

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of the Arbitration Between:

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CITY OF LOWELL

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-and-

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ARB-20-8270

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MERRIMACK VALLEY EMPLOYEES
ASSOCIATION

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Arbitrator:

Timothy Hatfield, Esq.

Appearances:

Kerry Jenness, Esq.

- Representing City of Lowell

Colin Confoey, Esq.

- Representing Merrimack Valley
Employees Association

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 did not violate Article V or Article VI, Section 5 of the collective bargaining agreement when it terminated Lisa Sam on August 24, 2020, and the grievance is denied.

Timothy Hatfield

Arbitrator

December 3, 2021

INTRODUCTION

Merrimack Valley Employees Association (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 virtual hearing via Web-Ex on February 11, 2021.

The parties filed briefs on March 12, 2021.

THE ISSUE

Did the City's termination of Health/Sanitary Code Inspector Lisa Sam on August 24, 2020, violate Article V (Management Rights of Employer) or Article VI, Section 5 (Progressive Discipline) of the Association's Collective Bargaining Agreement with the City? If so, what shall be the remedy?

RELEVANT CONTRACT LANGUAGE

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

ARTICLE V MANAGEMENT RIGHTS OF EMPLOYER

Except in case of conflict with the terms of this Agreement, the City reserves unto itself the regular and customary functions of municipal management, and reserves and retains all powers, authority and prerogatives including, but not limited to – the right to manage affairs of the City, to maintain and improve efficiency of the operation; to determine the methods, means, processes and personnel by which operations are to be conducted, to determine the size of and direct the activities of the working force, to assign work, to determine the work tasks, classification and standards of productivity and performance, and to evaluate employees with regard thereto: to hire,

promote, discipline, suspend and discharge employees for just cause, and to issue reasonable rules and regulations governing the conduct of each department, providing that such rules and regulations are not inconsistent with the express provisions of this Agreement.

ARTICLE VI GRIEVANCE PROCEDURE AND ARBITRATION (IN PART)

Section 5. The City agrees to apply progressive discipline in the following stages: verbal warning, written warning, suspension, termination. The department head shall have discretion to begin the progression at the point most suitable for the seriousness of the infraction, with the understanding that all but illegal or similarly egregious infractions will begin at stage one. ...

FACTS

The City of Lowell (City) and the Union are parties to a collective bargaining agreement that was in effect at all relevant times to this arbitration. Lisa Sam (Sam) worked as a Health Inspector / Sanitary Code Enforcement Inspector in the City's Inspectional Services Department for nineteen years. Sam's duties included inspections of homes and businesses within the City and the monitoring of COVID-19 regulation compliance by City businesses.

On March 25, 2020, the City issued Guidelines for Employees During Current State of Emergency. Included in this Guideline was a section on Travel Recommendations which stated:

Employees are strongly encouraged to follow Governor Baker's March 10th declaration of a State of Emergency which included ending all out-of-state travel for State employees and requested other employers follow the same course of action. City of Lowell employees who have traveled (particularly those that have traveled through airports and/or ferry/cruise ship services, and/or places or countries that are considered "hot spots") are required to notify their Department Head in writing, disclosing where they traveled to and the dates of travel. Such employees will likely be required to stay home to monitor for symptoms during a 14-day period, or greater. In the event an employee lacks accumulated sick time, other available time (vacation/personal days) may be used. In the event that an

employee has no accrued time, the employee will be allowed to be absent without pay.

On May 28, 2020, Sam traveled to Florida and returned to Massachusetts on June 1, 2020. Sam failed to inform her department head, Eric Slagle (Slagle) until June 9, 2020, of her trip. Upon emailing Slagle on June 9, 2020, Sam was informed that she would need to quarantine for fourteen days before she could return to work. Sam was out of work until June 16, 2020.

On June 22, 2020, City Manager Eileen Donoghue (City Manager Donoghue) disseminated the City of Lowell COVID-19 Travel Policy (Travel Policy). This policy stated:

Employees are required to notify their department heads in writing, if traveling to a country or place with a CDC Level 2 or 3 alert. Additionally, employees who have traveled through airports or utilized ferry/cruise ship services are also required to notify their department heads. Employees should be aware that travel restrictions on a Federal and State level are always subject to sudden change.

