

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of the Arbitration Between:

CITY OF WORCESTER

-and-

NAGE, LOCAL 495

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ARB-16-5396

Arbitrator:

Timothy Hatfield, Esq.

Appearances:

William Bagley, Esq.

- Representing City of Worcester

Timothy McGoldrick, Esq.

- Representing NAGE, Local 495

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 City had just cause to terminate the employment of Kevin O'Connell, and the grievance is denied.



Timothy Hatfield, Esq.

Arbitrator

March 1, 2018

INTRODUCTION

NAGE, Local 495 (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 in Worcester on June 14, 2017.

The parties filed briefs on September 22, 2017.

THE ISSUE

Whether the City had just cause to terminate the employment of Kevin O'Connell? If not, what shall the remedy be?

RELEVANT CONTRACT LANGUAGE

The parties' collective bargaining agreement (Agreement) contains the following pertinent provisions:

ARTICLE 11 GRIEVANCE PROCEDURE (In Part)

5. The award of the arbitrator shall be final and binding upon all parties, subject to the following conditions:

- a. The arbitrator shall make no award for grievances initiated prior to the effective date of this Article.
- b. The arbitrator shall have no power to add to, subtract from, or modify this contract or the rules and regulations of the City and the Charter, Ordinances and Statutes concerning the City, either actually or effectively.
- c. The arbitrator shall only interpret such items and determine such issues as may be submitted to him by the written agreement of the parties.
- d. Grievances may be settled without precedent at any stage of the procedure until the issuance of a final award by the arbitrator.

e. Appeal may be taken from the award to the Worcester Superior Court as provided for in paragraph 6.

6. Appeal from the arbitrator's award may be made to Superior Court on any of the following bases, and said award will be vacated and another arbitrator shall be appointed by the Court to determine the merits if:

a. The award was procured by corruption, fraud, or other undue means;

b. There was evident partiality by an arbitrator, appointed as a neutral, or corruption by the arbitrator, or misconduct prejudicing the rights of any party;

c. The arbitrator exceeded his powers by deciding the case upon issues other than those specified in sections 5(b) and (c), or exceeded his jurisdiction by deciding a case involving non-grievable matters as specified in Section 1, or rendered an award requiring the City, its agents, or representatives, the Union, its agents or representatives, or the grievant to commit an act or to engage in conduct prohibited by law as interpreted by the Courts of this Commonwealth;

d. The arbitrator refused to postpone the hearing upon a sufficient cause being shown therefor, or refused to hear evidence material to the controversy or otherwise so conducted the hearing as to prejudice substantially the rights of a party;

e. There was no arbitration agreement on the issues that the arbitrator determined, the parties having agreed only to submit those items to arbitration as the parties had agreed to in writing prior to the hearing, provided that the appellant party did not waive his objection during participation in the arbitration hearing; but the fact that the award orders reinstatement of an employee with or without back pay or grants relief that would not be granted by a court of law or equity, shall not be grounds for vacating or refusing to confirm the award.

FACTS

The City of Worcester (City) and the Union are parties to a collective bargaining agreement that was in effect at all relevant times to this arbitration. The grievant, Kevin O'Connell (O'Connell), worked for the City of Worcester (Worcester) in the Department of Public Works (DPW) from January 13, 2003 through July 5, 2016. O'Connell first worked as a laborer in the Parks

Department, before becoming a laborer, motor equipment operator, when assigned, at the Hope Cemetery (cemetery).

In June 2009, O'Connell suffered a work related injury, after stepping in a hole. O'Connell suffered both a knee and hip injury and was out of work until January 2010. O'Connell collected worker's compensation benefits during his absence. After returning to work, O'Connell continued to be in discomfort which he reported to medical professionals.

In January 2012, O'Connell was unable to work and underwent a left hip replacement. In addition to his hip replacement, O'Connell received an injection in his left knee, which was still problematic. The City, while not disputing his hip replacement, contested O'Connell's worker's compensation claim based on the allegation that there was no specific work injury in 2012.

The City hired a private investigator to follow O'Connell at certain times between June and August of 2012. The investigator photographed O'Connell mowing his lawn, using a leaf blower, throwing away trash at a dumpster in the cemetery, and changing a battery in a vehicle. O'Connell returned to work on August 20, 2012, while his worker's compensation claim was still pending at the Department of Industrial Accidents (DIA). The parties settled the matter on August 28, 2013, prior to a hearing. The City paid O'Connell benefits from January 24, 2012 through June 28, 2012, and O'Connell dropped his demand for benefits through his return to work date of August 20, 2012.

