

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS

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In the Matter of the Arbitration Between: \*

TOWN OF SUDBURY \*

-and- \*

ARB-15-4564

MASSACHUSETTS LABORERS' \*

DISTRICT COUNCIL \*

\*\*\*\*\*

Arbitrator:

Timothy Hatfield, Esq.

Appearances:

Kevin Feeley, Esq.

- Representing Town of Sudbury

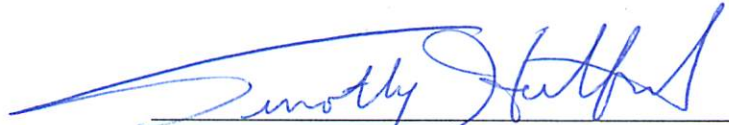
Salvatore Romano

- 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 have cause to terminate Mr. Zanco and the grievance is denied.



\_\_\_\_\_  
Timothy Hatfield, Esq.  
Arbitrator  
May 12, 2016

### **INTRODUCTION**

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 the Department's Boston office on November 30, 2015.

The parties filed briefs on April 21, 2016.

### **THE ISSUE**

Under the collective bargaining agreement, did the Town have cause to terminate Mr. Zanco from his employment? If not what shall be the remedy?

### **RELEVANT CONTRACT LANGUAGE**

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

#### **ARTICLE III – RIGHTS OF MANAGEMENT (In Part)**

Section 1. Except to the extent that there is contained in this Agreement an express and specific provision to the contrary, all authority, power, rights, jurisdiction and responsibility of the Town are retained by and reserved exclusively to the Employer including but not limited to the rights: to manage the affairs of the Town and maintain and improve the efficiency of its operation; ... to require from each employee the efficient utilization of his services; to hire, promote, transfer, assign, retain, discipline, suspend, demote, and discharge employees; to relieve employees from duty because of lack of work or other legitimate reasons; to promulgate and enforce reasonable rules and regulations pertaining to operations and employees; and to take whatever action may be conducive to carrying out the mission of the Department.

**ARTICLE IX OVERTIME (In Part)**

Employees shall be paid an overtime premium for all work over eight (8) hours in any one day or over forty (40) hours in one week. There shall be no discrimination against any employee who declines to work overtime. ... In situations where the public safety is involved, as determined by the Town Manager, overtime requests shall be mandatory. ...

**ARTICLE XVI JURY DUTY**

An employee called for jury duty on days falling within his usual work period for the Town shall be paid for those days the difference between the compensation he would have received from the Town and his fees, exclusive of travel allowance for any such jury service.

**ARTICLE XVIII GRIEVANCE AND ARBITRATION PROCEDURE (In Part)**

For purposes of this Agreement, a grievance shall be defined as a complaint between the Employer and the Union and/or any employee involving only an alleged specific and direct violation of express language of a specific provision of this Agreement. ...

Step 3. If the grievance is still unsettled, either Party may, within fifteen (15) days after the reply of the Town Manager is due, by written notice to the other request arbitration. ...

The decision of the arbitrator shall be final and binding on the Parties unless a Court of Law shall rule that the arbitrator has usurped the functions of the Town or the proper exercise of its judgment and discretion under the law and this Agreement.

The arbitrator shall be without the power or authority to modify, add to, alter, subtract from or change the terms of this Agreement. ...

Grievances involving disciplinary action shall be processed beginning at Step one. If the case reaches arbitration, the arbitrator shall have the power to direct a resolution of the grievance up to and including restoration to the job with all compensation and privileges that would have been due the employees. ...

The grievance as stated in the original grievance shall constitute the sole and entire subject matter to be heard by the arbitrator.

**RELEVANT STATE LAW****MASSACHUSETTS GENERAL LAW CHAPTER 258B – RIGHTS OF VICTIMS AND WITNESSES OF CRIMES (In Part)**

Section 3. To provide victims a meaningful role in the criminal justice system, victims and witnesses of crime, or in the event the victim is deceased, the family members of the victim, shall be afforded the following basic and fundamental rights, to the greatest extent possible and subject to appropriation and to available resources, with priority for services to be provided to victims of crimes against the person and crimes where physical injury to a person results: ...

