

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of Arbitration between:

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ARB-18-6474

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TOWN OF WILLIAMSTOWN

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and

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IUE-CWA, LOCAL 81256

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Arbitrator:

James Sunkenberg, Esq.

Appearances:

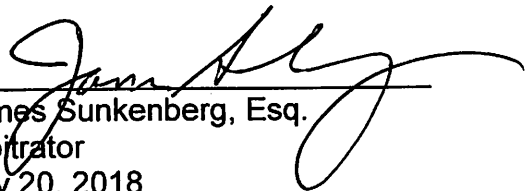
Jason Hoch - Representing Town of Williamstown

Amber Brooks - Representing IUE-CWA, Local 81256

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 issue, and, having studied and weighed the evidence presented, conclude as follows:

AWARD

The Town did not have just cause to terminate the employment of Mr. Bob Sweet. The Town shall rescind Sweet's discharge and reduce his discipline to a written warning, pursuant to Section VIII.C.3 of the Personnel Policy, for a first offense failure to exercise reasonable care in the operation of a motor vehicle. The Town shall immediately reinstate Sweet to his position without loss of seniority; and, calculating from the date of his unjust discharge, make Sweet whole for all provable lost wages and contractual benefits that directly resulted from the Town's violation of the Agreement. When calculating the remedy, the parties shall include, among other things, the Town's payout to Sweet of his accrued vacation and sick time, but shall not include any property damages related to the November 20, 2017 accident.


James Sunkenberg, Esq.
Arbitrator
July 20, 2018

INTRODUCTION

On January 25, 2018, the IUE-CWA, Local 81256 (Union) filed a petition for arbitration with the Department of Labor Relations (DLR). Pursuant to M.G.L. Chapter 23, Section 9P, the DLR appointed James Sunkenberg, Esq. to act as a single, neutral arbitrator with the full authority of the DLR. On May 22, 2018, the undersigned Arbitrator conducted a hearing in Springfield, Massachusetts. On or before June 22, 2018, the parties filed post-hearing briefs.

ISSUE

The parties stipulated to the issue:

Did the Town have just cause to terminate the employment of Mr. Bob Sweet?
And if not what is the remedy?

RELEVANT CONTRACT AND POLICY LANGUAGE

Collective Bargaining Agreement

Article 19-Discipline, Discharge, Suspension and Demotion

1. The Town shall have the right to discipline, discharge, suspend, and demote employees for just cause but not otherwise....Within 24 hours after disciplining, discharging, suspending, or demoting an employee, the employee shall be given a written statement containing all those facts upon which the Town...premeditated its...conclusion that such discipline, discharge, suspension, or demotion is for "just cause" and no other facts may be relied upon by the Town...at any subsequent proceeding pertaining to such discipline, discharge, suspension, or demotion.
2. The employee may submit such action of discipline, discharge, suspension, or demotion to grievance and arbitration under the provisions of Article 2 hereof.
4. No employee may be disciplined for violating a Town policy which is not included in the contract or the Town personnel manual unless the employee shall have previously been given a copy of the policy.

Personnel Policy Manual

VIII. Conduct and Discipline

A. Conduct of Employee

5. Town Property

An employee who has been provided town equipment such as tools, vehicles, materials, uniforms, etc. is expected to exercise reasonable care in the use and preservation of such equipment and to observe all safety precautions while carrying out the assigned work.

C. Safety

3. Duties and Responsibilities- Supervisor

Each supervisor has full authority and total responsibility for the maintenance of safe working conditions within his jurisdiction, whether it be in the field, in the shop or in the office....The following is a detailed schedule of a supervisor's duties and responsibilities....

Be firm in the enforcement of work policies by being impartial in taking disciplinary action against those who fail to conform, and by being prompt in giving recognition to those who perform well. This will help ensure impartial, positive enforcement. The following procedure for enforcement of the safety policy and safe work procedures will be adhered to:

First Offence: Written Warning – To be issued no later than the next working day on which the employee works. The employee will modify his procedure or obtain the appropriate safety clothing before being permitted to return to work.

