

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of Arbitration between: *
* ARB-20-8068
TOWN OF WAREHAM *
*
and *
*
MASSACHUSETTS LABORERS' *
DISTRICT COUNCIL *

Arbitrator:

James Sunkenberg, Esq.

Appearances:

Joseph Emerson, Jr. Esq. - Representing Town of Wareham
Sal Romano - Representing Massachusetts Laborers' District Council

The parties received a full opportunity to present testimony, exhibits, and arguments, and to examine and cross-examine witnesses at a hearing. I have considered the issue, and, having studied and weighed the evidence presented, conclude as follows:

AWARD

The Town did not terminate the grievant with just cause. The remedy shall be that the Town shall convert the discharge to a thirty-day suspension. The Town shall reinstate the grievant to his prior or a comparable position and make him whole for all lost wages and benefits, minus the thirty-day suspension.



James Sunkenberg, Esq.
Arbitrator
October 8, 2021

INTRODUCTION

On June 24, 2020, the Massachusetts Laborers' District Council (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 April 7, 2021, I conducted a hearing by videoconference.¹ On May 27, 2021, the Union filed its post-hearing brief; and on May 28, 2021, the Town of Wareham (Town) filed its post-hearing brief.

ISSUE

The parties stipulated the issue:

Was the grievant, Tyler Gomes, terminated with just cause? If not, what shall be the remedy?

RELEVANT CONTRACTUAL PROVISION

ARTICLE II MANAGEMENT RIGHTS

The Employer specifically retains the right to establish and abolish jobs, classifications and descriptions; to assign, reassign, hire, promote, transfer, retain, discipline, suspend, demote, and/or discharge employees for just cause.

FACTS

General Background

In or around April 2019, the Town hired the grievant, Tyler Gomes (Gomes) as a laborer in its Water Pollution Control Facility (WPCF). Christiana Robbins (Robbins), a student at a local vocational high school, interned as part of a cooperative program at the WPCF during her 2018 – 2019 senior year of high school. As part of the cooperative

¹I conducted the hearing remotely pursuant to Governor Baker's teleworking directive to executive branch employees.

program, Robbins worked in both the laboratory and the administration office; she worked in the administration office from approximately March – mid-May 2019. After graduating in May 2019, Robbins interned in the WPCF laboratory from June 3, 2019 – September 1, 2019. In February 2020, the Town hired Robbins to work part-time as an assistant in the WPCF administration office.

Robbins met Gomes during her cooperative program when he came into the administration office to do paperwork upon being hired, but she did not interact with him much during her cooperative because he infrequently had occasion to enter the administration office. Laborers regularly pass through the laboratory to enter and exit the building several times a day. At some point during her summer internship, Robbins and Gomes began regularly conversing when he would pass through the laboratory. Gomes would stop and talk to Robbins, and both Robbins and Gomes described the general work environment as friendly. In the Summer of 2019, Gomes was 25 and Robbins was 18.

Robbins testified that one day during her internship, while she was working on a bacteria project, Gomes sat down while he was talking to her in the laboratory and out of the blue told her that he was a “sex addict.” According to Robbins, she felt uncomfortable and violated. Gomes denied making this statement.

At some point after they began conversing at work, they became “friends” on social media sites such as Instagram and Snapchat. Although they communicated outside of work on social media, they did not interact in person outside of work. Their communications involved exchanging text messages and/or photographs and commenting on each other’s posts. The substance and frequency of these communications cannot be objectively ascertained because the record does not contain

any of their exchanges. Generally, Robbins' testimony minimized her role in their social media communications; whereas Gomes testified that their communications were mutual, including exchanging selfie-photographs.

During the period from September 2019 through February 2020, when Robbins was not an employee of the Town, they continued to communicate on social media. Robbins testified that during this period they mostly communicated over Snapchat by sending photographs or chatting back and forth. Robbins testified that during this period Gomes sent her photographs of himself shirtless and sent her a photograph of himself in a towel. According to Robbins, these communications made her uncomfortable because they worked together, and he is older than she. Gomes testified that they communicated with less frequency over social media after Robbins' internship ended.

When the Town hired Robbins to work in the administration office in February 2020, she rarely interacted with Gomes during the workday because Gomes' duties do not regularly bring him into the administration office, and they were not alone together, but they continued to communicate on social media. Gomes testified that their communications probably increased upon Robbins' return to work for the Town.

On or around March 17, 2020, Gomes commenced an eight-week parental leave to care for his newborn child. Robbins testified that they communicated over Snapchat after Gomes went out on leave, that he sent her photographs of his child that she responded to, and that he made offensive comments. Gomes testified that they mutually sent each other photographs, including mirror-selfies, over Snapchat after he went out on leave.

Discriminatory Harassment Policy

The Town maintains a Discriminatory Harassment Policy (Policy). On April 24, 2019, Gomes signed to acknowledge receipt of the Policy, and Gomes underwent Discrimination and Harassment Awareness and Prevention training on March 9, 2020. The record does not establish the substance of the training on March 9, 2020, or whether Gomes underwent any training prior to March 9, 2020. In March 2020, Robbins underwent the same training at a different session. The Policy provides, in relevant part:

I. Introduction

It is the goal of the Town of Wareham to promote a workplace that is free of discriminatory harassment (“Harassment”) of any type, including sexual harassment. Harassment consists of unwelcome conduct, whether verbal or physical, that is based on a characteristic protected by law, such as gender....The Town of Wareham will not tolerate harassing conduct that affects employment conditions, that interferes unreasonably with an individual’s performance, or that creates an intimidating, hostile, or offensive work environment.

The Town of Wareham prohibits any conduct towards its employees that could be Harassment, to the extent that conduct occurs in the workplace, in connection with work-related travel, and/or at work sponsored events....

Because the Town of Wareham takes allegations of Harassment and retaliation seriously, we will respond promptly to reports and complaints of workplace Harassment or retaliation. Where it is determined that inappropriate conduct has occurred, we will act promptly in a manner designed to eliminate the conduct, including corrective and/or disciplinary action as the Town of Wareham determines is appropriate.

