

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of the Arbitration Between:

NEW BEDFORD HOUSING AUTHORITY

-and-

MASSACHUSETTS LABORERS' DISTRICT
COUNCIL, LOCAL 367

ARB-24-10471

Arbitrator:

Timothy Hatfield, Esq.

Appearances:

Jaime Kenny, Esq. - Representing New Bedford Housing Authority

Sal Romano - Representing Massachusetts Laborers' District
Council, Local 367

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 Employer did not have just cause to suspend Roger Moniz for seven days. The Employer did have just cause to suspend Roger Moniz for five days. Moniz shall be made whole for all losses sustained above a five-day suspension and all records of a seven-day suspension shall be removed from his file and replaced with documentation of a five-day suspension.



Timothy Hatfield, Esq.
Arbitrator
July 1, 2025

INTRODUCTION

On February 9, 2024, Massachusetts Laborers' District Council, Local 367 (Union) filed a unilateral petition for Arbitration. Under the provisions of M.G.L. Chapter 23, Section 9P, the 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 June 17, 2024.

The parties filed briefs on August 19, 2024.

THE ISSUE

Did the Employer have just cause to suspend Roger Moniz for seven days?
If not, what shall be the remedy?

RELEVANT CONTRACT LANGUAGE

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

ARTICLE VIII

DISCHARGE OR SUSPENSION

For employees not covered by the provisions of Section 41, Chapter 31 of the Massachusetts General Laws, the Authority shall utilize the following:

Section 1 The Authority agrees that an allegation of arbitrary or capricious application of its rules and regulations shall be subject to the grievance procedure. The Authority shall not discipline or discharge any post-probationary employee without just cause. The Authority further agrees that disciplinary action shall be in a timely fashion.

Section 2 The Authority agrees with the tenants of progressive and corrective discipline where appropriate. Management retains the right to discipline employees for just cause. Once the measure of discipline is determined and imposed, the Authority shall not increase it for the particular act of misconduct unless new facts or circumstances become known.

Section 3 Notwithstanding any provision in this Agreement, the Authority may discharge or suspend an employee prior to completion of his/her nine-month probationary period without recourse to the grievance and arbitration procedures. Employees may use the grievance and arbitration procedures within the probationary period for reasons other than discharge or suspension.

Weingarten Act:

The Weingarten right is a right derived from the Supreme Court's 1975 Weingarten decision where the court recognized union employees' rights to representation at investigatory interviews. Weingarten rights include the right to have a coworker present at an investigatory interview that the employee reasonably believes might result in discipline. Weingarten rights must be invoked by an employee before an employer has any corresponding obligations. An employee must request the presence of a coworker at an investigatory interview.

The portion of the relevant federal statute provides that:

An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at:

Any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment; or any examination of an employee in the unit by a representative of the agency in connection with an investigation if the employee reasonably believes that the examination may result in disciplinary action against the employee; and the employee requests representation.

Section 4 - Progressive Discipline

Step 1: Verbal Warning Notice

Step 2: Written Warning

Step 3: Suspension

Step 4: Termination

For less severe infractions, the initial disciplinary action will be a verbal warning. The discussion between the employee and manager will be in a serious and professional in manner to ensure that the employee clearly understands the established standards and expectations with regard to his/her unacceptable performance or

behavior. A written record of the date and content of the discussion will be maintained in the appropriate file.

A written warning will be issued if the unacceptable behavior is more severe or frequent in nature and/or a verbal warning has already been issued. The written warning will outline the undesirable behavior, state expectations, and indicate the consequences that will occur if there is no improvement in performance. Written warnings should be forwarded to the Office of Human Resources for placement in the employee's official personnel file.