Second Offence: Written Warning – To be issued no later than the next working day on which the employee works. In addition to modifying his procedure or obtaining the appropriate safety clothing, the employee will serve a three (3) day suspension, without pay, prior to returning to work.

Third Offence: Written Termination – To be issued no later than the next working day on which the employee works, to be effective immediately, and....

Investigate thoroughly the causes of all accidents and close calls (near accidents) and take appropriate corrective action, and;

Make sure all accidents are promptly reported regardless of the extent of injury or property damage.

The employee shall have the right to appeal disciplinary action as outlined in Section VIII D.

4. Duties and Responsibilities- Employee

Each employee shall:

Observe established safety rules, operating procedures and safe work practices in the performance of his job, and....

Be continually aware of the need for safety, and;

Report all accidents promptly to the supervisor or foreman, no matter how slight.

D. Disciplinary Action

1. General Policy

It is the responsibility of all employees to observe the regulations necessary for the proper operation of the town. The town may utilize any of the following disciplinary actions when appropriate: oral reprimand, written reprimand, suspension, disciplinary probation or discharge. The severity of the disciplinary action shall be in accordance with the severity of the situation.

2. Reasons For

Disciplinary action may be imposed upon an employee for failure to fulfill his responsibilities as an employee, including, but not limited to, any of the following...

His insubordination or disobedience in carrying out reasonable directions given by a proper supervisor.

Drug and Alcohol Policy

E. Types of Testing

Post-Accident Testing

Any safety-sensitive employee involved in an accident shall be required to submit to drug and alcohol test(s) as soon as practicable after the accident.

Thresholds for FTA Post Accident testing:

- Fatality....
- Bodily injury...

- One or more motor vehicles incurring disabling damage as a result of the accident, requiring the motor vehicle(s) to be transported away from the scene by a tow truck or other motor vehicle.

F. Drug & Alcohol Testing Procedures

To test for alcohol, the employee shall be required to provide a breath sample using an Evidential Breath Testing (EBT) device on the NHSA conforming products list and operated by a trained Breath Alcohol Technician (BAT). If the initial test result is 0.02 or higher, the employee will be directed to take a confirmation test.

G. Consequences/Discipline

In addition to the immediate removal from safety-sensitive functions required by Federal Transit Administration Regulations, the Town will take the following disciplinary action against any individual who violates this policy:

- A) An individual who tests positive on a pre-employment or pre-duty test...
- B) Any covered employee who has a verified positive drug or confirmed alcohol test with an alcohol concentration of 0.04 or greater, or who refuses to submit to a drug or alcohol test under this part, will be removed immediately from his or her safety-sensitive function and be evaluated by a Substance Abuse Professional. The consequences of a verified positive drug or confirmed alcohol test, the employee is subject to disciplinary action up to and including termination under Town policy.
- C) If an employee's alcohol test result is 0.02 or above, but less than 0.04, the employee will be removed from safety-sensitive functions and the employee will be subject to the consequences of disciplinary action up to and including termination under Town policy (unless prohibited by the Town's Collective Bargaining Agreement).

FACTS

Discharge and Grievance

This matter arises from the Union's timely November 22, 2017 grievance challenging the Town of Williamstown's (Town) discharge of bargaining unit member Robert Sweet (Sweet), a Town employee with over thirteen years of service in the Department of Public Works (DPW) and no record of discipline. The November 20,

2017 discharge letter (Discharge Letter) from Town Manager, Jason Hoch (Hoch) states:

On November 20, 2017, at approximately 9:23 am, you were involved in an incident in which a Town Water Department vehicle was damaged in an accident with damage of greater than \$1000 to the vehicle and further damage to a structure off the property of the Town Hall. The vehicle in question was left in drive rather than safely placed in park. This lack of reasonable care in the use and preservation of town vehicles and a failure to observe all safety precautions while carrying out assigned work is in violation of Town's Personnel Policy Conduct and Discipline Section (VII, A.5.)¹ Further, when the Police Department conducted a portable breath test machine, it was stated that you "twice had to be corrected on how to blow into the machine as he was attempting to avoid registering a sample." In this case, it would be expected that the employee is under the direction of the police officer administering the test consistent with the Town's policies. I view the avoidance behavior as insubordination and disobedience in carrying out reasonable directions.

