

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS

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In the Matter of the Arbitration Between: \*  
\*  
CITY OF QUINCY \*  
\*  
-and- \* ARB-19-7255  
\*  
MASSACHUSETTS LABORERS' DISTRICT \*  
COUNCIL, LABORERS' LOCAL 1139 \*

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Arbitrator:

Timothy Hatfield, Esq.

Appearances:

Paul King, Esq. - Representing City of Quincy  
Sal Romano - Representing Massachusetts Laborers'  
District Council, Laborers' Local 1139

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 suspend Mr. McCormack for three days, and the grievance is denied.

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Timothy Hatfield  
Arbitrator  
October 16, 2020

### **INTRODUCTION**

Massachusetts Laborers' District Council, Laborers' Local 1139 (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 September 13, 2019.

The parties filed briefs on January 31, 2020.

### **THE ISSUE**

Whether the City had just cause to suspend Mr. McCormack for three days for an incident on November 20, 2018? If not, what shall be the remedy?

### **RELEVANT CONTRACT LANGUAGE**

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

#### **ARTICLE V RIGHTS OF THE CITY (In Part)**

The union recognizes the rights of the City to operate and manage its departments and divisions. Without limiting the generality of the foregoing, the City reserves to itself through its management officials the rights to direct employees, to hire, promote, transfer, assign, and retain employees within the departments and divisions covered by this Agreement; and to suspend, demote, discharge, or take other disciplinary action against any employee for just cause; ...

#### **ARTICLE VI PERSONNEL POLICIES**

The City and its management officials have the right to promulgate reasonable rules and regulations such as personnel policies pertaining to the employees covered by this Agreement, so long as such rules, regulations and policies do not conflict with any specific terms and conditions of this Agreement. The City's expectation is that employees will

at all times conduct themselves in a professional manner, and will perform his/her duties in a good workmanlike manner.

**ARTICLE XXX I GRIEVANCE AND ARBITRATION PROCEDURE (In Part)**

For the purposes of this Agreement, the term grievance shall mean any difference or dispute between the City and the Union or between the City and any employee with respect to the interpretation, application, claim, or breach or violation of any of the specific provisions of this agreement. ...

5) If no satisfactory resolution of the grievance is reached at Step 4, ... the Union may within forty-five (45) days after the decision is due, submit the matter to arbitration under the provisions of the American Arbitration Association ... or by mutual agreement with the City, file for expedited arbitration at the Department of Labor Relations.

The decision of the arbitrator shall be final and binding upon the parties. ... The arbitrator shall not add to, subtract from, or alter any provisions of the Agreement, nor may he make any decision in conflict with the laws of the Commonwealth of Massachusetts governing municipal employees. ...

**FACTS**

The City of Quincy (City) and the Union are parties to a collective bargaining agreement that was in effect at all relevant times to this arbitration. Ed McCormack (McCormack / grievant) works in the Sewer/Water/Drain Division of the DPW. Ed Donovan (Donovan) is also an employee in the Sewer/Water/Drain Division of the DPW. Michael Norton (Norton) is the Operations Manager of the DPW and Al Grazioso (Grazioso) is the Commissioner of Public Works.

On November 20, 2018, Norton received an email from Grazioso regarding a citizen complaint. The complaint stated that: "one of your trucks drove by the house this morning (truck 1239) and the passenger rolled down the window and flicked his cigarette butt on my lawn. Not good." It was signed "Bayside Rd. resident." The email was sent from the resident's personal email account at 10:11 AM.

McCormack and Donovan were working together in truck 1239 on the morning of November 20, 2018. Donovan was driving and McCormack was the passenger. The truck is equipped with a sign that states smoking inside the vehicle is prohibited. Donovan and McCormack were replacing a water meter on Mayflower Road, which is near Bayside Road.

Norton spoke to Donovan and McCormack together on November 20, 2018 about the complaint. Norton asked who was driving and McCormack stated he was the passenger. Norton asked who was smoking in the truck and McCormack denied he was smoking and stated that he was aware there was no smoking in City vehicles. Donovan also stated that there was no smoking in the vehicle.

After the first meeting, Norton met with Donovan without McCormack present. At this meeting, Donovan stated that McCormack was smoking in the truck and had seen him throw the cigarette butt out the window but did not want to get him in trouble.<sup>1</sup>

On December 10, 2018, McCormack was suspended for three days for smoking in the truck and being untruthful during the investigation. In his suspension letter, Norton stated that on May 21, 2018, McCormack had been provided a memorandum stating the City's policy prohibiting smoking in City vehicles. Norton also noted that McCormack, on October 10, 2018, had received

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<sup>1</sup> Donovan's testimony on whether McCormack was smoking and threw his cigarette butt out the window has repeatedly changed depending on whether McCormack was present during the questioning. On the two occasions that McCormack was not present in the room, Donovan stated that McCormack was smoking in the truck and threw his cigarette butt out the window. On three other occasions, when McCormack was present, Donovan has denied McCormack was smoking in the truck.

a one-day suspension for in-part not being truthful when questioned by a supervisor.

