

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of the Arbitration Between: *
*
TOWN OF ATHOL *
*
-and- *
*
SERVICE EMPLOYEES INTERNATIONAL *
UNION, LOCAL 888 *
*

Case No. ARB-17-5830

Arbitrator:

Will Evans, Esq.

Appearances:

Joseph S. Fair, Esq. - Representing Town of Athol

John J. Magner, Esq. - Representing SEIU, Local 888

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 violate the collective bargaining agreement by the manner in which the grievant was separated from employment. The grievance is denied.

Will Evans, Esq.
Arbitrator
October 3, 2017

INTRODUCTION

On February 23, 2017, the Service Employees International Union, Local 888 (Union or SEIU) filed a Petition to Initiate Grievance Arbitration with the Department of Labor Relations (Department), which designated the case as Category 1 and docketed the matter as ARB-17-5830. Under the provisions of M.G.L. Chapter 23, Section 9P, the Department appointed Will Evans, 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 May 24, 2017, at which time both parties had the opportunity to present testimony, exhibits and arguments, and to examine and cross-examine witnesses. On September 12, 2017, the parties filed post-hearing briefs. After careful review of the record evidence and in consideration of the parties' arguments, I make the following findings of fact and render the following opinion.

THE ISSUE

Did the Town violate the collective bargaining agreement by the manner in which the grievant was separated from employment? If so, what shall be the remedy?

RELEVANT CONTRACT LANGUAGE

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

Article 2 Management Rights

Except as otherwise expressly and specifically provided in the Agreement, the supervision, management and control of the Town's operations, working force and facilities are exclusively vested in the Town. Without limiting the generality of

the foregoing, the Town has the right to plan, direct and control the Town operations and working force, to hire, transfer, promote, assign and lay off employees, to demote, suspend, discharge, or take other disciplinary action against employees for just cause, determine the hourly, daily and weekly schedules of employment, the work tasks for employees or by others, to make, administer and enforce reasonable work rules and regulations, to take whatever action may be necessary to carry out its work in situations of emergency, all such rights being vested with the Town.

All positions that are appointed positions shall remain so under this Agreement.

Appointments are made at the sole discretion of the Town Manager as provided for by the Town Charter. The failure to reappoint an employee to his or her position without cause shall be grievable under this Agreement. If the Town Manager falls to reappoint an employee, the employee may appeal the Town Manager's decision as provided for under Article 16 - Grievance Procedure of this Agreement.

Nothing contained in this Agreement is to be construed as in any way granting or waiving the rights or responsibilities of the Town which may not be granted or waived by the Town under the statutes of the Commonwealth of Massachusetts.

Article 16 Grievance Procedure

STEP 1 An employee, with or without Union Officer/Steward, shall discuss orally, and in writing, his/her grievance with his/her Department Head within ten (10) calendar days of having been or having knowledge of having been aggrieved. The Department Head's response shall be due, in writing, within ten (10) working days of the oral discussion and written grievance.

STEP 2 If the matter has not been settled at Step 1, the Union Steward and/or the Union Representative, with the knowledge and approval of the aggrieved employee, may submit the grievance to the Town Manager, in writing, within ten (10) working days of the due date of the Department Head's response. A copy of said grievance will be submitted to the Board of Selectmen. The Town Manager's decision shall be due within thirty (30) days of receipt of the grievance.

STEP 3 If the grievance has not been resolved at Step 2, the Union and/or the Town may request arbitration through the Commonwealth of Massachusetts Board of Conciliation and Arbitration (CMBCA) within thirty (30) days of the due date of the Town Manager's response. A copy of the request for arbitration shall be mailed, by certified mail, to the other party. The decision of the designated arbitrator shall be final and binding on both parties. The fees and expense of the CMBCA/Arbitrator shall be borne equally by the Union and the Town. Only the Town or the Union may move the matter to arbitration.

If the Employer fails to respond within the specified time limits, the grievance will be moved to the next step. If the Union and/or employee fails to file or move the grievance forward within the specific time limits, the grievance will be considered dropped or settled consistent with the Employer's last response. All responses must be in writing within the specific time limits.

Grievances may be settled without precedent at any stage of this procedure. The time limits set forth in this Article may be extended by mutual agreement of the parties.

