the grave contained items inappropriate to use as backfill, including junk, asphalt, metal and a large boulder. Sweeney used mulch and ensured that the vault was four to five inches under the backfill. Sweeney and Sullivan returned to the grave multiple times over the ten days to check for weeds and poison ivy and observed no problems. There would be no question that Sweeney's use of the mulch as backfill was proper except for the fact that it rained significantly during the ten days in questions, causing the edges of the grave to sink and expose the vault.

The Town scheduled a meeting on May 23, 2012 with the Louis family. Sweeney was never informed that his failure to attend the meeting would result in

discipline or that the meeting could not be rescheduled. Even though Sweeney told his supervisor two days in advance that he was unable to attend the meeting due to the wake of a family friend, the supervisor never told Sweeney that he would be disciplined if he did not attend the meeting.

The Union also disputes whether the Town's investigation produced substantial evidence of proof of guilt. The charges alleged against Sweeney include insubordination, failure to supervise, poor performance and negligence, but the facts underlying the allegations do not support these charges. Concerning the charge of insubordination, Sweeney did not refuse to work or to obey any orders from his supervisor. If Sweeney is found to have made an error on May 2nd, it would be through negligence and not insubordination. However, an employee's mere negligence in performing his duties is not insubordination. Sweeney's failure to attend the meeting is also not insubordination because the Town had not specifically ordered Sweeney to attend the meeting. Further, Sweeney gave his supervisors two days' notice of his unavailability to attend the meeting.

Concerning the charge that Sweeney failed to properly supervise Thompson, the only time that Sweeney did not supervise Thompson was when Sullivan, Sweeney's supervisor, ordered Sweeney to inspect the town ball fields. Also, there is no basis for this allegation because there has been no allegation of improper performance by Thompson and the only time Thompson was unsupervised was when Sweeney was with Sullivan.

Concerning the charges of poor performance, Sweeney followed his training and buried the vault at the same level as the neighboring vault, and received no complaints from his supervisor who inspected the grave site three times after the insertion of the vault. The Louis family also had no complaints until later when the rain had caused the edges of the vault to become exposed. The Louis vault was close enough to the top layer of the ground that the sinking edges exposed the edge of the vault.

Concerning the charge of negligence, Sweeney performed the work in the manner that a well-trained, reasonably prudent employee would have done under the same circumstances. Sweeney dug and backfilled the grave and checked on the site two days later. No issues existed at that point in time. Sullivan observed the grave site prior to the backfilling and did not report any issues to Sweeney. Five days after the burial, Sullivan observed the grave site again and did not report any issues. If Sweeney was negligent, it should be mitigated as his supervisor tacitly approved his performance twice on the day he dug the grave and once again five days later when he reported no problems. Sweeney's actions were not the actual cause of the exposed vault as the continuous rain was an intervening and unforeseeable event without which the edges of the grave would not have sank and exposed the vault.

The Union also contends that the Town did not treat Sweeney in the same manner as it treated other employees. This becomes apparent when reviewing the discipline received by Sullivan. The Town required Sullivan, who failed to observe any problems when he viewed the grave twice before it was backfilled

and again five days after it was backfilled, to take two weeks of paid vacation and a letter of warning in placed his file. A five-day suspension to Sweeney is out of proportion in relation to Sullivan's discipline. Finally, vaults have been exposed in the past, and the Town has not disciplined those employees who dug the graves.

Finally, the Union argues that the discipline was not reasonably related to the seriousness of the offense and Sweeney's past record. The five-day suspension of Sweeney is his first discipline in over 26 years of employment with the Town and is excessive. The discipline was out of step with the purposes of progressive discipline, because it was punitive rather than corrective and ignored mitigating circumstances.

The Union requests that the Arbitrator find that just cause did not exist for Sweeney's five-day suspension and asks that the Town make him whole for all losses.

OPINION

The issue before me is: Whether there was just cause for the imposition of a five-day suspension for Mr. Sweeney? If not what shall be the remedy?

For all the reasons stated below, I find that there was not just cause for the imposition of a five-day suspension. 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 and replaced with a written warning for poor job performance on May 2, 2012.

Background

Sweeney is a twenty-six year DPW employee with an unblemished disciplinary record. Sweeney is currently working as a foreman in the Cemetery Division. In his July 5, 2012 disciplinary letter to Sweeney concerning his actions on May 2, 2012, Whalen finds that: "you were negligent in your job performance, you exhibited poor judgment, you failed to properly supervise your subordinate and you were insubordinate." I look first at the two allegations that the record before me does not support.