Upon returning from such travels, you will be required to stay home to monitor for symptoms during a 14-day period. You may also be asked to provide a letter or certification indicating that you have been cleared to return to work. Employees who choose to travel to or through such places, and are required to quarantine as a result, will be required to use their own accrued time during the 14-day quarantine period. Family First benefits will not be available under these circumstances.

On July 15, 2020, City Manager Donoghue sent an email to all employees that stated in part:

Masks/Face Coverings

On May 6, 2020, I issued a memorandum to all City of Lowell employees concerning the use of face coverings by city employees. This memorandum was issued as an order to comply with state-level

orders and guidance concerning the spread of COVID-19. To further clarify the policy stipulated in this previous communication, **it is a requirement that employees to wear face coverings in common public areas, in offices other than their own, when entering and exiting City buildings, and in their own office setting when they are not able to remain 6 feet apart from others.** (Emphasis in original)

Please be advised that this policy is mandatory. During the ongoing state of emergency, it is a directive that will be enforced in the same manner as other directives for City employees. Those who require an accommodation for medical reasons, should contact HR. We appreciate your cooperation with this simple yet critical measure to keep our workplace safe.

On July 22, 2020, Sam drove to North Carolina to visit her daughter who is in the Marines and stationed at Camp Lejeune. Sam wanted to visit her daughter after being unable to see her during her earlier Florida trip. Sam did not inform her supervisor Shawn Machado (Machado) or Department Head Slagle that she intended to leave the state. Upon her return from her trip on July 29, 2020, Sam again did not inform anyone of her out of state travels and did not quarantine prior to returning to work.

On July 29, 2020, during her workday, Sam conducted at least one health inspection in the community, and was observed working without her mask during a time she was unable to social distance in the office. A colleague reported this information, and the fact that Sam had traveled to North Carolina, to Machado. Machado then asked Sam if she had traveled to North Carolina over the weekend. Sam's initial reaction was to ask who had told him that and then, when Machado declined to tell her, she lied to him and said that she had not traveled to North Carolina.

On July 30, 2020, Sam sent an email to Slagle which stated:

I am out sick today. Attached please find my timesheet. I went to North Carolina to visit my daughter in the Marines over the weekend. Shawn asked me last night if I did. I lied to him. He said I should quarantine. Can I work from home? Thanks, Lisa Sam.

Sam was instructed to quarantine for fourteen days and was told she could not work from home. On August 17, 2020, Sam was placed on paid administrative leave pending an investigation.

On August 24, 2020, Sam was terminated for violations of City policies. In the termination letter, City Manager Donoghue stated:

I find that there is sufficient evidence to support the following instances of malfeasance and/or misconduct on your part, as stated within this notice and as summarized below:

1. You willfully violated the COVID-19 Travel Policy by not informing your department head in writing of your travel to North Carolina.
- 2. You willfully violated the COVID-19 Travel Policy by failing to quarantine for fourteen days upon your return from North Carolina.**
- 3. You endangered the health and welfare of your colleagues and members of the public by failing to wear a mask and by performing health inspections upon your prohibited return to work.**

Your conduct is directly inconsistent with your responsibilities as a Health Inspector/Sanitary Code Enforcement Inspector required to enforce COVID restrictions at businesses throughout the City of Lowell.

- 4. You willfully lied to your supervisor about your travel to a restricted location.**

Your actions are wholly inconsistent with the policies and procedures you agreed to uphold as a condition of your employment.

5. Your actions demonstrate conduct unbecoming a City employee.

A grievance was filed by the Union that was denied at all steps of the grievance procedure and resulted in the instant arbitration.

POSITIONS OF THE PARTIES

THE EMPLOYER

The question at the heart of this arbitration is whether, under the just cause standard, the City was justified in terminating Sam on August 24, 2020, for willful violation of City policies, including: traveling without notifying her supervisor; returning to work without quarantining and thus posing a risk to the health of her colleagues and the public; and lying to her supervisor about her actions, all conduct unbecoming a City employee.

Weingarten Rights Not Violated

During the arbitration, the Union suggested that Sam's Weingarten rights were violated because she was not offered Union representation when Machado asked her whether she had traveled to North Carolina. Weingarten rights arise only in situations when an employee affirmatively requests representation during an investigative interview. It is debatable whether Machado's question to Sam about whether she had left the state constituted an investigative interview that would trigger Weingarten protections even if Sam had affirmatively requested representation, which she did not.