On Monday, August 4, 2014, O'Connell reported to work at the cemetery and attended a morning meeting.¹ During this meeting, O'Connell was approached by Christopher Logan (Logan), a co-worker. Logan noticed that O'Connell was favoring one of his shoulders and asked if he was alright. Logan testified that O'Connell stated that "he got hurt at work, but not while he was working." O'Connell told Logan that he hurt himself the day before at the cemetery while lifting some wood into his truck. Logan did not report this conversation with O'Connell to anyone from the City. After the morning meeting, O'Connell left driving a backhoe towards the rear of the cemetery. O'Connell returned a short time later and falsely reported that he hurt his bicep and shoulder lifting a downed tree limb into the bucket of the backhoe. O'Connell went to UMass Memorial Hospital for treatment where an MRI confirmed that O'Connell had ruptured his left bicep tendon and torn his rotator cuff. O'Connell was first treated in a non-surgical manner before undergoing surgery in September 2015.

On March 12, 2015, Logan reported his conversation with O'Connell from April 4, 2014 to his supervisors after becoming angry that O'Connell had driven by the cemetery and taunted his co-workers while he was still out on worker's compensation leave. The City did not act on the information presented until O'Connell attempted to return to work in March 2016. At this time, O'Connell was given a letter dated March 22, 2016 placing him on paid administrative leave. On

¹ Both the City and the Union provided conflicting testimony on O'Connell's dress on August 4, 2014. As the attire worn by O'Connell plays no role in my decision, I decline to address this argument.

March 22, 2016, O'Connell received a letter stating that the City was requesting termination based on allegations related to his worker's compensation claim.

The letter stated in part:

[y]ou informed a co-worker that you actually did not hurt yourself at work. Rather, you injured yourself over the weekend moving firewood and waited to come to work on Monday to report it as work related. Further investigation was conducted, and it was determined that the report of this co-worker was credible.

On April 28, 2016, prior to his termination hearing, O'Connell and Logan were involved in an incident in front of O'Connell's house. The evidence presented surrounding this incident differed depending on who was testifying. One of the only facts that the witnesses could agree on was that O'Connell called Logan a "rat" during their heated exchange. The remaining facts, such as how Logan came to be in front of O'Connell's house, who started the argument, and what other statements were exchanged remains in dispute.²

The City held a disciplinary hearing on June 14, 2016, and a report was issued on June 29, 2016. A termination letter was issued on July 5, 2016. The Union filed a grievance on the termination that was denied at all steps by the City and resulted in the instant arbitration.

POSITIONS OF THE PARTIES

THE EMPLOYER

The City's Employee Handbook (Handbook) provides that the City generally follows progressive discipline, but further provides that:

² As the remaining facts surrounding this confrontation play no role in my decision, I decline to address them.

Certain offenses are serious and warrant suspension or immediate dismissal. Such examples include, but are not limited to: assault, making threats, stealing, fighting, or gross neglect of duty.

In the instant matter, it is clear that O'Connell was untruthful about the nature of his injury and, as a result of his misconduct, he fraudulently obtained more than \$18,000 in benefits from the City to which he was not otherwise entitled. Moreover, O'Connell has had two opportunities to present his evidence, once before an Administrative Judge of the DIA and once before a hearing officer designated by the City. Neither of these fact finders found O'Connell's version of events, or his explanation of calling Logan a rat to be credible.

All the City's witnesses testified credibly and consistently as to the material facts at issue. O'Connell appeared at work on a Monday morning, and all of the witnesses indicated that they observed his appearance to be out of the ordinary, with Reid³ noting that he looked like "Mr. Clean". The alleged incident occurred within minutes of the commencement of the workweek and it was unwitnessed. Before leaving the premises, O'Connell acknowledged to Logan that he had actually suffered the injury on the day prior to August 4th. Notwithstanding these facts, O'Connell filed a fraudulent claim with the City alleging to have suffered an injury while at work on the morning of August 4th, and then proceeded to accept benefits to which he was not entitled.

While Union counsel may have succeeded in upsetting and frustrating the City's witnesses with respect to tangential facts, he failed to sway them from their core and material testimony. Reid's testimony at the workers' compensation

³ Gordon Reid, Storekeeper for the City's Parks Department.

hearing centered on O'Connell's appearance on August 4th, and he was never asked about how O'Connell got to the hospital. Again at the arbitration hearing, Reid again consistently testified about O'Connell's clothing on the day in question. Similarly, Logan, whom Union counsel managed to badger and frustrate, again consistently testified that O'Connell told him he was not hurt at work, and that he called him a rat in their subsequent encounter.