(b) for victims and family members, to be present at all court proceedings related to the offense committed against the victim, unless the victim or family member is to testify and the court determines that the person's testimony would be materially affected by hearing other testimony at trial and orders the person to be excluded from the courtroom during certain other testimony; ...

(k) for victims and witnesses, to be provided, where appropriate, with employer and creditor intercession services by the prosecutor to seek employer cooperation in minimizing employees' loss of pay and other benefits resulting from their participation in the criminal justice process, and to seek consideration from creditors if the victim is unable, temporarily, to continue payments; ...

**FACTS**

The Town of Sudbury (Town) and the Union are parties to a collective bargaining agreement that was in effect at all relevant times to this arbitration. The grievant, Anthony Zanco (Zanco) was hired by the Town on August 8, 2013 as a Light Equipment Operator in the Department of Public Works (DPW).

On March 20, 2014, Zanco's seventeen-year old son was murdered. A juvenile and two adults were arrested. The juvenile pleaded guilty to a reduced charge, and the adults were awaiting trial at the time of the arbitration hearing. As a result of this tragedy, Zanco exhausted all of his contractually entitled

benefits including sick days, vacation days, and compensatory days. Zanco was not eligible for Family Medical Leave, but the Town granted him a leave of absence from April 15, 2014 through May 31, 2014. Zanco did not request further leave and returned to work in June 2014.

Zanco did not report to work on many days in fiscal years 2014 and 2015. In fiscal year 2014, Zanco, in addition to his paid leave time, had thirty-four unpaid work days. In fiscal year 2015, Zanco worked ninety-nine days out of a total of one hundred and ninety-four work days. Zanco was on paid leave for twenty-five and one-half days, and was on unpaid leave for sixty-eight days. Of those sixty-eight unpaid days, Zanco reported that twenty-seven were for court dates, leaving forty-one days of unexcused unpaid leave. Zanco testified that he could not work because of psychological and medical issues related to the death of his son, but that he did not tell his supervisors why he was not coming to work because he believed there was nothing they could do for him.

On January 8, 2015, after repeated discussions between Zanco and the DPW Director, the Town issued a verbal warning about his attendance that was reduced to writing on January 14, 2015. Zanco's attendance did not improve after the verbal warning and on February 23, 2015, the Town issued a written warning. In part, the written warning stated:

The purpose of this letter is to emphasize the seriousness of your attendance record (absenteeism) as a Light Equipment Operator with the Town of Sudbury Department of Public Works and to reprimand you for failing to meet acceptable attendance standards. Further, you are hereby warned of additional disciplinary action if your attendance does not improve. Because your absences from work are occurring so frequently, your attendance cannot be relied on and your

services are of greatly reduced value. Attendance at work is an essential element of your position and the employment relationship.

In spite of the verbal and written warnings, from February 25, 2015 through March 17, 2015, Zanco was only present at work on four days.

On March 17, 2015, the Town notified Zanco of its intention to hold a disciplinary hearing based on his attendance record. On March 24, 2015, the disciplinary hearing was held before Wayne Walker (Walker), the Interim Assistant Town Manager / Human Resources Director. At this hearing, Zanco cited his ongoing tragic personal family circumstances as the primary contributing factor, which precluded him from being able to appear for work, and indicated that the mental stress had made it very difficult for him to carry out his work obligations. He expressed hope that closure in the matters relating to the tragedy would lead to him having a better mental outlook and a more positive job attendance record. After hearing all of the evidence, Walker recommended to Interim Town Manager Maryanne Bilodeau (Bilodeau) that Zanco be terminated.

On March 27, 2015, Bilodeau notified Zanco that his employment with the Town had been terminated. On March 31, 2015, the Union filed a grievance over the termination that was denied at all steps by the Town and resulted in the instant arbitration.