Machado asked Sam a simple yes or no question because he was concerned that her presence in the office could pose a public health threat to the other employees and the public if she became infected with the coronavirus due to traveling to a high-risk area without spending the appropriate time in quarantine after returning to Massachusetts. Machado was not attempting to elicit evidence to support discipline against Sam, but rather to clarify information he had received from another employee. Certainly, he could not have anticipated that Sam would lie to him. Even if Machado's question is deemed part of an investigatory interview, the fact remains that Sam did not request union representation before answering. It is the employee's right to determine whether the presence of a union representative is more or less advantageous to her interests. Machado was not obligated to suggest that Sam seek union representation, and she made no request for such representation herself. Therefore, there is no basis to assert that Sam's Weingarten rights were violated.

Just Cause

Sam's willful violation of the travel policy constitutes substantial misconduct that adversely affects the public interest. By not quarantining after travel and then standing near her colleagues without a mask, contrary to City and State policies and regulations, Sam put her colleagues and members of the public in direct danger of infection from the coronavirus. The result of these poor decisions was that the City no longer had confidence in Sam's ability to perform the core function of her job, which is to interpret and enforce health and safety guidelines.

Sam's position is one requiring public trust because she represents the City to residents and business owners in connection with enforcing health and safety regulations. Certain forms of employment carry a position of trust beyond that imposed by all public service. While on its face, the position of health inspector is less obviously a special position of public trust than that of a police officer or fire fighter, Sam is entrusted, because of her position, to enter residents' homes, as well as non-public areas of City businesses, to inspect and investigate potential violations of health and safety regulations. By going into the office and out in the field without quarantining, potentially exposing employees, business owners, and the public to a highly contagious virus, Sam violated that trust.

Further, by lying to her supervisor, Sam eroded the trust that she had gained from her many years of employment for the City. It is simply not credible that Sam did not understand that her travel to North Carolina would not require a quarantine, given the City's detailed June 22, 2020 travel policy as well as Sam's personal experiences with such requirements from her earlier travel in May 2020.

There can be no question that the City had just cause to terminate Sam's employment. Sam was in a position of public trust, tasked with enforcing health guidelines and regulations; it therefore goes to the heart of her responsibilities for the City that she must understand, observe, and execute all public health edicts of the State and the City. By violating the City's travel policy, she put her colleagues and the public in danger. Further, by her own testimony and in writing, she admitted to lying to her supervisor. If she truly thought her travel was permissible

and did not pose a risk, why did she not simply tell Machado that she had driven to North Carolina when asked?

On these undisputed facts, involving conduct that violated City policy, of which Sam was aware, the content of which relates directly to the responsibilities of her job, and which potentially risked the health and safety of her colleagues and the public, compounded with lying to her supervisor, it can hardly be said that Sam's acts constituted something other than substantial misconduct which adversely affected the public interest. For all the foregoing reasons, the City requests that the discharge be upheld.

THE UNION

The Union's position in this case is simple. Even if the Arbitrator concludes that Sam committed the misconduct that is alleged, the City has failed to meet its heavy burden of proving that it possessed the requisite just cause to terminate Sam's employment. The City's burden is heavy in this matter since not only does the collective bargaining agreement contain the traditional just cause provision, it also contains a progressive discipline requirement that must be met before an employee can be terminated. Accordingly, in view of the totality of the circumstances, including Sam's previously unblemished nineteen-year career in her position with the City, termination in this case is untenable and constitutes a violation of Article V and Article VI, Section 5 of the collective bargaining agreement.

The first two allegations against Sam are that she failed to follow the City's Travel Policy when she failed to notify Slagle in writing of her travel to visit her

daughter in North Carolina on July 22, 2020, and her subsequent failure to immediately quarantine upon her return on July 26, 2020 and her return to work on July 29, 2020. These facts are not in dispute, it is the Union's position that they simply don't rise to "illegal or similarly egregious infractions" under the clear language of Article VI, Section 5.