On April 28, 2017, you were involved in an incident involving responding to an on call situation at a measurable rate of intoxication requiring the Police Department to respond to a citizen complaint about your behavior and subsequently to hold you in protective custody. Following that incident, you were placed on administrative leave and subsequently required to attend an evaluation by a Substance Abuse Professional. Following completion of an evaluation program, we opted to defer any other discipline that would have been applicable under either the collective bargaining contract or the Town's personnel policy.

Based on the leniency from the incident earlier this year and the provision of assistance for alcohol related issues, the violations of policy from November 20, 2017 incident are unacceptable. The combination of the two circumstances provide the just cause as required by contract for terminating your employment as of 7:30 am on November 21, 2017. This letter, the Protective Custody Report 17-26-AR and Crash Report 17-181-AC issued by the Williamstown Police Department constitute the statement upon which the discharge is based.

Under the provisions of the contract covering your position, you have the ability to submit this action to a grievance.

April 28, 2017

¹ The correct citation is Section VIII.A.5 of the Personnel Policy Manual.

On the night of April 28, 2017, Sweet, while off-duty, responded to a request for assistance with a water issue at a private residence in Williamstown. An incident with a third-party ensued, and officers of the Williamstown Police Department (Police Department) took Sweet into protective custody after determining him to be intoxicated. They subsequently released Sweet to the custody of his wife. The entire incident, from the third-party's call to the Police Department to the releasing of Sweet to his wife, unfolded within an hour.²

After this incident, the Town placed Sweet on administrative leave and required him to complete a substance abuse program. Sweet completed the program, and he then returned to work. The Town did not discipline Sweet for this incident.³

November 20, 2017

On the morning of November 20, 2017, Sweet was driving a Town vehicle and he pulled up to the Town Hall on work-related business that he was rushing to complete. He left the vehicle out front and entered the Town Hall. Later, upon reemerging from the Town Hall, he discovered that the vehicle was gone. Sweet forgot to place the vehicle in "Park," instead leaving it in "Drive," and the vehicle rolled down an embankment and into the storage shed of a local motel. The accident damaged both

² The Town relies on this April incident to buttress its case for discharging Sweet in November, but it did not produce any witnesses to testify regarding this April incident.

³ Contrary to the assertion in the Discharge Letter that the Town "opted to defer" any discipline related to this incident, the December 8, 2017 document summarizing the Step I Grievance Hearing states that "at no point was he disciplined for his actions on the 28 of April 2017." The Town also did not produce any evidence that the parties placed Sweet on a last-chance agreement or any other type of performance improvement plan. Thus, the evidence in the record shows that the Town did not discipline Sweet for this incident.

the vehicle and the shed, but the vehicle remained drivable and did not need to be towed from the scene of the accident.⁴

At the time of the accident, Ed Rondeau (Rondeau), Sweet's Supervisor, was present in the vicinity of the Town Hall, which also contains the Police Department. After the accident, both Rondeau and Sweet entered the Police Department to report the accident.⁵

A police officer administered a field sobriety test to Sweet, which he passed. The officer then gave Sweet a breathalyzer test. Sweet's blood alcohol registered at .016%, indicating that he was not intoxicated.⁶ Sweet then returned to work.

The next morning, November 21, 2017, the Town discharged Sweet. The Town subsequently paid Sweet for his accrued sick and vacation time, and the Town did not

⁴ At the hearing, Hoch asserted that the accident caused approximately \$3900 in damage to the vehicle. The Town, however, did not produce any evidence documenting the amount of the damage to either the vehicle or the shed, or the Town's actual costs related to this damage. In its post-hearing brief, the Town asserted that it paid \$4899.55 to repair damage to the vehicle and the shed. Because the Town did not offer evidence to establish this information at the hearing, I make no finding regarding the amount of damage beyond the approximate amount of \$3900 to the vehicle.

⁵ Rondeau did not testify at the hearing.