Suspension without pay may follow a verbal or written warning or may be the first disciplinary action taken if warranted by the circumstances. Prior to suspending an employee, managers must obtain approval from the Office of Human Resources and supply appropriate supporting documentation. The length of the suspension will depend on the facts of each case such as type and severity of the behavior, previous work performance of the employee, and prior disciplinary actions. The suspension letter will outline the undesirable behavior, state expectations, and indicate the consequences that will occur if there is not any improvement. A copy of the letter should be forwarded to the Office of Human Resources for placement in the employee's official personnel file.

An employee may be suspended without pay for serious infractions of workplace conduct rules, including, but not limited to, rules prohibiting sexual harassment, workplace violence or drug or alcohol use, or for violations of state or federal laws.

An employee may be placed on an investigative suspension because of alleged serious misconduct. In these cases, the employee is removed from the workplace while the Office of Human Resources investigates the matter. Normally investigative suspension is leave with pay. The Office of Human Resources must approve any investigative suspension.

Termination may be advised when an employee has engaged in serious misconduct or has not corrected performance and/or behavior. Prior to dismissing an employee, managers must obtain approval from the Executive Director and supply appropriate supporting documentation. If approved, the written letter of termination includes the reason for termination, effective date, and information regarding the appeal process.

FACTS

The New Bedford Housing Authority (Housing Authority or Employer) and the Union are parties to a collective bargaining agreement that was in effect at all relevant times to this arbitration. Roger Moniz (Moniz/grievant) was hired in 2007 as a Maintenance Aide for the Housing Authority. Jose Jorge, Jr. (Jorge) is an employee of the Housing Authority and Union Steward. The Housing Authority employs approximately forty Maintenance Aides.

Steve Beauregard (Beauregard) is the Housing Authority's Executive Director. Wendy Mendoza-Rivera (Mendoza-Rivera) is the Housing Authority's Assistant Executive Director. John Fernandes (Fernandes) is the Housing Authority's Director of Facilities. Paul Bergeron (Bergeron) is a District Supervisor and Moniz's supervisor.

As a Maintenance Aide, one of Moniz's essential job functions listed on the Maintenance Aide job description is: "removes snow from grounds and premises by plowing, snow blowing, or shoveling." Snow operations are dependent on the weather and may occur outside regular working hours. Mendoza-Rivera discusses this possibility with all applicants for the Maintenance Aide position in their initial interview.

On Friday, January 5, 2024, Bergeron, after consulting with Fernandes, communicated to Moniz and the rest of his staff that a winter storm was anticipated for Sunday January 7, 2024, and staff would be called in to perform snow operations.

On Sunday January 7, 2024, Bergeron contacted Moniz and the rest of his staff to report to work for a snow operation. Moniz testified that he received two

text messages from Bergeron but did not hear them as he had fallen asleep after eating four roast beef sandwiches while watching football. Moniz called Bergeron at 4:00 p.m. to say he missed the texts because he was asleep. Moniz testified that Bergeron told him not to report to work as the snow operation was winding down. Two other Maintenance Aides did not report for the snow operation, but both were excused prior to the snow operation by the Housing Authority.

On January 8, 2024, Fernandes told Beauregard and Mendoza-Rivera that Moniz failed to report for snow operations the previous day. Moniz was called into a meeting with Beauregard, Mendoza-Rivera, and Union Representative Jorge. Moniz was asked why he did not report for the snow operation, and he stated that he had fallen asleep after eating four roast beef sandwiches and watching football.

On January 16, 2024, Beauregard issued a ten-day suspension to Moniz for his failure to report for snow operations on January 7, 2024. This was Moniz's second suspension for missing a snow operation as he was suspended in 2022 for one day for missing a snow operation.

On January 16, 2024, Jorge reached out to Beauregard asking him to reduce Moniz's suspension to five days, claiming that Moniz acknowledged his error in judgement, could have handled the situation better, and has learned from this experience. Beauregard responded by reducing the suspension to seven days.

On January 18, 2024, Moniz filed a grievance alleging that he was suspended without just cause. This grievance was denied at all steps of the grievance procedure by the Housing Authority, resulting in the instant arbitration.