The City Travel Policy does not constitute a federal, state or local law, nor was the policy ever collectively bargained with the Union. Moreover, the Travel Policy was devoid of any language that warned employees that a violation of the policy could serve as the basis for discipline, never mind the termination of employment that was implemented in Sam's case. If the City's intent was to terminate any employee who violated the Travel Policy, then two things needed to occur. First, the City needed to negotiate and secure the Union's agreement to waive the provisions of Article V and Article VI. Second, the City needed to include an express warning within the Policy that notified employees that any violation of the Policy would result in termination. The City did neither of these things. Accordingly, by the express, clear, and unambiguous language of the collective bargaining agreement, the City was required to follow the tenets of progressive discipline in this case and should have issued a verbal warning to Sam instead of summarily terminating her employment.

Modification of Discipline

It is well established that an arbitrator has the authority to modify penalties imposed by management. In support of this argument, the Arbitrator should consider the following factors.

Contract Language and Employment Record

As noted above, the collective bargaining agreement contains both a just cause provision and progressive discipline language that requires a verbal warning, a written warning, and a suspension in an employee's record before the penalty of termination can be imposed except in the event of a violation involving illegal or similarly egregious conduct. As the allegations in this case do not rise to that level and Sam had a nineteen-year career in the City with no discipline, the discipline should be modified.

Nature of Travel and Lack of Specificity in Travel Policy

The Arbitrator should also consider the fact that Sam traveled by automobile to visit her daughter in North Carolina. The undisputed evidence shows that she drove directly to her daughter's apartment, and the only time she left was to go to a nearby park where she avoided interacting with people. She did not act irresponsibly.

Sam also testified that she was confused by the language of the Travel Policy that referred to "travel through airports or utilized ferry/cruise ship services. Sam did not believe that her automobile travel fell within the purview of the City's travel policy. Other issues with the City's travel policy include the lack of collective bargaining before implementation, the failure to define or provide employees with a list of restricted locations, and the failure to warn employees of potential discipline for violations.

Weingarten Violation

After working all day, Machado confronted Sam and asked her if she had traveled to North Carolina. Significantly, even though Sam's response to his question was later used as the primary justification for her termination, Machado admitted that he did not inform Sam that she had the right to have Union representation present at the questioning.

The manner in which Sam's Weingarten Rights were violated, in addition to all the other factors compel the Arbitrator to modify the penalty to a verbal warning. Sam was clearly prejudiced by the City's failure to offer her the right to have a Union representative present. Had a Union representative been allowed to attend the questioning he or she could have advised Sam to tell the truth and the City might not have moved for termination.

Due Process

In addition to the above-described manners in which the City violated Sam's rights to just cause and progressive discipline under the collective bargaining agreement, the City's summary termination of Sam without conducting an investigation, including an interview of Sam, violated her right to industrial due process.

Slagle admitted that he conducted no investigation, and nobody from the City ever had the benefit of hearing Sam's side of the story. Instead, the City's entire case is based on Sam's initial shocked reaction when confronted by Machado instead of a thorough investigation.

Safety Standards Policy

The third basis for Sam's termination was that she allegedly wasn't wearing a mask on July 29, 2020. This allegation should be discounted because City employees were not required to wear masks at all times while at work. Sam testified that she was not required to wear a mask when at her desk, but that she did wear one whenever she could not maintain a social distance of six feet from another person. Machado never testified that Sam had failed to wear a mask and that while Slagle testified that he "observed Sam not wearing a mask, he failed to offer any specific testimony about whether Sam was at her desk or that she had failed to socially distance while not wearing her mask. Accordingly, in the absence of any clear evidence that Sam actually violated the Safety Standards Policy, this allegation must be discounted.

Conclusion

For all the foregoing reasons, the Arbitrator should conclude that the City's termination of Sam violated Article V and Article VI, Section 5 of the collective bargaining agreement. Even if the Arbitrator concludes that Sam committed any of the alleged violations, in view of her previously unblemished employment record and all the other mitigating factors discussed, the Arbitrator should modify the discipline to a verbal warning in accordance with the Progressive Discipline language of the collective bargaining agreement with a make whole remedy for Sam.

OPINION

The issue before me is: Did the City's termination of Health/Sanitary Code Inspector Lisa Sam on August 24, 2020, violate Article V (Management Rights of Employer) or Article VI, Section 5 (Progressive Discipline) of the Association's Collective Bargaining Agreement with the City? If so, what shall be the remedy? For all the reasons stated below, the City did not violate Article V or Article VI, Section 5 of the collective bargaining agreement when it terminated Sam on August 24, 2020.