### **POSITIONS OF THE PARTIES**

#### **THE EMPLOYER**

Zanco and his family have experienced a tragedy of unimaginable proportions. In reviewing the facts of this matter, it is clear that the Town

recognized the magnitude of Zanco's loss and despite the fact that he was a relatively new employee, the Town treated Zanco with sympathy and compassion. Zanco testified that the Town was incredible in how it handled the situation and did everything that it could to help him. Ultimately, Zanco admitted that he still is unable to work a regular job, and that he does not think he will be able to work until sometime after the individuals responsible for killing his son are brought to trial.

After the murder of Zanco's son, the Town granted him a month and one-half off as approved leave and indicated that Zanco could seek more leave if he needed any. The Town also reminded Zanco of the availability of the Employee Assistance Program. Zanco did not request any further leave and returned to work in early June 2014. Beginning July 1, 2014, Zanco used his twenty paid leave days and took another sixty-eight unpaid days off. Of these sixty-eight days, twenty seven were approved court days and forty-one were unexcused days off. The District Attorney's Office later informed the Town that there were actually only nine court days between July 1, 2014 and March, 2015. Zanco testified at the hearing that he did not work when required due to ongoing psychological issues that he was having. Also, as stated above, he remains unable to work regularly and believes that he will remain unable to work until after his son's murderers go to trial.

The Union's sole defense seems to be the claim that under the employee handbook, employees do not have to work if they have some legitimate reason for not going to work. However, as Walker, the author of the employee handbook

testified, the provision means that if you have available leave, the absence is excused so long as you have a legitimate reason. Zanco, however, had no approved leave and, even if you count the twenty-seven court dates as excused, Zanco was still absent without leave for over eight weeks in the portion of fiscal year 2015 that he remained an employee of the Town.

The Town verbally counseled and warned Zanco about his attendance issues, and he was aware that he had to show up to work in order to keep his job. When his attendance did not improve, the Town issued a written warning to Zanco and told him that if his attendance did not improve, his job would be in jeopardy. Unfortunately, after receiving the written warning, Zanco's attendance worsened, and he only showed up to work four times between February 23, 2015 and March 17, 2015.

Zanco experienced an unimaginable tragedy, and while the situation is incredibly sad, it is axiomatic that you have to report to work to keep your job. Zanco did not work despite being given countless opportunities. The Town wishes nothing but the best for Zanco in all that he does and hopes that he gets all the help that he needs and is able to return to work as a productive employee with a satisfying career. However, the Town had the right to make its decision to end Zanco's employment, and the Town respectfully requests that the Arbitrator deny the grievance.



**THE UNION**

Prior to his tragic family loss, Zanco was a perfect employee without a single disciplinary incident. The evidentiary record clearly establishes all absences were connected to the tragic murder of his son.

The Town will argue that the Employee's Handbook, Section 5.2.1 prohibits poor attendance / excessive tardiness that causes disruption. Section 5.2.1 states:

To maintain a safe and productive work environment, the Town expects you to be reliable and punctual in reporting for scheduled work. Absenteeism and tardiness place a burden on other employees and the Town. When you are unable to report to work because of illness, injury or other reason, you are expected to notify your supervisor promptly.

Poor attendance and excessive tardiness are disruptive and will not be permitted. When you have been absent without authorization for any length of time, and where the department head determines there is not a satisfactory excuse or legitimate explanation, you will be subject to disciplinary action, up to and including termination.

The Union agrees with this proposition when it is properly applied. However, in this case, it was not applied properly and was twisted to suit the Town's point of view.

The Town did not present any evidence demonstrating that Zanco's absence was disruptive to the Town's services. The most important language of Section 5.2.1 concerns whether or not the Department Head determines the existence of a satisfactory explanation or excuse for not reporting to regular duty work assignments. The Town did not consider Zanco's explanation, and ignored the information provided by the District Attorney's Office showing that Zanco was

covered by the protection of Massachusetts General Law Chapter 258B – Rights of Victims and Witnesses of Crimes (Victim’s Law). Additionally, the Town failed to contrast Zanco’s absences with the protections of the collective bargaining agreement regarding jury duty. It is necessary to evaluate the information provided by Zanco and the applicable provisions of the collective bargaining agreement, in order to determine whether Zanco’s absences were excusable, and whether those absences violated Section 5.2.1 of the Handbook.