Please note that while this policy sets forth our goals of promoting a workplace that is free of Harassment, the policy is not designed or intended to limit our authority to discipline or take remedial action for workplace conduct which we deem unacceptable, regardless of whether that conduct satisfies the definition of harassment. This means that the Town of Wareham will take responsive action, including corrective or disciplinary action, where there is conduct that could contribute to Harassment in the workplace, without regard to whether the conduct rises to the level of “unlawful harassment.”

II. Definitions

Sexual Harassment

In Massachusetts, the legal definition for sexual harassment is this: “sexual harassment” means sexual advances, requests for sexual favors, and verbal or physical conduct of a sexual nature when....

b. such advances, requests or conduct have the purpose or effect of unreasonably interfering with an individual’s work performance by creating an intimidating, hostile, humiliating or sexually offensive work environment.

....

The definition of sexual harassment is broad. In addition to the above examples, other sexually oriented conduct, whether intended or not, that has the effect of creating a work environment that is hostile, offensive, intimidating or humiliating to either male or female workers could rise to the level of unlawful harassment and is therefore prohibited.

Hostile Work Environment

The legal definition of harassment other than sexual harassment is conduct based on a legally-protected category that has the purpose or effect of unreasonably interfering with an individual’s work performance by creating an intimidating, hostile, humiliating or offensive work environment.

For purposes of this policy, “Harassing Conduct” means any conduct, whether verbal or physical, that is sexual in nature or based on a characteristic protected by law, without regard to the welcomeness, severity or pervasiveness of the conduct. In order to maintain an environment free of Harassment, the Town of Wareham prohibits Harassing Conduct in any work-related context. While it is not possible to list all those circumstances that may constitute Harassment, the following are some examples of prohibited conduct; in particular contexts, this conduct could rise to the level of unlawful harassment:

- Display or circulation of written materials or pictures that are sexual or degrading based on a legally-protected category.
- Verbal abuse, slurs, derogatory comments, or insults about a legally-protected category
- Unwelcome sexual advances – whether they involve physical touching or not;
- Sexual epithets, jokes, written or oral references to sexual conduct, gossip regarding one’s sex life; comment on an individual’s body, comment about an individual’s sexual activity, deficiencies, or prowess;
- Displaying sexually suggestive objects, pictures, cartoons;
- Unwelcome leering, whistling, brushing against the body, sexual gestures, suggestive or insulting comments;
- Inquiries into one’s sexual experiences; and,
- Discussion of one’s sexual activities.

....

III. Reporting Procedures

All employees, managers, and supervisors of the Town of Wareham share responsibility for avoiding, discouraging and reporting any form of Harassing Conduct and/or Harassment....

If any of our employees have observed or been subject to conduct that could be Harassing Conduct, the employee has the right to file a report with our organization. This may be done in writing or orally. In addition, residents, visitors, applicants, vendors, contractors, their agents and employees, or other third parties who believe they have been subjected to Harassing Conduct or Harassment by a Town employee may file a report with our organization using the procedures described herein....

Prompt reporting of Harassing Conduct is in the best interest of our organization and is essential to a fair, timely, and thorough investigation....

IV. Investigation

When we receive a report, we promptly investigate the issues in a fair and expeditious manner to determine whether there has been a violation of our policy. The investigation will be conducted in such a way as to maintain confidentiality to the extent practicable under the circumstances. Our investigation will usually include private interviews with the person filing the report and with witnesses whose information would be helpful to a determination of what happened. We will usually interview the person alleged to have violated the policy. Everyone is required to cooperate with all aspects of an investigation. When we have completed our investigation, we will, to the extent appropriate, inform the reporter and the person alleged to have violated the policy of the outcome, and if appropriate, the responsive action while maintaining privacy as appropriate on the details of specific employee information.

Notwithstanding any provision of this policy, we reserve the right to investigate and take action on our own initiative in response to behavior or conduct which may violate this policy, regardless of whether an actual report or complaint is made.

V. Disciplinary Action

If after an investigation, the Town determines that one of our employees has violated this policy, we will take responsive action as we deem appropriate under the circumstances. Such action may range from counseling or training to corrective or disciplinary action, which may include termination from employment.

Robbins Reports Gomes to Human Resources

On Monday morning, March 23, 2020, Robbins complained to her boss that an incident had occurred – outside of work – with Gomes over social media on the evening of Friday, March 20, 2020. Her boss immediately sent Robbins to speak with Dorene Allen-England, Esq. (Allen-England), the Assistant Town Administrator and Director of Human Resources. Robbins and Allen-England spoke that morning for between thirty minutes and one hour. During Robbins' meeting with Allen-England, Allen-England suggested to Robbins that Robbins report Gomes to the police. Allen-England told Robbins that she would commence an investigation and get back to Robbins.

Allen-England's contemporaneous notes of this conversation state:

friday 3/20 texting w/ Tyler back/forth thru-out day.

-Talking about studying w/ him for oper. cert. program. He asked her to "Netflix + chill"

-he asked her "how important is sex in a relationship to you"

@ 5:30 p.m. he sent her naked pic. of himself in mirror w/ purple devil emoji over his penis. She blocked him – snapchat

-she spoke w/ [C + M] (co-workers but went to school w/ them – friends) they were playing video games.²

[M] texted Tyler. Tyler told [M] he sent pic + [M] called Tyler out on it.

once she blocked him Tyler tried following on instagram again.

he would tell her "she's hot" "pretty" "wants her to like him" these texts were during work and after.

she didn't know Tyler before working here.

²Neither M nor C testified at the arbitration hearing, and I have not used their names in this decision. I have not considered any of the statements attributed to them for the truth of any matter asserted therein.

Robbins' Testimony about March 20, 2020 Incident and Allegations against Gomes

Robbins testified that on the evening of Friday, March 20, 2020, she was at her boyfriend's house playing video games. She planned to take a work-related examination to obtain an operator's license and had previously been studying with two friends – M and C – who also worked for the Town. Robbins testified that she contacted Gomes on Snapchat to see if he had a textbook she wanted for the examination and she asked him to help her study with M and C. According to Robbins, Gomes responded that she could come over to his house to watch him be a dad and “watch Netflix and chill,” which Robbins testified her “generation” understands to mean “have sex.” Robbins testified that a suggestion was made to go to the beach, but she said no. She felt uncomfortable and did not respond.