POSITIONS OF THE PARTIES**THE EMPLOYER**

The term just cause essentially embodies seven principles:

1. Was the employee adequately warned of the consequences of his conduct?
2. Was the employer's rule reasonably related to the efficient and safe operation of the job?
3. Did management investigate before administering the discipline?
4. Was the investigation fair and objective?
5. Did the investigation produce substantial evidence or proof of guilt?
6. Were the rules, orders and penalties applied evenhandedly? and
7. Was the penalty reasonably related to the seriousness of the offense and past record?

Moniz was on Notice of the Expectations Regarding Snow Removal

Moniz received clear and consistent notice regarding the expectations for snow operations throughout his employment with the Housing Authority. The job description for Maintenance Aide lists ten essential job functions, one of which is "removes snow from grounds and premises by plowing, snow blowing, or shoveling." There is no language stating this essential function is only required for storms occurring during regular work hours. Mendoza-Rivera testified that snow operations have been mandatory for Maintenance Aides for her thirty-two-year tenure with the Housing Authority. In fact, snow removal is such a critical function that she discusses it with all Maintenance Aide applicants to ensure they are aware that snow operations are mandatory and may occur outside of regular work hours.

During the hearing, Moniz was asked by Union Counsel if snow removal was always part of his job and replied "yes." Moniz was also asked if anyone ever told him snow removal was mandatory and he replied "yes, all the time." When asked who told him snow removal was mandatory, he replied "all my supervisors."

Not only was Moniz aware of his obligation for snow removal in general, but he was also aware of his supervisor's expectations for this particular storm. On Friday, January 5, 2024, Bergeron, communicated to facilities staff that they would be on standby on Sunday and should await their supervisors' call, a fact that Moniz confirmed in his testimony.

Finally, Moniz was on notice of the Housing Authority's expectations regarding snow operations because he was previously disciplined for the same offense in 2022, receiving a one-day suspension. During the hearing, Moniz attempted to claim he had no knowledge of the prior suspension, but Mendoza-Rivera testified that she hand-delivered the suspension letter to Moniz in the presence of his union representative.

Snow Operations are Reasonably Related to the Efficient and Safe Operation of the Job

The Housing Authority is responsible for maintaining safe, affordable housing units for the residents of New Bedford. Snow removal is a critical part of maintaining safe, accessible housing. Snow operations are so critical to the position of Maintenance Aide that it is included in the job description and discussed at every applicant's interview. Failure to perform snow operations would undermine one of the Housing Authority's most critical functions – providing safe access to housing for residents of New Bedford.

Discipline was Administered Following a Fair and Objective Investigation

The Housing Authority provided Moniz with an ample opportunity to be heard prior to issuing discipline. When Moniz finally contacted Bergeron around 4:00 p.m. on January 7, 2024, he admitted that he failed to report for the snow

operation because he fell asleep. The following week, Moniz was called into a meeting with Beauregard, Mendoza-Rivera and his Jorge. The purpose of the meeting was to provide Moniz with an opportunity to explain his failure to perform the snow operation. Moniz reiterated that he watched football, ate four roast beef sandwiches and fell asleep, despite being on notice that he was expected to be on standby due to the forecasted winter storm. The Housing Authority did not issue discipline until after he was provided with an opportunity to provide facts and information about the incident, with his union representative present.

Substantial Credible Evidence

It is undisputed that Moniz was aware of the expectation to perform snow operations on January 7, 2024, and failed to report to work. Moniz admitted this during his phone call to Bergeron on the day in question, and in his follow-up meeting with Beauregard, Mendoza-Rivera and Jorge. These statements consistently show that Moniz was aware of the expectations and failed to perform his duties.