Failure to Properly Supervise Subordinate

This charge is completely unsupported based on the record before me. There is no allegation that Thompson did anything improper on May 2, 2012, and the Town did not discipline him in any manner. Because the time Sweeney spent away from the cemetery on May 2, 2012 during the service was at the request of his supervisor Sullivan, the claim that Thompson was not properly supervised on that date is baseless.

Insubordination

This charge is also completely unsupported based on the record before me. This allegation stems from the fact that Sweeney did not attend the May 23, 2012 meeting with the Louis family. The unrebutted testimony showed that on May 21, 2012, Sweeney informed Sullivan, his direct supervisor, that he would be unable to attend the May 23, 2012 meeting due to his attendance at a wake. At no time did Sullivan inform Sweeney that missing the meeting was unacceptable or could lead to discipline. Sullivan either did not inform Whalen,

his supervisor, of Sweeney's unavailability prior to the meeting, and/or Whalen failed to notify the Louis family that Sweeney would not be attending the meeting. In either event, Sweeney cannot be held liable when he informed his supervisor in plenty of time about his conflict and was never informed that attendance was mandatory or that discipline would result from his non-attendance. The Town's failure to notify the Louis family prior to the meeting and the family's resulting unhappiness over Sweeney's failure to attend the meeting is not insubordination on Sweeney's part. Management's failure to notify the family about information it had in its possession for two days was the catalyst to the family's continued unhappiness over the situation.

Negligence / Poor Judgement

I turn now to the remaining allegation that Sweeney acted negligently and exercised poor judgment. On May 2, 2012, Sweeney made an unfortunate mistake when he did not dig the Louis family grave deep enough to accommodate the larger than usual vault. The problem however did not occur for nine days.⁴ In the interim, Sweeney, and Sullivan, who visited the grave to check on poison ivy growth, did not observe any problems with exposure of the vault. MacDonald also testified that she had visited the grave on at least two occasions prior to May 11, 2012 and had not noticed a problem. The exposure did not occur until the backfill had settled. Unrebutted testimony at the hearing showed that ground/backfill settlement has occurred in the past resulting in other

⁴ Based on the testimony of multiple witnesses at the arbitration hearing, I do not credit the Town's argument that the vault was exposed from the beginning and ignored by Sweeney.

partial vault exposures. The problem in those instances was fixed and resulted in no discipline of the DPW employees involved.

Five-Day Suspension

When the two unsubstantiated charges of failure to supervise and insubordination are discounted, the only remaining charge concern Sweeney's actions on May 2, 2012. There is no doubt that the grave was not dug deep enough to hold the type of vault used and could not withstand any type of backfill settling. The facts show that some ten days after the burial, the backfill settled and the side of the vault became exposed for which Sweeney was responsible as the foreman and backhoe operator. It is unfortunate that the Louis family was witness to the exposure before it could be fixed, but that does not change the underlying facts. It was a mistake made by a twenty-six year employee with no disciplinary record. The exposure did not occur for ten days and during that time not only did Sweeney and Sullivan examine the grave on multiple occasions, but the family had also visited the grave on at least two occasions without incident.

There are other additional mitigating factors to consider as well. First, similar issues with vault exposures have occurred in the past without employee discipline. Second, the Town did not impose similar discipline against Sullivan for his role in this incident. Sullivan is Sweeney's direct supervisor and was present at the burial site on May 2, 2012. Sullivan observed the depth of the grave and did not have an issue with its depth. On two occasions after the backfilling, Sullivan was at the grave site examining for poison ivy growth and reported no problems with the backfilling or any type of exposure. In addition,

Sullivan had an unproductive interaction with MacDonald on the day of the exposure discovery. For his role in this incident, Sullivan was forced to use two weeks of his paid vacation time and a disciplinary letter was placed in his personnel file.

Based on the totality of the circumstances, including Sweeney's length of unblemished service; Sullivan's role in the incident and lack of significant discipline; the Town's history of failing to discipline employees under similar circumstances; and the Town's inability to sustain the charges of failure to supervise and insubordination, I find that there was not just cause for a five day suspension. There is however sufficient facts on the record to support a written warning to Sweeney for his poor work performance in not digging the grave site deep enough to allow for the additional size of the vault used. Had Sweeney dug the grave deep enough, any backfill settling would not have exposed the side of the vault and this situation could have potentially been avoided.

AWARD

There was not just cause for the imposition of a five-day suspension. 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 and replaced with a written warning for poor job performance on May 2, 2012.

Timothy Hatfield, Esq.
Arbitrator
July, 30, 2014