⁶ The Town solely relies on the following statement in the Crash Report to support its allegation of insubordination against Sweet: "He was instructed on the portable breath test machine and twice had to be corrected on how to blow into the machine as he was attempting to avoid registering a sample." The next two sentences state: "Once a sample was obtained, it was registered as 0.016%. This indicated that he was not intoxicated, but that he did have alcohol in his system." The first sentence offers an opinion regarding Sweet's mental state, i.e. he was attempting to avoid registering a sample. This opinion was not subject to cross-examination at the hearing because the Town did not produce the officer to testify. On the other hand, Sweet reported the accident, he passed the field sobriety test, he credibly testified that he was nervous, and the officer did, in fact, obtain a sample. I therefore do not credit this opinion statement from the Crash Report, and do not find that Sweet attempted to avoid registering a sample.

seek restitution from Sweet for any damages to the vehicle or the motel property. On November 22, 2017, the Union grieved Sweet's discharge, and this arbitration followed.

At the arbitration hearing, Hoch stated that Sweet was not discharged based upon the presence of alcohol in his system. Additionally, the Town did not produce any evidence that Sweet had ever received the Drug and Alcohol Policy.

ARGUMENT

Town

The Town argues that its actions were reasonable, and that upon terminating Sweet it exceeded the requirements of its policy in order to provide for his welfare. The Town also argues that upon Sweet's termination, he failed to present information that the termination was improper.

After the incident on April 28, 2017, the Town placed Sweet on paid administrative leave and allowed him to complete a substance abuse program. Upon his return to work, the Town opted to not impose any further discipline at that time, whether direct or deferred. On November 20, 2017, Sweet then failed to exercise reasonable care while operating a town vehicle, subjecting him to discharge, prosecution or other disciplinary action.

Once inside the Police Department, Sweet was insubordinate to a police officer when he attempted to avoid registering a blood alcohol sample. Because of Sweet's insubordination, the Employer added this act as part of the reason for termination.⁷

⁷ The Town notes that it was concerned about an "apparent conflict of facts" regarding Sweet's alleged, limited alcohol use and his measurable blood alcohol concentration after he started his shift, but chose not to pursue "multiple additional levels of potential justification for termination."

In deciding to terminate Sweet, the Town showed concern for the welfare of both Sweet and his family by not seeking punitive damages from him, and by authorizing full payment of accrued vacation and sick time for which Sweet was not otherwise eligible.

During the grievance process, the Town gave Sweet the fairest possible opportunity to address concerns with additional information, but no new information was provided to allow the Town to re-evaluate its response. When offered an opportunity to discuss the situation or provide additional facts, Sweet did not provide any to demonstrate any part of the allegation that the reasons for termination were questioned, disputed and without merit. The Town therefore had no choice but to stand by its decision.

The Town asks that the Arbitrator uphold its termination of Sweet. Given the severity of the first incident of 2017 and the circumstances of the second incident of 2017, the Town felt that Sweet's actions had created a situation where his continued employment was untenable and potentially hazardous. If not, the Town requests that the Arbitrator make it whole for its expenses related to the November 20, 2017 incident and its payout to Sweet of his accrued sick and vacation time.

Union

Preliminarily, Article 19, Section 4 of the CBA provides that no employee may be disciplined for violating a Town policy which is not included in the contract or the Town Personnel Manual unless the employee shall have previously been given a copy of this policy. Sweet never received either the Personnel Policy or the Drug and Alcohol Policy.

The termination letter gave three reasons for terminating Sweet. The first reason is lack of reasonable care under Section VIII.A.5 of the Personnel Policy. Section VIII.C.3 of the Personnel Policy, however, provides for progressive discipline for safety violations, and under this Section a first offense results in a written warning, not a termination. The second reason is insubordination. Under Section VIII.D.2 of the Personnel Policy, insubordination relates to carrying out reasonable directions given by a proper supervisor. Sweet was not insubordinate to a proper supervisor, and he did not attempt to avoid registering a sample. Additionally, the Town tested Sweet for alcohol under the Post-Accident Testing provision of the Drug and Alcohol Policy, which did not apply to the situation. The third reason is Sweet's prior incident in April 2017. Sweet never received any discipline for that incident, and he fulfilled his obligation of an outpatient program. Moreover, Hoch stated at the hearing, at least twice, that Sweet was not terminated for alcohol.