Robbins testified that approximately thirty minutes later, Gomes sent her, via Snapchat, a photograph of himself standing nude in a mirror with a purple, devil-emoji covering his genitals. Gomes did not expose himself to Robbins. Robbins opined that Gomes could not have accidentally sent this photograph because he would have had to intentionally attach the photograph to the “chat” to send it. Robbins did not preserve the photograph, and she immediately “blocked” Gomes on Snapchat, which deleted the entirety of their prior communications. Robbins did not show the photograph to anyone, but she told M and C about it.

Robbins testified that after this incident – she did not identify when – she removed Gomes from her Instagram account. Both had been “following” each other on Instagram. Robbins testified that Gomes regularly posted images on his Instagram account that included revealing “mirror-selfies.” Unlike with Snapchat, Robbins did not explain why she

never preserved or produced any of their Instagram communications. Robbins did not testify about any additional attempts by Gomes to communicate with her after March 20, 2020.

Additionally, Robbins testified that during a “normal conversation” Gomes asked her if sex was important to her in a relationship, which Robbins found “kind of weird.” She appeared to attribute this question to a social media exchange, but she did not identify when that exchange occurred; she did not include this question from Gomes in her testimony about the events of the events of March 20, 2020. Robbins also testified that in or around February 2020, Gomes made comments to her over Snapchat about her looks, but she did not testify about these comments with specificity.

Allen-England’s Testimony about Meeting with Robbins

Allen-England testified that Robbins explained to her that Robbins was at her boyfriend’s house texting back and forth with Gomes when he made the Netflix comment. Allen-England did not associate “Netflix and chill” with sex until Robbins explained to her that Robbins associated “Netflix and chill” with sex. Thirty minutes later, Robbins received the devil-emoji photograph. During this conversation, Robbins revealed to Allen-England that Gomes had made prior comments to her of a sexual nature. Robbins told Allen-England that Robbins had told M and C about the March 20, 2020 incident. Allen-England told Robbins that she would investigate and get back to Robbins.

Robbins’ Communication with C

On or around Sunday, March 22, 2020, Robbins communicated with C about Gomes over Snapchat.³ Robbins made the following relevant statements:

- I had to block Tyler and I'm not sure if I should report or not
- I was trying to just be nice and talk with him and he started asking how important sex is in a relationship to me and stuff like that then sent me a naked picture with an emoji over his dick
- I blocked him so I don't have anything he said to me
He admitted to sending the picture to [M]
He said he "sent it to his recents"
- I was really uncomfortable
- And when he was asking about hanging out he asked where to go and I'm like maybe the beach it's my favorite but not if it's windy because my hairs a mess and I'm my chapstick and he was like well don't wear it I don't like the feeling of it anyways [sic]
Like we aren't hanging out to do stuff
I thought I gave him one of my old wastewater books so I was going to study with him with it but he doesn't even have it it's in my car
So that was the reason behind hanging out but after that never
- He's always like come Netflix and chill
Then he told me he has a "crush on someone" even tho he has Courtney
- I did I just would friend zone him and say we can be friends⁴
- No matter what he said I would friend zone him because 1) I have a boyfriend 2) I don't have feelings for him
- He asked me about if I ever thought about him in that way and what it was like I go if I meet someone I find attractive I think of scenarios of being together but it's not like I stay on them and told him even if I did think about him in that way they're thoughts and have nothing to do with real life
- I would always bring him back to the friend zone or change topics....

³This is the only social media communication in the record. The parties agreed that C's statements in this exchange would not be admissible for the truth of any matter asserted therein.

⁴Robbins is acknowledging that she perceived Gomes to be romantically interested in her.

He talked about me coming over and I was like wow I think I found summer shorts for work finally trying to change the subject because we all know work shorts are to the knees...

Idk be never got the hints and was just always uncomfortable. He would ask for mirror selfies and thinks I'm perfect inside and out and he wants to make me like him [sic]

- Should I unblock him and see if he says anything else? Then I can screen shot it and actually have something
I kinda wanna tell guy on Monday

- It's scary for me to do that because most guys are bigger than me and I never know if they're going to hurt me. It happens all the time. But I will report him
I unblocked him so we'll see how it goes.

- It's just intimidating for me because I'm barely 90 pounds yanno. Tyler just made me uncomfortable and hopefully if I talk to guy and Dorene it'll be alright

Allen-England Commences Investigation

On March 23, 2020, after speaking with Robbins, Allen-England spoke with M and C together in her office. Allen-England testified that M told her that he reached out to Gomes, and Gomes told M that he had sent the photograph to his recent social media contacts, which included Robbins. Allen-England testified that both M and C reported to her that Gomes had made comments of a sexual nature in the past about Robbins.

On March 24, 2020, Allen-England spoke over the telephone with Gomes, who was on parental leave. Allen-England's contemporaneous notes of this conversation state:

Called Tyler
wrongfully accusing me

"not really out of line"
-harmless flirting

No word "stop"

Tyler sent pic of baby + then friendly convo. [I] have thought of you before [she said]

She asked to hang out – made plans convo was dead
-he accidentally sent pic

[his solution to this] rotate him to another dept.
Joking w/ [M]. was an accident pic says. “I like the way my hip looks”

Suspension [said he learned this at my MCAD training] 1st time = his solution

Sd “she’s cute”

“Girls get benefit of doubt” “mutual to an extent” “coming off as a dickhead” “as a female get way more”

I really apologize I don’t mean to be a dickhead

Allen-England’s Testimony about First Conversation with Gomes

Allen-England testified that she called Gomes on Tuesday, March 24, 2020, and told him about the allegations against him. According to Allen-England, Gomes waived his right to Union representation over the telephone; and he told her that he was not really out of line, Robbins had never told him that she wanted him to stop, and he admitted to accidentally sending the picture to Robbins. Allen-England described Gomes in this conversation as “very polite.” He allegedly told Allen-England that girls get the “benefit of the doubt” and he apologized to Allen-England if he was coming off as a “dickhead.” Allen-England also testified that Gomes said that Robbins had told him in a prior conversation that she found him attractive and thought about him. Gomes suggested that he receive a suspension or be transferred to another department. Allen-England told him she would get back to him.