Notwithstanding O'Connell and Moore's⁴ clearly coordinated and disingenuous effort to discredit Logan, it cannot be disputed that O'Connell, within weeks of receiving notice that an employee had disclosed that he was not truthful about the nature of his injury, and one month prior to the City's termination hearing, called Logan, the employee who disclosed his deception, a rat. In the context of the proceedings that were underway, in which Logan was testifying as to O'Connell's fraudulent conduct, any other explanation as to O'Connell's intent in calling Logan a rat is, at best, disingenuous, and at worst a continuation of O'Connell's dishonesty.

For the foregoing reasons, the City had just cause to terminate the employment of O'Connell, and the grievance should be denied.

THE UNION

The City alleges just cause in O'Connell's termination letter, but there is no definition of just cause in the collective bargaining agreement. The term has been defined in case law however. In Grief Bros. Cooperage Corp., the arbitrator set forth the seven step test for determining whether a company had just cause

⁴ Brian Moore, witness for the Union.

to discipline an employee. He stated that a no answer to any of the questions normally signified that just cause did not exist for the employer's disciplinary decision. The seven questions are:

1. Did the company give the employee forewarning or foreknowledge of the possible or probable disciplinary consequences to the employee's conduct?
2. Was the company's rule reasonably related to the orderly, efficient, safe operation of the company's business?
3. Did the company before administering discipline to an employee make an effort to discover whether or not the employee did in fact violate the rule or order of management?
4. Was the company's investigation conducted fairly and objectively?
5. At the investigation, did the "judge" obtain substantial evidence as proof that the employee was guilty as charged?
6. Has the company applied the rules and penalties evenhandedly and without discrimination to all employees?
7. Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee's proven offense, [and] (b) the record of the employee in his service with the company?

After considering the underlying facts and circumstances concerning the rationale for which O'Connell was terminated, the answer is a resounding no. Most specifically, the City failed to conduct a fair, objective, substantial and detailed investigation to determine if there was proper evidence to support Logan's allegations. The City conducted only a perfunctory investigation, taking Logan's claims as fact from the start, and moved forward with termination, the most severe form of discipline.

At the arbitration hearing, several witnesses testified for the City including Reid, Chapman, Logan, and Reichert. Reid was called to testify as to what O'Connell was wearing on August 4, 2014. The City has put forth a strange and illogical contention that O'Connell was not in his usual work outfit that morning and somehow this proves his injury was a fraud. Stated another way, the City believes that O'Connell showed up to work that day already injured and intended to perpetrate a fraud on his employer, and he then called unwanted attention to himself by not appearing dressed for work. Reid testified that with his light colored clothing on, O'Connell looked like "Mr. Clean". O'Connell didn't dispute this testimony stating that he frequently wears light colored clothing in the summer.

Chapman, the foreman on duty that day, was called to essentially support the "Mr. Clean" theory. Interesting however, is the fact that Chapman did not notice any injury during a 7 AM meeting that both he and O'Connell attended, but did testify that after O'Connell reported the injury, he saw O'Connell's bicep muscle protruding and O'Connell's arm appeared to be in a continuous flex position. This Testimony clearly establishes that O'Connell's injury happened after 7 AM on the morning in question.

Reichert, the City Attorney who handles Worker's Compensation claims, was called to testify about O'Connell's work history and O'Connell's 2009, 2012, and 2014 worker's compensation claims. In 2012, O'Connell went out with an injury related to his worsening condition related to his 2009 injury. The City contested liability on the 2012 injury claim, asserting that there was no new

injury. O'Connell went back to work on August 20, 2012, and the parties settled the matter in 2013 prior to a Trial/Hearing on the matter. Each side gave some ground in the settlement agreement and the agreement was not the direct result of the 2012 private investigator's photos of O'Connell working around his house as alleged by Reichert. Reichert's testimony in this case was indicative of the City's behavior in this entire matter. O'Connell made several worker's compensation claims in the past, and therefore, was a fraud. Logan's statement was believed from the start, his motives never were questioned, and there was never any attempt at a fair and balanced investigation as required for just cause.

None of these witnesses saw Logan talking to O'Connell on the morning of August 4, 2014. Additionally, Logan testified that he never told anyone of the alleged conversation with O'Connell before reporting it to the City in March 2015. As such, the City's claim rests almost entirely on Logan's credibility.

The first time Logan came forward on March 12, 2015, he signed a written statement with his allegations against O'Connell. Logan later testified at the City's hearing on June 14, 2016, at the DIA hearing on May 19, 2016, and again at this arbitration hearing.