The Town did not show that it had just cause to terminate Sweet. The Union requests that the Arbitrator return Sweet to his previous position. The Union also requests that Sweet be made whole for all lost wages, including any applicable overtime; seniority; healthcare benefits, including reimbursement for any costs that Sweet or his dependents incurred due to loss of coverage; and other benefits.

OPINION

The issue in this arbitration is whether the Town had just cause to discharge Sweet. Under a just cause provision, like the one contained in Article 19 of the parties' collective bargaining agreement (Agreement), an employer has the burden of proving that just cause supports the discharge. The Town did not carry its burden.

The Town provides three reasons to support the discharge of Sweet under the parties' Agreement. First, Sweet failed to exercise reasonable care while operating a Town vehicle. Second, Sweet was insubordinate to a police officer. Third, its leniency from the April 28, 2017 incident, combined with the November 20, 2017 incident, provides just cause to discharge Sweet. I disagree, and address each reason in turn.

First, the Town is correct that Sweet failed to exercise reasonable care while operating a Town vehicle. The Town is also correct, and the Union concedes, that this failure to exercise reasonable care violated the Town's Personnel Policy, specifically Section VIII.A.5. Accordingly, Sweet's failure to exercise reasonable care subjects Sweet to discipline under the Agreement and Section VIII.C.3 of the Personnel Policy. Standing alone, however, it does not constitute just cause to discharge him.

Second, the Town did not establish that Sweet was insubordinate. As I have explained, I do not credit the opinion statement in the Crash Report that Sweet attempted to avoid registering a blood alcohol sample. To successfully establish the opinion's veracity, the Town needed to produce the officer at the hearing to testify, and subject his testimony to cross-examination. The Town failed to do this without explanation. Because the Town failed to establish that the conduct upon which it predicated its allegation of insubordination actually occurred, I need not address whether such conduct, if proved, would constitute insubordination or other just cause to discharge Sweet.⁸

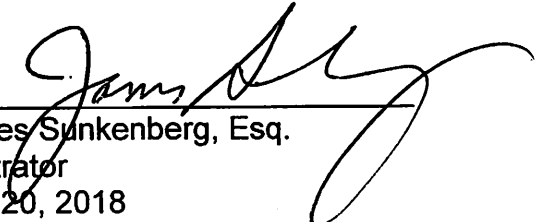
⁸ Additionally, the Town did not follow its own policy regarding the threshold for post-accident testing, which this accident did not meet because the vehicle was drivable. I also note that Sweet's blood alcohol result of .016% did not violate the Town's Drug and Alcohol Policy, and the Town did not prove it ever gave this policy to Sweet.

Third, the notion that the Town may unilaterally and indefinitely defer disciplining an employee in the name of leniency and then later hold that leniency against that employee as an aggravating factor supporting discharge in an unrelated incident of ordinary negligence is contrary to the parties' contractual provision that just cause support the discharge. Sweet fully complied with the Town's requirements of him after the April incident. In November, the Town treated Sweet as if it had placed him on a last-chance agreement after the April incident. No such agreement exists.

In conclusion, the Town proved no more than that the November 20, 2017 incident resulted from a failure to exercise reasonable care in the operation of a motor vehicle. In other words, Sweet had an accident, and the Agreement requires the Town to treat it as it would any other accident involving any other employee. The just cause provision of the parties' Agreement prohibits the Town from discharging Sweet based upon the facts that the Town has established. I therefore sustain the grievance.

AWARD

The Town did not have just cause to terminate the employment of Mr. Bob Sweet. The Town shall rescind Sweet's discharge and reduce his discipline to a written warning, pursuant to Section VIII.C.3 of the Personnel Policy, for a first offense failure to exercise reasonable care in the operation of a motor vehicle. The Town shall immediately reinstate Sweet to his position without loss of seniority; and, calculating from the date of his unjust discharge, make Sweet whole for all provable lost wages and contractual benefits that directly resulted from the Town's violation of the Agreement. When calculating the remedy, the parties shall include, among other things, the Town's payout to Sweet of his accrued vacation and sick time, but shall not include any property damages related to the November 20, 2017 accident.


James Sunkenberg, Esq.
Arbitrator
July 20, 2018