On December 11, 2018, the Union filed a grievance,<sup>2</sup> citing a lack of progressive discipline that was denied at all steps by the City and resulted in the instant arbitration.<sup>3</sup>

### **POSITIONS OF THE PARTIES**

#### **THE EMPLOYER**

##### The Complaint is Admissible and Reliable

It is well established that hearsay evidence is admissible in arbitration proceedings. It is necessary to assess the reliability of the complaint based on independent corroborating evidence, giving it weight as appropriate. Arbitrators have admitted hearsay evidence in the form of complaints against employees under like circumstances without requiring the complainant to testify. Employers need not necessarily produce the complaining individual to establish the nature of the alleged misconduct that precipitated the discipline, especially where the employer provides credible and corroborating testimony about the nature of the complaint.

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<sup>2</sup> After filing the grievance, bargaining unit members attempted to prevent Donovan from answering questions from the City about the incident. Union representative Joseph McArdle (McArdle), after a phone conversation with City Labor Counsel Michael Maccaro, had to intervene to have Donovan answer questions without a Union Steward present after being assured Donovan was not being disciplined.

<sup>3</sup> On the morning of the arbitration hearing McCormack phoned Donovan at his home prior to leaving for the hearing at the DLR office in Boston.

There is ample evidence demonstrating that the information in the complaint is reliable and should support the arbitrator's conclusion that the grievant smoked inside Truck 1239. The reliability of the complaint is established by the numerous details that were corroborated by independent evidence. First, the complaint correctly identified DPW Truck 1239 being in the area of Bayside Road on the morning in question. Based on the work logs for the job the grievant and Donovan performed nearby on Mayflower Road, the complaint was submitted around the same time that they would have been traveling in the area. The complaint also correctly identified that there were two people in the vehicle. It would have been impossible for the resident to have known any of these detailed facts unless he actually did see the grievant handling a smoked cigarette butt inside the vehicle.

That the complaint was short, detailed and to the point further establishes its reliability. It is exactly what one would expect to be written by a constituent who saw a public employee throw a smoked cigarette butt onto his grass. Even the grievant admitted that nearly all of the information in the complaint was accurate. Conveniently, the only part he disputes (i.e. throwing a smoked cigarette butt out of the window) is the one that contributed to his suspension. Furthermore, Donovan's testimony and prior statements to Norton corroborates the information in the complaint. The complaint is not the sole proof of the grievant's misconduct, it is corroborated by ample independent evidence.

Despite what the Union may suggest, there is no basis to conclude that the complaint is fabricated or inaccurate. There is every reason to believe the resident saw what he reported. The grievant testified that he does not know anyone who

lives in the area of Bayside Road, therefore, there is no evidence that the resident was biased against the grievant. The grievant could not identify any conceivable reason why this resident would go out of his way to file this complaint. It is also significant that the resident was willing to be identified in the complaint and did not file it anonymously. Taking the credible evidence together, the complaint has the necessary indicia of trustworthiness for it to be admitted and given weight.

The Union also cannot claim it did not have the opportunity to elicit testimony from the resident. The arbitrator explicitly asked the Union if it wanted to subpoena the resident to testify in this matter, and the Union declined the opportunity. It cannot now raise the nonappearance of the resident as a defense. The City was not obligated to call the resident to testify, as it had other credible and corroborating evidence of what happened from Donovan. So, to the extent that the Union suggests that just cause is lacking because the resident did not testify during the hearing, that argument is meritless.

#### The Grievant Smoked in the Vehicle and Subsequently Lied to Norton

To be sure, Donovan's testimony was inconsistent in some respects, but not all. His reluctance to testify against the grievant was obvious, and he stated as much to Norton during the investigation. There was one takeaway however that prevailed from the evidence as a whole: Donovan was telling the truth when he twice told the City he saw the grievant smoking inside Truck 1239. There is no question that Donovan was anxious and hesitant to testify candidly about what he observed.

Donovan admittedly has been reluctant to tell the truth about what he saw since the very beginning. He told Norton during their second meeting that he did see the grievant smoking inside the vehicle, a statement witnessed by general foreman William Wright. Additionally, Donovan admitted that he told the City during a preparation meeting that he did in fact see the grievant smoking inside Truck 1239. His obvious reluctance to directly admit to this fact during the hearing,<sup>4</sup> does not preclude a finding that it exists, where context demands otherwise.