Gomes’ Testimony about Robbins and First Conversation with Allen-England

Gomes testified that he was attracted to Robbins. He stated that he had asked her if she found him attractive and she had said yes. He acknowledged that he would flirt with

her and thought their flirtation was mutual. They sent each other mirror-selfies and other photographs. He testified that he had given her compliments, including that she was pretty and that she was smart. He would have liked to have had a date with Robbins, but he knew that she had a boyfriend. They had discussed hanging out together, but they never got together in person. Gomes testified that he did ask Robbins to watch “Netflix and chill,” but he testified that he was inviting her to hang out and did not mean the “modern day intention” that Robbins described in her testimony.

Gomes testified that he discovered on the night of March 20, 2020, that Robbins had blocked him from Snapchat after he tried to reach out to her to ask her a work-related question. He testified that he was playing video games with M, who told him that Robbins had blocked him because of the photograph. Gomes testified that he did not know until then that he had sent the photograph to Robbins. According to Gomes, he meant to send the photograph to his girlfriend, but accidentally also sent it to Robbins. In other words, he meant to attach the photograph, but he did not mean to include Robbins as a recipient.⁵

Gomes testified that he told Allen-England during the March 24, 2020 phone conversation that the photograph was an accident. He admitted to Allen-England that he thought Robbins was cute. He felt he was being treated unfairly and realized he was being “a little aggressive” so he apologized to Allen-England if he was coming across as a “dickhead.” He testified that he would have apologized to Robbins once he realized he offended her, but Allen-England told him not to contact her. Robbins never communicated to Gomes that their interaction offended her or made her uncomfortable.

Robbins Reports Gomes to the Police

⁵I note here that the Town waived its right to cross-examine Gomes during the hearing.

On Wednesday, March 25, 2020, at 12:49 PM, Robbins, taking Allen-England's prior suggestion, reported Gomes to the Wareham Police Department. The officer who received the complaint noted that Robbins reported no contact with Gomes since the evening of March 20, 2020. The officer informed Robbins that the officer could not pursue criminal charges against Gomes.

Allen-England Concludes Investigation

On March 27, 2020, Allen-England spoke with Robbins over the telephone. Allen-England's contemporaneous notes of this conversation state:

Tyler texted her baby pics after doctor's visit
 C sd "so cute. I just want her" he said "we are a package deal"⁶
 -baby just got her shots. C felt bad + sd I hope she got something good (treat) after.
 -Tyler sd "yeah. A tittie"

Tyler asked her if she thought about him she sd yes but she kept saying "we both have people" "I'm not going to break up w/ my boyfriend"
 -she kept trying to friend zone him + change the topic

Tyler kept asking her to get together
 sd "I'm going to make you like me"
 no convo w/ him after devil emoji pic.

[she started crying] honestly "I feel a little nervous"
 "All men are bigger than me"
 "I'm afraid of being alone around him
 Intimidated

After she blocked him Tyler was driving past boyfriend's house early Wednesday a.m. he lives far from Tyler.

Tyler told [M] he sent pic to his "recents"
 I asked what that meant "recents"
 Means last 6-15 people you snapchatted
 -doesn't know if pic went to all recents or just her

caption on pic was something like "I like how my hair (or hip) looks"

⁶Here, "C" refers to Robbins and not the C who did not testify.

[not the first time] Tyler sent her pic months ago of him in a towel + other mirror selfies

She kept dropping hints:

- just friends
- we have people (boy/girl friends)
- I like being just friends

C didn't like how Tyler acted –
awkward [sic] and uncomfortable

she spoke w/ Zina from WPD re: filing report

Allen-England's Testimony about Second Conversation with Robbins

Allen-England testified that she asked Robbins if Robbins had told Gomes that she thought about him and found him attractive, and that Robbins said yes, but in the context of Gomes saying that he was going to “make” Robbins like her and in response to Gomes asking Robbins if she ever thought about him. Allen-England asked Robbins if Gomes had made other comments, and Robbins told Allen-England that Gomes had made a comment to Robbins about his daughter getting a “titty” for a “treat” after going to the doctor to get a shot. According to Allen-England, Robbins was crying during this conversation and told her that she was afraid, at which point Allen-England suggested that Robbins reach out to the police.

Allen-England did not testify about the allegation in her notes that Gomes was driving by the house of Robbins' boyfriend. She also did not testify about any efforts on her part to ascertain whether Robbins was the only person to receive the photograph from Gomes.

Robbins' Testimony about Second Conversation with Allen-England

Robbins testified that Gomes told her he was going to make her like him at some point over the Summer of 2019; she did not elaborate on the context of the conversation other than to say that Gomes asked her if she liked him, and that Gomes scared her. Robbins testified that she told Gomes he was attractive in response to him asking her, but that she did not think of him that way. Robbins testified that she never talked about sex with Gomes.

Allen-England's March 27, 2020 Conversation with Gomes

On March 27, 2020, Allen-England spoke with Gomes over the telephone. Allen-England's contemporaneous notes from this conversation state:

Told him conducted 4 interviews
that he is entitled to Weingarten or pkge.
-he sd he reached out to Tim Roche + Tim sd I didn't interview anyone. they never left the plant
-he sd I blocked him from talking to everyone

sd. he wld love to say "you're lying"

Now he plans on taking full 12 weeks out.

Told him we discussed him taking his PTO spread out + then returning
He now wants full 12 weeks
I told him to send me email confirming his RTW date + that would be the hearing date.
-B Marcosa will be in touch for him to pay his deductions.

he was pushy + rude. He will fight termination "gray area"

Allen-England testified that after speaking with Robbins, she exchanged "one or two" calls with the Union before again speaking with Gomes over the telephone. She testified that she informed Gomes that she had conducted four interviews, and that he waived his Weingarten rights. Gomes did not change his initial statement and told Allen-England that sexual harassment was a grey area. He also said that he wanted to extend

his parental leave for the full twelve weeks available to him. Allen-England offered Gomes the opportunity to resign or face a discharge hearing. According to Allen-England, this time Gomes was aggressive and rude to her.