Article 36 **Dispatcher Issues**

HOURS OF WORK

The work week schedule for the full-time dispatchers shall be Sunday through Thursday. The hours of work for the position of Lead Dispatcher shall normally be 0700 hours to 1500 hours, Monday through Friday. These duty hours and days may be temporarily adjusted, swapped, or changed upon mutual agreement between the Lead Dispatcher and office of Chief of Police.

One dispatcher shall be assigned as a vacation relief dispatcher as described in the job description. The vacation relief dispatcher shall remain on a Sunday through Thursday schedule and shall normally be assigned to work 0700 hours to 1500 hours on Sunday and Monday of each week. The vacation relief dispatcher shall normally be assigned to work from 1100 hours to 1900 hours on Tuesday through Thursday.

However, as the vacation relief dispatcher, the hours are subject to change based upon the need to be reassigned to cover for another dispatch vacancy. Should that need arise, the vacation relief dispatcher shall be reassigned to cover the vacancy. The open first watch vacancy created by the movement of the vacation relief dispatcher shall be filled in accordance with the normal procedure for filling vacancies as outlined by this Contract as well as any department rules and regulations in place at the time.

The vacation relief dispatcher shall fill in and/or change their schedule to cover Vacation, Sick, Holiday, Personal and training days of other full time dispatchers provided the dispatcher requesting time off has requested the time off at least 48-hour in advance unless mutually agreed to by the vacation relief dispatcher.

The vacation relief dispatcher shall fill in and/or change their schedule to cover ATO¹ of other full time dispatchers provided the dispatcher requesting ATO time off has requested at least two weeks in advance, unless mutually agreed to by

¹ The CBA later defines ATO as compensatory time off.

the vacation relief dispatcher. Coverage will be sought if the request for ATO is less than two weeks. If the request is less than two weeks, the dispatcher will not be denied their request for ATO unless the shift is not filled.

The vacation relief dispatcher will only be required to swap his/her shift for a minimum of eight hours.

Any open position created by the movement of the vacation relief dispatcher shall not be considered "vacant" if the Lead Dispatcher is on duty and available to perform dispatch duties for part or all of the shift, that part of the shift shall be considered "vacant" and shall be filled with the aforementioned protocol.

Movement of the vacation relief dispatcher on Sundays may require the filling of the full open vacancy. Movement of the vacation relief dispatcher on other days may only require the filling of the duties of the half of the dispatch vacancy, allowing the Lead Dispatcher to perform dispatch duties on the other half of the shift.

Article 38 Discipline

No employee shall be discharged, demoted, suspended, or disciplined in any way except for just cause. The Town and the Union agree that progressive discipline should apply in all cases of discipline, based on severity of incident.

Progressive discipline will include the following:

- Verbal warning
- Written reprimand
- Suspension without pay
- Termination

If an employee is to be disciplined the employee may have union representation present. The Employer will notify an employee of when a meeting may result in discipline so s/he can secure Union representation.

Upon issuing discipline to an employee, the Employer shall notify the Union via mail within five (5) business days.

An employee shall have the right, upon his/her request, to review the contents of his/her personnel file and have attached in the file any response s/he feels is appropriate to any material. No material shall be placed in an employee's file until s/he has had an opportunity to review the material. Upon such review, the employee will acknowledge receipt by signing the agreement with the material. The employee will receive a copy upon signing the document. Any documentation of a verbal warning shall be expunged from the employee's personnel file after six (6) months if within that time the employee has received no other warnings.

If a supervisor has reason to orally reprimand an employee, he/she shall do so in a manner that will not unduly embarrass the employee before the public or fellow worker. Nor will the employee unduly embarrass a supervisor.

FACTS

Sarah Gambrell (Gambrell or Grievant) was hired as a part-time civilian dispatcher for the Town of Athol (Employer, Athol, or Town) in March 2011. At some point during her employment, her position became full-time and she served as the vacation relief dispatcher, whose primary function was to cover vacation, sick, holiday, and personal days taken by the three other full-time dispatchers. As a dispatcher, Gambrell's duties included answering the telephones for the Police Department, transferring calls to other departments, and performing administrative duties, such as preparing forms and handling license to carry requests. Although Gambrell did not receive annual reviews, she was never subject to discipline and always received her contractual step increases.

On or about March 10, 2015, the Town entered into an agreement with the City of Gardner (Gardner) to regionalize emergency and dispatch services at a center located in Gardner. Gambrell, feeling left out of the process, provided a letter on October 7, 2016 to Lieutenant Kevin Heath (Heath) stating, in part, the following:

I will be resigning my position as a full time dispatcher with the Athol Police Department, effective November 8, 2016.