The Town cannot make a convincing argument that Zanco’s absences violated Section 5.2.1. The Town argues that Zanco’s absences caused problems with staffing work assignments and therefore, are unexcusable. A good analogy to make would be if Zanco had been assigned to a long term trial as a jury member. If this had happened, he would have been excused from work, and the Town would have filled his daily work assignments in a different way. This clearly shows the lack of validity in the Town’s argument. Zanco’s behavior is protected by the Victim’s Law, the collective bargaining agreement and the language of the employee’s handbook.

The Town has failed to establish the existence of just cause for termination, an extreme form of discipline. Termination can only be justified when it is supported by adequate reasons and credible evidence. The Town has fallen short of this standard. The Town’s failure to establish by a preponderance of evidence that its actions were based on just cause leaves only one conclusion, which is that after months of treating Zanco appropriately under the circumstances, the Town decided to “change up” on Zanco. In so doing, the

Town ignored every legitimate reason to continue treating Zanco fairly during this traumatic time of his life.

It is clear that the Town has failed to demonstrate that Zanco engaged in misconduct as outlined in the March 27 termination letter. The termination must be vacated because it was done without just cause or common sense, ignored rules of law and contract provisions, and was committed with a prejudicial mindset. The Union requests Zanco be made whole for his unjust termination.

### **OPINION**

The issue before me is: Under the collective bargaining agreement, did the Town have cause to terminate Mr. Zanco from his employment? If not what shall be the remedy?

For the reasons stated below, the Town did have cause to terminate Mr. Zanco, and the grievance is denied.

There is no question that the death of Zanco's son was an unimaginably tragic loss that called for a wide-ranging sympathetic response from the Town. In this regard, I find that the Town's actions were respectful and appropriate in both dealing with the immediate aftermath and the long range challenges facing Zanco in his effort to return to work.

The Town's granting of a month and a half of leave to Zanco, even though he was not eligible for FMLA leave, was a compassionate gesture. The Town also offered its Employee Assistance Program and the opportunity for further leave if Zanco so desired. Zanco ultimately did not request further leave from the Town and attempted to return to work. Over the next eight months, the Town

continued to support Zanco, even as it became apparent that he was struggling to return to a full-time work schedule.

In fiscal year 2015, Zanco was only able to work ninety-nine days out of a total of one hundred and ninety-four work days. He was on paid leave twenty-five and one-half days, and was on unpaid leave sixty-eight days. Of those sixty-eight unpaid days, Zanco reported that twenty-seven were for court dates, absences which the Town excused. However, Zanco still incurred forty-one unexcused absences. The Union provides no support for its claim that the Victim's Law should have excused all of Zanco's sixty-eight absences, not just the twenty-seven reported court dates. In spite of Zanco's significant amount of missed time, the Town did not commence formal discipline until January 8, 2015, after informal discussions did not improve the situation.

The Town had initiated formal disciplinary proceedings after counseling was ineffective in improving Zanco's attendance, and Zanco had demonstrated an inability to maintain an acceptable attendance record over a sustained period of time. While the tragic personal situation is certainly a mitigating factor, an employer has to be able to rely on an employee reporting to work on a consistent basis.

Additionally, Zanco's admission at his disciplinary hearing and again during the arbitration hearing that he would be unable to consistently work full-time until after a resolution to the pending court proceedings is also detrimental to a successful employment relationship. The Town has a limited number of DPW employees to perform everyday tasks and a significant amount of

emergency public safety work during the snow and ice season. The Town cannot be required to operate shorthanded for an extended period with no definitive end point. While Zanco hoped to be able to return full-time in the future, there was no guarantee that he would be able to work consistently. The length of time that the Town allowed to pass before commencing disciplinary proceedings against Zanco, combined with his lack of progress in fulfilling his obligation to report to work, and the uncertainty of when or even if he could return to full-time work creates the requisite cause to uphold the termination. The grievance is denied.

**AWARD**

The Town did have cause to terminate Mr. Zanco and the grievance is denied.



Timothy Hatfield, Esq.  
Arbitrator  
May 12, 2016