Discharge

By letter dated May 26, 2020, Allen-England wrote to Gomes, regarding “Weingarten Meeting,” that, in relevant part:

On March 17, 2020, you started your eight (8) week parental leave for the birth of your child. Subsequent to the start of your leave, you informed me that you would like to stay out for twelve weeks pursuant to FMLA leave. Your leave will expire on June 9, 2020.

....

Additionally, as we have discussed, we have an outstanding disciplinary issue to address with you. I have scheduled a Weingarten hearing for June 10, 2020 at 10:30 a.m. in room 24 at Town Hall. You must attend the hearing. You have the right to bring union representation if you so choose as the meeting may result in disciplinary action. You must arrange for your union representative to be present.

Until the time of your meeting you are not allowed at WPCF.

By letter dated June 11, 2020 (Discharge Letter), Allen-England discharged Gomes. The Discharge Letter states, “Pursuant to our meeting today, your employment... is terminated for cause effective immediately.” Allen-England’s contemporaneous notes from this meeting state, in relevant part:

offered 2 weeks pd w/ 1 month health

[Tyler’s statement] “super unfair” why was [C] interviewed

“not saying I didn’t violate policy”
you should reach out to others (T. Roche, Ryan, etc.)

all other employees. I sd no need since he admitted sending a text. Why would I go around the Plant + ask everyone if he sent nudes.

“accidental” – not embarrassed at all. not showing anything. middle schoolers wld be embarrassed.

She sd he was attractive. He didn't say anything that “she didn't want to hear”

....

I gave him termination letter w/ unemployment but told him we will fight benefits since he was terminated for cause
-he blatantly violated our MCAD policy – which he admits doing

We agreed to waive Grievance steps + go right to arbitration

Allen-England's Testimony about Discharge of Gomes

Allen-England testified at the arbitration hearing that she explained to Gomes during the referenced meeting that he was being discharged for violating the Policy and that this explanation was captured in her contemporaneous notes of that meeting. Allen-England testified that she discharged Gomes because he egregiously violated the Policy by sending a nude photo to Robbins in March 2020, and by various comments and exchanges with Robbins that occurred in person and on social media dating back to the Summer of 2019. Further, Gomes was on notice of the Policy, and he was unapologetic about his conduct. Gomes told M that he sent the photograph to his “recents” but told her that he sent it accidentally. Allen-England testified that she found the comments he allegedly made scary. Additionally, Allen-England opined that the occurrence of any misconduct outside of the workplace did not matter because both Gomes and Robbins are employees.

Allen-England testified that this meeting was an opportunity for Gomes to tell her his side of the story and that he admitted to violating the Policy. She testified that Gomes stated that he did not tell Robbins anything that she did not want to hear. Gomes stated that he was being treated unfairly and questioned why Allen-England had spoken to [C]

and asked Allen-England to speak to additional employees, which Allen-England refused to do. Allen-England testified that although she already concluded that Gomes had violated the Policy, she had not yet decided to discharge him. At the conclusion of this meeting, the Union and the Town agreed to waive the grievance process and proceed directly to arbitration.

Robbins' Statement

After Allen-England discharged Gomes, she asked Robbins to prepare a written statement summarizing her allegations against Gomes. In her testimony, Allen-England did not explain why she waited to take a statement from Robbins until after she discharged Gomes. Allen-England did testify, however, that she intentionally limited the documents in this matter to her investigatory notes. On June 17, 2020, Robbins submitted the following statement to Allen-England:

When I started working at the Water Pollution Control Facility, I was met by the people whom I would now work with. At first I was nervous being one of the only girls that would be working in the lab or with equipment (as an intern). Soon I realized there was nothing to worry about. These men met me with nothing but kindness, compassion, and support. They taught me and didn't make me feel uncomfortable or less than them for not knowing as much. I worked in this environment for a few months until I started working in the office more for my Senior Project. After school was over I returned to a full time Wastewater Intern working with the men I had worked with before.

I met Tyler when I was still partly working in the office for my year-long project. I thought he was nice and he seemed like a good addition to the team. We had what I considered a friend relationship. We would talk, share jokes, snapchat, and sometimes work together. Progressively through these friend conversations on social media he would say things like "you're so perfect" "you're beautiful," send heart eye emojis and I took it as a compliment (as selfish as it sounds) and would reply with a "thank you" or "you're so kind." Many times I would try to change conversation and when I would change the conversation it would be to the weather, how work was going, how the day was going, or other small talk topics. He tried talking to me one day while working on my Bacteria Project and as we kept talking he brought up he is a "sex addict." During this I felt my cheeks get red with embarrassment and not knowing what to say back to [a]

comment like that. I felt like confused on why he was saying this to me and what triggered it. I didn't know he had talked about me until he told me to my face that "everyone here likes you" in the way he did. I would try explaining to him I have a significant other and that I felt he was too old for me. I would try and express my discomfort, embarrassment, and anger in any positive way to change the situation that I could.

He had said to me before he wishes "I wanted to be with him." This is when I noticed it was more than a friendship he wanted. It was making me feel uncomfortable, and I worried it would impact how the people I worked with thought of me. I thought they would think it's okay to talk to someone like that or they would say those things to me too. Tyler knew I was in a relationship because my significant other was seen on my social media and he would come for lunch when I worked on Saturday. Tyler disregarded and seemed to discredit my relationship because he didn't like him and would continue to make advances. These advances would be shirtless pictures, pictures right after he was done showering, and comments regarding sexual activities.

When I stopped working at the Water Pollution Control for roughly 6 months we would talk here and there about work, life, and it seemed like his advances would stop. I came back to the Facility as a part-time worker in Late February. By the end of March, we had sexual harassment training we all attended. I remember I had asked Tyler (and 2 other friends at the Facility) if he would help me review wastewater so I could retake the test and get my license to operate and that's when he would say things like "you can watch me be a dad" "we can watch Netflix and cuddle" or "Netflix and chill." These advances made me very uncomfortable and upset. I again felt like my space, my job, and my mind was invaded. I had never had a problem with anyone else I worked closely with making remarks to me or about me. It made me question my value as a person and a worker.