The reason for my resignation is simple. The regionalization process between Athol and Gardner has been conducted behind closed doors and without the input from any Athol Police, Firefighters or Dispatchers. Promises are continually being made by the Town Manager and the figures and rationale behind the regionalization are constantly changing.

Gambrell chose November 8, 2016 as her last day of work so as not to cause any hardship or to disrupt dispatch services for the Town. Gambrell's supervisor, Becky Isakson (Isakson), was scheduled to return from vacation by that date, and the Town would have a full month's notice to find a replacement. After consulting with Town Manager Shaun Suhoski (Suhoski) regarding Gambrell's letter, Russell Kleber (Kleber), the Chief of Police for Athol, hand delivered a letter to Gambrell on October 12, 2016 stating, "I am in receipt of your October 7, 2016 letter to Heath resigning from your employment...This letter shall serve as a confirmation that your resignation has been accepted by the Town and your last day of employment will be November 8, 2016."

Gambrell continued to work as a dispatcher in Athol after submitting her letter. Since the Town was in the process of regionalizing, Kleber decided not to hire a full-time dispatcher to replace Gambrell, but rather to post for more part-time dispatchers. Kleber believed that, based on the needs of the Police Department, hiring a full-time dispatcher would be more expensive and less flexible than hiring several part-time dispatchers. As such, beginning shortly after October 12, 2016, Kleber sought to attract three to four additional part-time dispatchers. At the time, the Town employed four full-time dispatchers, including Gambrell, and four part-time dispatchers.

At some point after submitting her resignation letter, Gambrell began to believe that the Town's regionalization of dispatch services might not happen. There were a number of people opposed to the idea, and it was uncertain whether there were enough votes among the Board of Selectmen to finalize the

agreement. Therefore, on November 7, 2016, one day before her resignation was to take effect, Gambrell wrote to Heath, Kleber, and Isakson that “[d]ue to personal reasons, I will be rescinding my letter of resignation with the Athol Police Department. As such, I will be returning to duty on Wednesday, November 9th at my regularly scheduled time of 1100 hours.” After receiving Gambrell’s letter of rescission, Kleber consulted with Suhoski. Based on Suhoski’s advice, Kleber responded to Gambrell in writing on the following day, November 8, 2016, that her “resignation became official [when accepted] and is not capable of being rescinded by [her].” Gambrell’s last day of employment with the Town was on November 8, 2016.

On or about November 15, 2016, the Union filed a grievance on behalf of Gambrell alleging that the Employer violated Article 38 of the parties’ collective bargaining agreement by terminating Gambrell without just cause and failing to apply progressive discipline.² After holding a Step 1 grievance meeting on December 16, 2016, the Town issued a decision on December 21, 2016 denying the grievance. In the denial letter, Kleber stated, “[t]he November 8, 2016 letter from the Town did not serve to terminate Ms. Gambrell’s employment since Ms. Gambrell’s resignation had already been accepted by the Town on October 12th.” The Union proceeded to Step 2 of the grievance process on January 4, 2017.

² Approximately one week after filing the present grievance, the Union filed a grievance on November 21, 2016 related to the Town’s decision not to fill the vacation relief dispatcher position that Gambrell vacated. The dispute was resolved between the parties with the Employer agreeing to post a full-time dispatcher position internally (which was later filled by a part-time dispatcher) and to assign an existing full-time dispatcher as the vacation relief dispatcher.

After Suhoski denied the Step 2 grievance on January 30, 2017, the Union petitioned for arbitration with the Department on or about February 23, 2017.

POSITIONS OF THE PARTIES

THE UNION

The Union argued that the Employer failed to sustain its burden of proof that Gambrell was discharged for just cause. Gambrell's October 7, 2016 letter that she will be resigning *at a future time* was rescinded prior to becoming effective. Although Gambrell was under no obligation to provide advanced notice, she did so in order not to disadvantage the Employer. Once she realized that none of the reasons for her resignation had come to pass, she rescinded her resignation in a timely manner. Since the Employer failed to show any harm or detriment by allowing Gambrell to rescind her resignation, Gambrell's separation from employment should be treated as a discharge and subject to the just cause provision in Article 38 of the CBA.