In light of the complaint and Donovan's statements, the evidence established that the grievant lied about what happened when Norton asked him. To be sure, the grievant's story has evolved since the beginning, adding self-serving information at the hearing that he chose not to share with the City. It is undisputable that he denied smoking in the vehicle when Norton questioned him and throughout the proceedings. Norton testified that it is more egregious for an employee to lie about smoking inside a City vehicle, as compared to an employee who owns up to the infraction. The arbitrator should conclude that there was just cause for the three-day suspension given to the grievant, in part, for being untruthful when questioned.

#### The Grievant is Not a Credible Witness

The arbitrator should not credit the grievant's testimony on whether he smoked inside a City vehicle. First, and most significantly, the grievant's testimony

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<sup>4</sup> Donovan's exact testimony was "that it is possible" that he told Norton that he saw the grievant smoking inside the vehicle.

was contradicted by what Donovan told the City on two occasions when the grievant was not present, that the grievant smoked in the DPW truck. The grievant was still denying under oath what Donovan said occurred and what the complainant independently reported. The grievant even testified inconsistently about something as simple as how often he smokes during his shifts, first denying that he smokes during shifts and then stating that he smokes five or six times per shift. It was apparent that the grievant was relying on blanket denials that contravened other credible evidence.

Further, the grievant's credibility is compromised by the fact that he could not identify a legitimate reason why the resident would report that he saw the passenger in Truck 1239 throw a cigarette butt out the window. The only response offered was that he puts his smoked cigarette butts in his pants pocket, testimony that was offered for the first time during this hearing. So, we are to believe that the resident fabricated only the information regarding the cigarette butt out of the rest of the accurate and detailed information? The evidence simply does not support this theory, and the arbitrator should reject it.

Additionally, the arbitrator should scrutinize what the grievant and the Union have undisputedly done in this case. First, the Union openly and unsuccessfully attempted to prevent Donovan from speaking to the City. Moreover, the grievant called Donovan on the morning of the arbitration hearing. It is reasonable to infer that the purpose of this call was to discourage Donovan from testifying truthfully. It is undisputed that the grievant and Donovan have never been friends or even social acquaintances apart from working together for less than two years.

Moreover, the two had not been working together for almost a year as of the date of the hearing. These facts directly undermine the grievant's self-serving testimony on why he called Donovan on the morning of the hearing. However creative it may be, the grievant's claim that he called Donovan on the morning of the hearing to make sure he didn't oversleep is dishonest at best and deceitful at worst. In sum, all of the circumstances leading up to and involving Donovan's testimony support the conclusion that the grievant is not a credible witness.

### Conclusion

For the reasons outlined above, the arbitrator should conclude that the City had just cause to suspend the grievant for smoking inside a City vehicle and for subsequently being untruthful about it when questioned by a supervisor. All the credible evidence points to only one conclusion, Donovan did see the grievant smoking inside Truck 1239, and Donovan's obvious reluctance to testify against the grievant does not preclude this conclusion. The undisputed evidence showed, and Donovan admitted, that he twice told the City the grievant was smoking in the vehicle. The detailed and reliable complaint from the identified and disinterested resident corroborates the fact that the grievant smoked inside Truck 1239. The City requests that the grievance be denied.

### **THE UNION**

In this case the question that must be asked is: where is the proof, where is the evidence? The resident's absence is fatal to the establishment of just cause by a preponderance of the evidence. The Union has been deprived of testing the resident's memory, the statements alleged, his perception of events, his demeanor

and objectivity. His ability to communicate honestly, convincingly and credibly will never be determined. The record totally lacks the existence of any of the above. The resident's failure to testify, and be cross-examined, prevents any hearsay evidence from receiving any weight of admissibility. How can the truth be determined? What rings true or false? What about the resident's voracity? Without any of the above, it is impossible to arrive or determine the existence of just cause.

The time-tested practical approach to determine the basic elements of just cause were made famous by Arbitrator Dougherty's so-called "Seven Tests". A no answer to any of the seven tests means that just cause was not satisfied or severely weakened by the City's arbitrary, capricious or discriminatory behavior. In this case, questions three and four require an answer of no based upon the evidence presented. Question three and four state:

3. Did the Employer, before administering the discipline to an employee, make an effort to discover whether an employee did in fact violate or disobey a rule or order of management?
4. Was the Employer's investigation conducted fairly and objectively?