Not too long after I had asked him to help me study, around 5 – 6 pm on a Friday, Tyler sent me a picture over the snapchat text of him naked with an emoji, the purple devil, over his genitals. Immediately after this I blocked him and that following Monday reported it to my boss and HR. He tried to bribe my significant other for \$500 for me to redact my statement.⁷ Tyler said it was "his (my significant other's) fault" I blocked him. I took this as him trying to invalidate how I feel and like he was trying to cover something. I had felt violated and disrespected. I felt uncomfortable and angry that he didn't get the message I wanted to be just friends. I felt like he didn't understand I have a voice too and this wasn't okay. He had sent me pictures with a towel almost covering nothing on his body, him shirtless and pictures like that before. I had never sent anything back or like that to engage in or start the conversation. I had thought when Tyler's child was born the advances would stop because priority's change but

⁷Robbins did not testify regarding this allegation.

they didn't stop [sic]. If anything he used his leave to engage in this behavior more. He would use that as an excuse to "come see him" or "watch him take care of the baby."

I had known Tyler had talked to other women this way considering when we would talk about celebrity influencers he would bring up girls and talk about how "bad" they were or how "thick" they were. He would talk about how he watches girl-gamers stream because some girls just show their butt while they tally subscribers. He told me that I could do it because people would watch "just because of your voice." I felt disgusted that he only supports women who feel they need to subject themselves to succeed. I was angry he thought of women in the only way they're pretty or useful is when they're not dressed or close to it. I tried to be a helpful friend, or a good friend at the least, but he wanted more than what I was offering.

ARGUMENT

The Town

Gomes violated the Town's Policy. The Town argues that the evidence demonstrates that Gomes began sexually harassing Robbins in the Summer of 2019 when she began her internship at the WPCF, and that this harassment culminated in Gomes sending Robbins a nude photograph of himself on March 20, 2020. Gomes was on notice of the Town's sexual harassment policy, and he received training on that policy in March 2020. Gomes made sexual advances toward Robbins and continued to make advances after she rejected him, which created an "intimidating, hostile and humiliating and sexually offensive work environment" for Robbins.

Gomes is older than Robbins. During the Summer of 2019, Gomes stopped into the lab, where his job did not require him to be, and told Robbins that he was a "sex addict." This flustered Robbins and she did not know how to respond. Gomes did not exactly deny that he made this comment.

During the Summer of 2019, Gomes also told Robbins that, "Everyone here likes you." This statement made Robbins feel that that people at work were talking about her

and that there was nothing she could do to stop such talk. No employer wants an employee to receive this message at the workplace.

Between the end of Robbins' internship and her return to work for the Town in February 2020, Gomes communicated with Robbins on social media. During this time, he sent her messages that stated, "I am going to make you like me," and "how important is sex in a relationship to you." Gomes also told Robbins that he wished she wanted to be with him. During this period, Gomes also sent Robbins photos of himself shirtless and wearing only a towel.

Gomes acknowledged that he asked Robbins if she thought him attractive, and he attempted to portray his interaction with Robbins to Allen-England as a mutual flirtation. It was clear from Robbins' testimony that this was not the case, and that she had indicated to Gomes that they were both in relationships and she would not cheat on her boyfriend. Gomes did not deny that he told Robbins that, "I am going to make you like me."

Gomes' behavior continued even after his girlfriend had his baby. This is "evidenced by a Snapchat exchange they had after he had taken his new[-]born baby to get shots. Ms. Robbins responded "cute, I hope she got something good (a treat) after." Mr. Gomes' response was "Yeah, a tittie.""

The Town argues that the evidence presented at the hearing clearly proves that Gomes' behavior met the definition of sexual harassment in the policy and created a hostile work environment for Robbins. Prior to March 20, 2020, Gomes shared pictures of a sexual nature with Robbins; he shared pictures of women gamers and commented on their bodies; he told Robbins he wanted to "make" her like him; and he made sexually explicit comments to her, including that he is a "sex addict" and asking her if sex is

important to a relationship. He also made comments about her appearance to her and to others at work.

Gomes humiliated and intimidated Robbins, but she nevertheless tolerated his behavior for the wrong reasons. The last straw came when Gomes sent a nude picture of himself to Robbins on March 20, 2020, after inviting her to watch "Netflix and chill." Gomes acknowledged making this comment and did not deny understanding its slang meaning. He followed this invitation with a nude photograph of himself with a purple emoji covering his genitals. Gomes lacks all credibility in this case.

Allen-England conducted a full and fair investigation. She gave Gomes three opportunities to explain how he "accidentally" sent the picture; he provided no explanation. Instead, he told Allen-England how to discipline him and told her that he did not tell Robbins anything she did not want to hear. He did not deny sending the picture to Robbins, and the investigation revealed that Gomes had been harassing Robbins prior to March 20, 2020. Gomes also attempted to place the blame for his conduct on Robbins and stated that she never told him to stop.

During his first interview, he failed to tell Allen-England that he invited Robbins over to "Netflix and chill." During his second interview, Gomes implied that Allen-England was lying about the witnesses she had spoken with during her investigation. During his third interview, Gomes admitted to violating the policy and again failed to explain how he accidentally sent the photograph to Robbins. Gomes continued to remain unapologetic about his behavior and continued to blame Robbins for his conduct.

The dismissal followed the June 11, 2020 interview, and Allen-England had not made up her mind to discharge Gomes prior to the interview. She explained the reasons

for discharging Gomes to him with his Union representative present and presented Gomes with the discharge letter at the end of the meeting.

In conclusion, Gomes sexually harassed Robbins during the summer of 2019, he continued his behavior while she was not an employee of the Town, and his behavior culminated in March 2020. Gomes was not dismissed just for the nude picture he sent or just because he asked Robbins to watch Netflix and chill. He was dismissed for violating the Town's policy. His defense of his behavior and his attitude during the investigation made it clear that he does not comprehend how his actions have impacted Robbins and that he has no remorse or intention of changing his behavior. As a result of his behavior, Robbins believed that she would have to tolerate this behavior if she were to continue to work for the Town.