As no other witness or shred of evidence corroborated Logan's claim that he had any conversation with O'Connell on the morning of August 4, 2014, his various statements and testimony must be scrutinized to determine his credibility. Logan was combative and defensive in his testimony at the arbitration hearing. When questioned as to inconsistencies in his past statements, he was flippant in

his responses, defensive that the Union would even question his credibility and eventually stormed from the room during cross examination yelling profanities.

Regarding the March 12, 2015 statement, Logan testified that he didn't tell anybody about the alleged conversation for over seven months, keeping it completely to himself. He also testified that no co-workers saw him talking to O'Connell on the morning in question. When asked some basic questions about his written statement, such as: "Whom did you speak to first", "Who actually typed the statement", and "Did you sign it in anyone's presence", he testified that he could not remember. In his statement, there are specific quotations attributed to O'Connell and other instances when O'Connell is paraphrased. When questioned about how he could remember specific quotations some seven months later, Logan stated that he had a very good memory for that stuff. Logan was unable to remember basic details regarding the logistics of giving the statement, but asserts under oath that he could remember actual quotations from a conversation from over some months prior. This is not credible.

Logan was also questioned about the content of his written statement and how it differed from his later testimony. This was about the time when he stormed from the hearing yelling and swearing. Crucial details differed from his written statement and his testimony at the DIA hearing concerning what O'Connell allegedly said to him on the day in question. Yet he wants us to believe he "has a very good mind for this stuff", when giving different versions of the conversation at issue in 2016 and again in 2017.

In addition, it should be noted that Logan's written statement contains no reference to how O'Connell was dressed, yet during his latter testimony in 2016 and 2017, his unsolicited testimony on how O'Connell is dressed is one of his primary focuses. Logan's new recollections just happen to coincide with the testimony of Reid and Chapman as to what O'Connell was wearing that day, suggesting that Logan edited his testimony accordingly after learning how Reid and Chapman were going to testify. Even so, they still could not get their testimonies straight on what O'Connell allegedly was wearing on his feet. Logan claimed boat shoes, Chapman claimed sneakers and Reid didn't say.

Logan's anger and bias towards O'Connell is clear. He testified that he didn't like O'Connell, and that they didn't get along to the point that Logan once challenged O'Connell to a fight. Logan first came to work in the cemetery in January 2012, at the same time O'Connell left work to have hip surgery. According to Logan, co-workers were gossiping about O'Connell "screwing" them all. Logan testified that he had a very bad opinion of O'Connell before ever meeting him or working with him.

Of course Logan told none of this to the City in his initial statement of March 12, 2015. Essentially, he told the City that he nobly came forward as he and his co-workers had a difficult winter and he knew it was now the right thing to do. In this sanitized statement, he references none of the anger, bias, and motivation for revenge that comes out in his later testimony. There is no evidence the City ever investigated Logan's motives for coming forward, or if they did, it was ignored, which is not in keeping with just cause requirements.

Logan's testimony about the incident occurring at O'Connell's house in April 2016 also fits his familiar pattern and highlights his loose relationship with the truth. According to Logan, he just happened to drive by O'Connell's house at 11:20 AM, in a City truck, while going to lunch. According to Logan, O'Connell blocked Logan's vehicle, and gave him the finger while screaming at him. According to Logan, he was innocent and said and did nothing in response. O'Connell testified that Logan initiated the encounter by coming to his home, giving him the finger first, and then taunting him as he backed into his driveway. Logan later acknowledged that he had pulled his truck over, got out of his truck, walked towards O'Connell's driveway and got into a heated verbal argument with O'Connell. After the incident, O'Connell was upset and called the Cemetery to report the incident. Logan's foreman then called Logan on the phone trying to track him down, disputing Logan's assertion that he was innocently on a lunch break. Logan was also asked if he taunted O'Connell by stating "I got you". Logan responded with "I don't recall", essentially admitting that he went to the City for revenge against O'Connell.

The timing of the encounter at O'Connell's home was at a point when O'Connell did not know the full allegations against him. He had been served a letter with general allegations, but did not know specifics, including that Logan was the accuser. This is important when considering the term "rat" that was admittedly used by O'Connell to Logan during their encounter. O'Connell testified honestly at the DIA and Arbitration hearing that he called Logan a rat, and he explained what he meant by it. He could have easily denied that he said

it, if his overall motives were improper, and if he was lying about his work injury, but he did not. O'Connell explained that he heard there were false rumors being spread about him by his fellow co-workers, including Logan.