This dispute is extraordinary because there is such a lack of evidence to support the City's claims. We know the City has no percipient witness who can testify that McCormack acted in violation of any rules or policies. So, the only matter to be considered is the context of McCormack and Donovan's testimony and the results of the City's incomplete and poorly conducted investigation that does not support any of their conclusions.

The City's evidence failed to prove the issue to which it was directed. The City did not interview all the witnesses who were identified and never introduces any evidence of independent reliability. In fact, there is no direct evidence in this case. No proof, if believed, that can prove a factual claim regardless of other evidence in the record. This case consists of evidence best described as circumstantial based primarily on uncorroborated statements. The City based its entire case on an exhibit exclusively based on hearsay. The evidence relied upon to support the discipline is not reliable. This leaves all of the facts submitted as unreliable in nature, untested by cross-examination, untrustworthy, and not worthy of any evidentiary weight or relevance.

#### Conclusion

In summary, it becomes obvious the City has failed to meet its burden of proof because it relied upon evidence which did not withstand or was tested by cross-examination. The evidence proved to be unreliable, untrustworthy and unacceptable. The City failed the "Seven Tests" of just cause, and the discipline was arbitrary, capricious and without any sense of equity or logic. This was an unprovable case, yet the City elected to impose a three-day suspension for alleged bad behavior. Considering all of the above, the Union requests the grievance be sustained and the grievant awarded all lost money and entitlements.

#### **OPINION**

The issue before me is: Whether the City had just cause to suspend Mr. McCormack for three days for an incident on November 20, 2018? If not, what

shall be the remedy? For all the reasons stated below, the City had just cause to suspend Mr. McCormack for three days, and the grievance is denied.

The Union's fundamental argument in this case is that the arbitrator can not rely on the information provided in the citizen's complaint because the City did not call the resident to testify at the arbitration hearing. This argument is unpersuasive for multiple reasons. First, the City is not relying exclusively on the resident's complaint as the basis for the discipline. While it is true that the resident's complaint serves as the lynch pin for what ultimately results in a three-day suspension, as discussed in further detail below however, it is not the only evidence presented by the City. Additionally, the Union, while lamenting its inability to test "the resident's memory, the statements alleged, his perception of events, his demeanor and objectivity [and] his ability to communicate honestly, convincingly and credibly," it fails to acknowledge that during the hearing, the Union was offered the opportunity to suspend the hearing so it could subpoena the resident for a rescheduled second day of hearing. The Union, for undisclosed reasons, declined the opportunity to subpoena the resident and bring him in to testify so it could explore all of the issues that it now claims are reasons for the complaint to be ruled inadmissible. Based on these factors, I reject the Union's argument that the complaint is inadmissible, and/or lacks evidentiary weight.

I find the resident's complaint to be persuasive based on the significant factors that upon investigation were found to be accurate. First and foremost, work records demonstrate that Truck 1239 was in the location described at the time reported. Second, the complaint reported two employees in the truck, and it is

undisputed that Donovan and the McCormack were in the truck on that particular date and time.

While McCormack continues to deny smoking in the truck, I find his testimony to be remarkably uncreditible. His testimony of putting his used cigarette butts in his pants pocket as a defense of why he couldn't have thrown the cigarette butt out the window was specious at best. In addition, his repeated actions in both attempting to prevent Donovan from speaking to the City during its investigation, and in calling Donovan on the morning of the arbitration hearing to intimidate him prior to his testimony is reprehensible. His repeated actions to prevent damaging testimony against him, and his own flimsy testimony lead to the inevitable conclusion that he is guilty of smoking in the truck as alleged by the City.

I am persuaded by the totality of the evidence presented by the City, including my observation of Donovan's testimony at the arbitration hearing, that on two different occasions Donovan told the City that McCormack was smoking in the truck on the day in question. His reluctance to confirm this information at the arbitration hearing and his extreme nervous and uncomfortable demeanor at the hearing were clearly related to McCormack's repeated intimidating actions. Additionally, I find the testimony of Norton that Donovan, on two occasions, confirmed McCormack smoked in the truck, combined with Donovan testimony that "it is possible" he told Norton that McCormack smoked in the truck to be creditible.

Based on the resident's complaint, and the eyewitness testimony of Donovan, the City had just cause to believe that the grievant not only was smoking in the truck and tossed his cigarette butt on the resident's lawn as reported, but

also lied to his supervisor when questioned about his actions. As such, the City had just cause to suspend the grievant for three days and the grievance is denied.

**AWARD**

The City had just cause to suspend Mr. McCormack for three days, and the grievance is denied.



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Timothy Hatfield, Esq.  
Arbitrator  
October 16, 2020