Furthermore, Gambrell served as the vacation relief dispatcher, a position set forth in Article 36 of the CBA as mandated to be filled. Thus, the Town had no authority to vacate the position without first bargaining with the Union. In fact, the Union grieved the Town's decision not to back fill Gambrell's former position and the grievance was upheld in the Union's favor.

For all the foregoing reasons, the Union requested that the arbitrator reinstate Gambrell and make her whole in all respects, including back pay and interest.

THE TOWN

The Town argued that the Union's grievance is not substantively arbitrable since nothing in the parties' CBA governs the issue of resignations and/or rescission. As the Town has agreed to submit only disputes involving the interpretation and application of the CBA to arbitration, the arbitrator is without authority to render a decision on resignation and/or rescission.

Even if the grievance is substantively arbitrable, the Union failed to meet its burden that the Town violated the CBA by the manner in which Gambrell was separated from employment. Gambrell's separation from employment was due to a voluntary resignation. Therefore, the provisions of Article 38 requiring just cause for discipline do not apply. Furthermore, the Employer's refusal to accept Gambrell's rescission was within its rights and does not violate the CBA.

For all the foregoing reasons, the Town requested that the arbitrator deny the grievance.

OPINION

Grievances seeking to revoke an employee's resignation are precisely the types of issues that should be presented to labor arbitrators. Scott v. Ameritech Publishing, Inc., 938 F.Supp.2d 702, 708 (2013). Disputes often arise over whether a resignation occurred and was voluntary, or whether it was accepted and relied upon. Accordingly, I find the present dispute to be substantively arbitrable.

The Union's argument, however, that Gambrell's separation from employment should be treated as a discharge and subject to the just cause

provision in Article 38 is unsupported by the record. Based on the evidence presented at hearing, Gambrell expressed a clear intent with the October 7, 2016 letter to resign and to sever her employment relationship with the Town effective November 8, 2016. No evidence was presented that Gambrell's resignation was coerced, involuntary, or tendered under reduced mental capacity. To the contrary, Gambrell stated clearly in the letter and at hearing that her resignation was due to the regionalization process between Athol and Gardner. As such, the Union's reliance on Moss Supermarket is misplaced since the arbitrator found it unclear whether the employee intended to resign. See Moss Supermarket, 99 LA 408 (Arb. Grupp 1992) (constructive discharge found due to the employer's failure to allow the employee to clarify remarks regarding a reassignment which the employer interpreted as amounting to a resignation).

There was no dispute that the Town received and accepted Gambrell's resignation. The Town informed Gambrell that it had accepted her resignation on October 12, 2016 and that her last day of employment would be November 8, 2016. Compare Davis Cabinet Co., 45 LA 1030 (Arb. Tatum 1965) (employer refused to accept immediate resignation in order to allow employee time to cool off and reflect) and Minnesota Pollution Control Agency, 97 LA 389 (Arb. Daly 1991) (no evidence that employer accepted employee's resignation either verbally, in writing, or by some action).

Gambrell sought to rescind her resignation one day before it was to take effect and a full month after expressing her intent to resign. By this point, Kleber had assessed the needs of the Police Department and thought it better to replace

Gambrell with three to four part-time dispatchers, rather than another full-time dispatcher. Although the Town had the discretion to permit rescission, it was not required to do so. Nothing in the CBA, including Articles 36 and 38, required the Employer to allow Gambrell to rescind her letter of resignation.

Finally, the Union's argument that Gambrell should be reinstated since the Town lacked the authority to vacate the vacation relief dispatcher position without first bargaining is unpersuasive and outside the scope of the present arbitration. Even if one interprets the CBA as requiring a vacation relief dispatcher at all times, nothing in the CBA mandates that Gambrell hold the position. The Employer could satisfy such a requirement by assigning any of the dispatchers as the vacation relief dispatcher. To find otherwise would create a result whereby the Employer could be said to violate the CBA in the event of an employee's voluntary resignation, retirement, or even death. Furthermore, the issue of the vacancy in the vacation relief dispatcher position was subject to a separate grievance and resolved by the parties. Accordingly, the issue cannot be litigated in the present arbitration.

AWARD

For all the foregoing reasons, the Town did not violate the collective bargaining agreement by the manner in which the Grievant was separated from employment. The grievance is denied.

Will Evans, Esq.
Arbitrator
October 3, 2017