There are many other definitions of the term rat that fit O'Connell's testimony, and the definition is more nuanced depending on context. In the present case, unlike the DIA matter where O'Connell was the plaintiff and had the burden of proof, the City bears the heavy burden of proof in this matter, and must disprove that O'Connell intended one of the many other recognized meanings under these specific circumstances.

The fatal flaw in the City's case is that Logan is not a credible witness and there are no other corroborating facts or witnesses that support his claims. O'Connell has consistently testified that he was hurt at work on August 4, 2014, and the medical evidence supports his injuries, and subsequent disability. The City has the heavy burden of proof in this matter to establish just cause, and each and every element of doubt must be resolved in O'Connell's favor. Moreover, in deciding the issue of just cause for termination, O'Connell's lack of any prior discipline must be considered as part of the analysis.

DIA Decision

The City has offered the DIA decision of the Administrative Judge dated April 21, 2017 as an exhibit in this matter. The Union objects on multiple grounds. First, the Arbitrator in this matter should be the sole judge of the credibility of the witnesses, and should not have that function taken away by another administrative agency hearing a different type of case. In addition, in the

DIA claim, O'Connell was seeking payment of benefits pursuant to Massachusetts statute and regulations. In the present disciplinary matter, the City is the moving party, and the issue to be decided is whether the City had just cause for the termination pursuant to the collective bargaining agreement. Finally, the burdens of proof and the party that holds that burden are not the same in both matters. In the DIA matter, O'Connell had the burden to prove the case and doubt would be resolved in the City's favor. In the present matter, the City has the heavy burden of proof, and all doubt should be decided in O'Connell's favor.

Conclusion

For all the foregoing reasons, the Union asserts that the grievance should be upheld, and the Union respectfully requests that any and all documents relating to his termination be expunged from his personnel file, and that O'Connell be reinstated and made whole for all losses associated with his termination as well as any other or further remedy deemed appropriate by the Arbitrator.

OPINION

The issue before me is:

Whether the City had just cause to terminate the employment of Kevin O'Connell? If not, what shall the remedy be?

For all the reasons stated below, the City had just cause for the termination of Kevin O'Connell and the grievance is denied.

While I find Logan's attitude and behavior at the arbitration hearing to be distasteful, I am convinced that his underlying testimony about his conversation with O'Connell, at the morning meeting on August 4, 2014, was credible. While it is unfortunate for all parties that Logan didn't immediately report the conversation to the City, I find his reason for ultimately reporting it to be plausible. O'Connell's actions in taunting his co-workers while he was out on worker's compensation leave pushed Logan to report his conversation.

I find O'Connell's testimony at the arbitration hearing to be self-serving and lacking in credibility. While there is no doubt as to the severity of O'Connell's injury, his claim as to how and when he was injured is dubious, especially when viewed in the light of his actions during the morning meeting while conversing with Logan, his continued taunting of his co-workers while out on leave, and his choice of words during his encounter with Logan in front of his house prior to his termination hearing. A review of all of the facts, strains O'Connell's denials beyond the point of believability.

There is little doubt that Logan and O'Connell had a long-standing contentious relationship. That fact, however, does not automatically prove that Logan's claims are untruthful. Logan's actions during the encounter in front of O'Connell's house were petty and unnecessary, and his zealousness in reveling in O'Connell's downfall is unflattering. O'Connell, however, did himself no favors with his outburst calling Logan a "rat". O'Connell's attempt to backpedal from the common and accepted definition of calling someone a "rat" is simply not

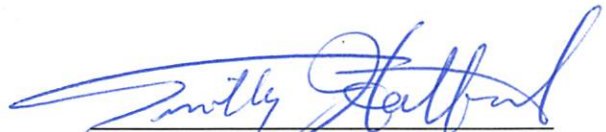
convincing or believable. O'Connell was simply enraged that Logan had turned him into the City.

Theft of this magnitude, in the form of accepting worker's compensation benefits worth \$18,000 for which you are not entitled, is justification for termination by the City even without any prior disciplinary history. While the City's chief witness' conduct during the arbitration hearing was less than ideal, the entire picture of the events that transpired, coupled with with O'Connell's unconvincing testimony, renders the City's actions in terminating O'Connell clearly supportable.

For all the reasons stated above, the City had just cause to terminate the employment of Kevin O'Connell, and the grievance is denied.

AWARD

The City had just cause to terminate the employment of Kevin O'Connell, and the grievance is denied.



Timothy Hatfield, Esq.

Arbitrator

March 1, 2018