Spring 2020 represented an early phase of the COVID 19 pandemic, with many uncertainties and disruptions to people's daily activities. In response to this emerging pandemic, Federal, State and Local officials enacted new or revised policies for the protection of the public at large and more specifically in this case, for its employees. During this time, vaccinations were either completely unavailable, or in very limited supply to the general public. Due to the uncertainty of controlling the spread of the virus, and the lack of an available vaccine, social distancing policies and travel restrictions were broadly implemented, including in the City of Lowell. It is with this background that the City of Lowell's actions in terminating Sam must be judged.

Sam's first trip out of state occurred on May 28, 2020, when Sam traveled to Florida. Sam returned to Massachusetts on June 1, 2020, but did not inform her supervisor of her trip, as required, until June 9, 2020, at which time she was informed that she need to quarantine for fourteen days before returning to work. Sam returned to work on June 16, 2020, having completed her mandatory

quarantine. Any argument that Sam was unaware of the need to quarantine after traveling out of state after her second trip is unconvincing. Sam, after reaching out for information upon her return from her first trip, and having to quarantine for an additional seven days before returning to work, can not conceivably argue that she was unaware of the need to quarantine upon her return from her second trip.

Sam's second trip out of state occurred on July 22, 2020, when she drove to North Carolina to see her daughter. Sam drove down and back and testified that her only outing was a walk in a park in North Carolina. Sam returned to Massachusetts on July 26, 2020, and returned to the office on July 29, 2020, without quarantining. In addition to failing to quarantine, Sam failed to inform her supervisor of her travels either before, during or after her trip. During her workday on July 29, 2020, Sam conducted an inspection of a local business and was observed working in City Hall without a mask while not socially distancing herself from other individuals. Sam's reckless actions jeopardized the health and safety of her co-workers and any members of the community she encountered on her inspection. Sam's blatant disregard for the policies enacted to contain the spread of the virus is inexcusable, especially given the fact that she had just recently traveled and was forced to quarantine, thereby unquestionably being aware of the requirements after this second trip.

Adding to the undeniable certainty that Sam was aware of her violation of the Travel policy was her reaction to being asked by Machado about whether she had traveled to North Carolina. Sam angrily wanted to know who told him. Then she lied and said she had not traveled to North Carolina. If Sam was truly unaware

of her need to quarantine, she would have no reason to lie. Instead Sam, keenly aware of her violation of the Travel Policy, lied to her supervisor in an attempt to cover up her misdeeds. It was not until the next day that Sam, in an attempt at damage control, emailed Slagle and confessed to traveling, not quarantining, and lying to Machado about the whole situation.

Sam's flouting of both the Travel Policy surrounding quarantining, and the mask wearing requirements at City Hall is especially alarming when one considers her position with the City. Sam is not a City employee who works alone. Sam is a Health Inspector / Code Enforcement Officer tasked with enforcing State and Local regulations, including COVID 19 regulations, for City business to remain open. The City could not have any confidence that Sam, unwilling to abide by the regulations herself, would enforce the regulations with the City's residents. Sam's actions, in addition to physically placing her co-workers and City residents with whom she interacted with on inspections in a compromised position by traveling, failing to quarantine, and failing to wear her mask when required, also placed the City in the impossible situation of having no credibility with the public when it continued to employ an inspector who failed to follow the same rules she was entrusted to enforce.

The City's decision to terminate Sam instead of imposing a lesser penalty is also justified based on Sam's actions and her attempt to cover them up by lying. Sam's nineteen year mostly unblemished disciplinary record must be considered when deciding the level of appropriate discipline. Article VI, Section 5 Progressive Discipline procedures must also be considered. Even with these two factors being

considered, I find that Sam's blatant disregard for the safety of her co-workers, and the City residents she interacted with during inspections was unconscionable and rose to the level of "similarly egregious actions" that remove the constraints of progressive discipline under Article VI, Section 5. The City can not be required to employ a Health Inspector / Sanitary Code Enforcement Officer whom it can not trust to enforce the same regulations she refuses to follow, during a world-wide pandemic.¹

AWARD

The City did not violate Article V or Article VI, Section 5 of the collective bargaining agreement when it terminated Lisa Sam on August 24, 2020, and the grievance is denied.



Timothy Hatfield, Esq.
Arbitrator
December 3, 2021

¹ I find the remaining Union arguments, including the argument of a Weingarten Rights violation to be unpersuasive.