Just cause exists to terminate Gomes, and the grievance should be dismissed.

The Union

The Union argues that this case is basically a "he said," "she said" type of controversy. The discharge letter that Gomes received failed to set forth any facts or specifics of wrongdoing, negatively affecting his right to due process. The investigation was poorly done and failed to conform to the required Seven Tests of Just Cause. The alleged March 20, 2020 photograph would have been sent as part of a conversation outside of work, which falls outside the terms of the policy. Without the photograph, there is no way to determine whether the emoji in the photograph was akin to Gomes wearing a bathing suit or what the photograph represented. The lack of evidence requires one to rely solely on Robbins' testimony about what happened. Human Resources never attempted to obtain a copy of the photograph from Gomes.

Robbins was not a credible witness. She only complained about the March 20, 2020 photograph; she did not complain about any prior alleged incidents and none of those alleged incidents resulted in any unreasonable interference with her work performance or created an intimidating, hostile, or offensive work environment. Robbins did not produce any verifiable evidence of any allegedly offensive communications. Despite Gomes allegedly harassing Robbins for many months, she continued to communicate with him on social media and asked him for help studying.

Allen-England did not explain why her discharge letter failed to set forth the reasons for discharging Gomes. Her testimony produced little evidence to support violations of the policy and her investigation was neither fair nor expeditious. She did not take a statement from Gomes, and Allen-England did not take a statement from Robbins until after she had discharged Gomes. There was no evidence that Gomes knew he could be discharged under the policy for conduct that occurred outside of work. Allen-England never acquired any evidence to prove that Gomes engaged in the conduct alleged against him, and she did not acquire evidence that the alleged conduct affected Robbins' ability to perform her work.

Gomes is being blamed for basically flirting with Robbins. Flirting, which the policy does not define, does not rise to the level of harassment. Phrases such as "you are pretty," "I want you to like me," and "let's watch Netflix and chill" do not lay the foundation for terminating Gomes under the policy. Allen-England's investigatory notes also demonstrate poor investigatory skills. Gomes explained that he sent the photograph accidentally, and Allen-England did not make any effort to corroborate or refute what Gomes told her.

The policy provides for an assortment of disciplinary options short of termination. Allen-England did not adequately explain why lesser discipline than discharge would not suffice under the circumstances.

Allen-England took the alleged comments out of context and did not attempt to determine if Gomes made them. For example, Allen-England never asked Gomes if he made the statement, "How important is sex in a relationship to you?" Standing alone, the statement, even if made, is not reasonably offensive and Robbins did not mention it in her June 17th statement.

Allen-England had already decided to discharge Gomes at the June 11th meeting, and he was given the termination letter at that time. Gomes was unable to mount an effective defense at that time due to the failure to notify him of the specific allegations against him. Allen-England was pre-disposed to terminate Gomes based upon her interpretation of the evidence. She was not concerned with allowing Gomes to explain what happened or clear up any errors of judgment. Additionally, Gomes cooperated during the investigation, and Robbins never communicated to Gomes that she felt disrespected.

The employer must prove misconduct through verifiable evidence. That did not happen here because the employer produced nothing more than allegations and assertions. This dispute is extraordinary because of the lack of evidence to support the employer's claims that Gomes violated the policy. Even if the employer had proved misconduct, it did not prove that the penalty it imposed was reasonably related to the alleged offense. In this case, the "youthful culture" at issue mitigates against discharge.

OPINION

The issue is whether the Town terminated Gomes with just cause. The Town argues that it discharged Gomes because he violated the Policy by “creating an intimidating, hostile and humiliating and sexually offensive work environment for Ms. Robbins.” The Town’s case contains two components: 1) Gomes harassed Robbins by sending her a nude photograph of himself on the evening of March 20, 2020; and 2) Gomes sexually harassed Robbins through comments and advances from the Summer of 2019 through March 2020. I find that the Town proved that Gomes sent an offensive photograph to Robbins but did not prove the remainder of its case, and that the Town therefore had just cause to discipline Gomes but did not have just cause to terminate him. I address the allegations in turn before considering the appropriateness of the penalty that the Town imposed.

1) The March 20, 2020 Photograph

Gomes admitted to sending a sexually suggestive photograph to Robbins over a private social media platform while both were off duty on the evening of Friday, March 20, 2020. Although this conduct occurred outside of work, their communication that evening involved, at least ostensibly, studying for a work-related exam. This photograph crossed a line with Robbins and offended her; she brought the incident to the Town’s attention immediately upon arriving for work on the morning of Monday, March 23, 2020. Based upon these established facts, Gomes violated the Policy and is subject to discipline.

From here the case, however, becomes less clear. The photograph was sexually suggestive but did not rise to the level of a nude exposure. I cannot objectively evaluate the photograph because the Town did not introduce it into evidence, and I have not seen it. Moreover, Gomes admitted to sending the photograph but maintained that he sent the

photograph accidentally, and I decline to dismiss this possibility where the Town waived its cross-examination of the grievant.⁸ Robbins herself told Allen-England that Robbins did not know if others had received the photograph, and Allen-England did not pursue this line of inquiry. The Town has the burden of proof, and it did not prove that Robbins was the intended rather than accidental recipient of the photograph. An accident would not absolve Gomes of misconduct, but his intent is relevant to the level of his appropriate discipline.

2) Summer of 2019 through March 2020

Turning to the second component of the Town's case, I begin by noting that these allegations are vague and have shifted over time. The Discharge Letter does not enumerate the specific allegations against Gomes. Allen-England testified that in addition to the photograph, she discharged Gomes because of certain comments that he made and his demeanor, but her notes from the June 11 meeting do not reflect that she communicated to him any reason for his discharge beyond the photograph.⁹ At the hearing and in its brief, the Town raised additional allegations, such as that Gomes told Robbins while at work that he was a sex addict, that do not appear in the record until after the Town discharged Gomes. The just cause protection contained within the CBA entitles

⁸If Gomes lacks all credibility as the Town claims, cross-examination easily could have established that fact.

⁹To the extent necessary, I briefly note that I do not credit the Town's position that Gomes' attitude aggravates his offense. Allen-England testified that he was polite during the initial interview. He testified that he did not apologize to Robbins because he was instructed to stay away from her. Rather than being unapologetic, his change in attitude appears to relate to Allen-England telling him during their March 27, 2020 interview that she was terminating him. Allen-England's testimony that she did not make up her mind to discharge Gomes until the June 11, 2020 meeting contradicts her own notes and is not credible.

Gomes to notice of the specific allegations against him, and the Town's attempt to bootstrap its case after the fact runs afoul of basic principles of due process.

On the merits, the Town did not prove that Gomes sexually harassed Robbins by creating an "intimidating, hostile and humiliating and sexually offensive work environment" from the Summer of 2019 through March 2020. The Town alleges that after Robbins' internship ended and before she returned to work for the Town in February 2020, Gomes sexually harassed her by telling her he was going to "make" her like him; asking how important sex was in a relationship to her; telling her he wished she wanted to be with him; and sending her offensive photographs of himself, including a photograph of himself wearing only a towel. Even if one accepts the Town's characterization of the facts, which I do not, the Town has not explained how Gomes created a hostile work environment for a non-employee, and it has not charged him with violating the provisions of the Policy that apply to non-employees.¹⁰

Moreover, this component of the case involves allegations of misconduct outside of work on private social media platforms, and, in addition to ignoring the required nexus to the workplace, the Town has not produced any of the relevant communications to support its allegations. The Town did not attempt to recover them. To establish a disputed narrative, it instead relies upon the word of Robbins, who not only did not complain about this alleged misconduct, but also deleted the objective evidence that would support the Town's allegations.

This lack of objective evidence is critical because I do not find Robbins to be a credible witness, especially regarding her testimony that their interaction prior to the

¹⁰This point underscores the importance of articulating specific allegations.

March 20, 2020 photograph left her feeling violated, humiliated, and/or offended. She represented herself as a largely unwilling and passive participant in her interactions with Gomes. She testified that she reached out to Gomes on March 20, 2020, only to study as part of a group with C and M. She testified evasively that a suggestion was made to go to the beach, but she said no. The Snapchat conversation with C, which is the only social media communication in the record, however, establishes that after Robbins contacted Gomes, the two discussed hanging out without M and C present. Robbins, who knew that Gomes was romantically interested in her, raised the prospect of them hanging out alone at the beach while also linking their meeting to her physical appearance. Contrary to her representations, the two discussed going on what is commonly referred to as a date.¹¹

Robbins also testified that they never talked about sex. Yet, the Snapchat communication with C also references a discussion in which Robbins, in her own words, told Gomes not simply that she found him attractive, but that she thought of “scenarios of being together” but did not “stay on them.” Contrary to her representations, she engaged in sexually charged dialogue that mere co-workers do not engage in. I therefore disagree with the Town that this record proves that Robbins conveyed to Gomes that she was uninterested in him.

Additionally, I find Robbins’ testimony about their interaction prior to March 20, 2020, to be unreliably revisionist. Robbins testified that Gomes engaged in conduct that made her uncomfortable because she worked with him, during a time when she was not

¹¹Within this context, I do not find asking her to watch “Netflix and chill” to be reasonably offensive, especially where the Town did not prove that Gomes was using this phrase as a euphemism for sex.

an employee of the Town. Further, if Robbins did not welcome their interaction over social media, if she found his alleged comment about his daughter getting a treat, or any other alleged comment offensive, she could have ended that interaction at any time prior to March 20, 2020, but she did not. Even after undergoing sexual harassment training, she not only continued to communicate with him privately outside of work, but she sought him out.

Further undermining her credibility, the record shows that on March 27, 2020, Robbins accused Gomes of what amounts to stalking her and/or her boyfriend on the morning of March 25, 2020, even though Robbins reported to the police on the afternoon of March 25, 2020, that Gomes had not contacted her. This is a serious accusation of criminal misconduct, and the Town has not explained its unresolved presence in the record.¹²

In sum, Robbins' testimony was misleading to the point of being untruthful. The facts, to the extent that they can be established on this record, show that Robbins and Gomes engaged in a mutual flirtation rather than that Gomes unreasonably and offensively continued to pursue Robbins after she rejected him. Regarding this component of the Town's allegations, the record contains no credible evidence that Gomes unreasonably interfered with Robbins' working conditions or created a hostile working environment. Rather, Robbins actively participated in their on-going communications and did not terminate their private, social media interaction at any time prior to receiving the photograph. The Town proved that Gomes crossed a line and

¹²Robbins' statement also contains an unsubstantiated and unresolved accusation that Gomes attempted to influence this matter with a bribe.

violated the Policy when he sent the photograph on the evening of March 20, 2020, not before.

3) Appropriate Level of Discipline

The Town proved that Gomes sent a photograph to Robbins that violated the Policy, but it did not prove the remainder of its case. The Town has not argued that this single violation establishes just cause to summarily discharge Gomes, as would no doubt be the case if, for example, the photograph contained an explicit exposure. Indeed, the Town's argument that it discharged Gomes for ongoing conduct over a period of months in addition to the photograph implicitly acknowledges that sending the photograph was not dischargeable in and of itself.

The Town's interest in responding to sexual harassment complaints and preventing the escalation of any related misconduct cannot be overstated. Nevertheless, the Town must still prove that just cause exists to terminate its employees. It did not here meet its burden. Based upon the foregoing, I conclude that a 30-day suspension is sufficiently serious to protect the Town's interests while also ensuring that it complies with its contractual obligations. This level of discipline will also unequivocally convey to Gomes that any similar violations of the Policy will result in his discharge.

AWARD

The Town did not terminate the grievant with just cause. The remedy shall be that the Town shall convert the discharge to a thirty-day suspension. The Town shall reinstate the grievant to his prior or a comparable position and make him whole for all lost wages and benefits, minus the thirty-day suspension.

A handwritten signature in black ink, appearing to read "James Sunkenberg". The signature is fluid and cursive, with a large, looping initial "J".

James Sunkenberg, Esq.
Arbitrator
October 8, 2021