Expectations Regarding Snow Removal are Consistently Applied

The Housing Authority's Expectations regarding snow removal for Maintenance Aides are explicitly clear and consistently applied. The Union attempted to argue that Moniz was subjected to disparate treatment because two other Maintenance Aides did not report for snow operations on January 7, 2024, and were not disciplined. While it is accurate that two other Maintenance Aides did not report and were not disciplined, their circumstances were not comparable to Moniz's situation. One of the Maintenance Aides was on a pre-approved

vacation and not expected to return, while the other informed his supervisor on Friday of a daycare issue on Sunday and was excused. Moniz never communicated that he was unavailable or had a legitimate reason to be excused from the snow operation.

The Seven Day Suspension is Reasonably Related to the Seriousness of the Offense and Moniz's Record of Prior Discipline

Moniz's seven-day suspension is appropriate given the importance of snow operations and his disciplinary history. When deciding upon the appropriate level of discipline, the Housing Authority took into account Moniz's disciplinary history, including his one-day suspension in March of 2022 for failing to perform snow operations. Despite previously being given the shortest suspension possible in an effort to correct the behavior, Moniz repeated the same misconduct. Moniz has also received five written warnings for various other performance issues.

Failure to report to mandatory snow operations is not a minor offense. If all the Maintenance Aides opted to watch football, eat four roast beef sandwiches, and fall asleep during snow operations, Housing Authority residents would be at risk. By failing to report to work without any legitimate excuse, Moniz's share of the snow operations fell to his co-workers, who were forced to cover more areas and work longer hours to make up for his absence. Unfortunately, Moniz has not learned from his previous discipline and, as a result, he was appropriately given a seven-day suspension for his misconduct.

Conclusion

Based on the above, the Housing Authority had just cause to suspend Moniz for seven days. As such, the grievance should be denied.

THE UNION

The Housing Authority has failed to prove any wrongdoing, rule, policy, violation or the existence of just cause. Also, there is clear evidence that the Housing Authority has unilaterally elected to create a factual scenario it can interpret as it wishes. The record is barren when it comes to any rules or regulations shown to Moniz that falling asleep is somehow willful or intentional bad behavior. Finally, there is evidence of disparate treatment towards Moniz after other Maintenance Aides did not report for snow removal and were not disciplined.

In the Housing Authority's suspension letter, its entire claim is based upon Moniz being advised on January 5, 2024, that there was a potential arrival of a storm requiring snow and ice removal. This "be prepared notice" was conveyed to almost forty Maintenance Aides. Moniz agrees his job description lists "removing snow from grounds and premises by plowing, snow blowing or shoveling." There is absolutely no evidence, however, that Moniz refused to perform any essential functions. The un rebutted testimony established that Moniz was home watching football while waiting for the snow removal call. He fell asleep, and did not hear the text or phone ring. When he woke up, he realized he had missed a call from his supervisor and returned the call. Moniz asked Bergeron if he still wanted him to come in and was told to do whatever he wanted. The supervisor never told Moniz that snow removal was mandatory, nor did he tell him that if he did not report to work that he would be disciplined.

Just Cause

In this case, just cause never existed, and the Housing Authority never demonstrated any violation of work rules. The Housing Authority did not have a defined mandatory snow removal policy, or a specific protocol for “on call snow removal” status being modified or excused. It was simply a unilateral decision made by the Housing Authority.

The time-tested practical approach to determine the basic elements of just cause were made famous in Arbitrator Dougherty’s “Seven Tests.” A “no” answer to any one of these questions means just cause either was not satisfied or seriously weakened by the Housing Authority’s arbitrary, capricious, or discriminatory behavior. The Seven Tests include:

1. Notice: Did the Employer give to the employee forewarning or foreknowledge of the possible or probable consequences of the employee’s disciplinary conduct?
2. Reasonable Rule or Order: Was the Employer’s rule or managerial order related to the orderly efficient and safe operation of the Employer’s business?
3. Investigation: Did the Employer, before administering the discipline, make an effort to discover whether the employee did in fact violate a rule or order of management?
4. Fair Investigation: Was the Employer’s investigation conducted fairly and objectively?
5. Proof: At the investigation, was there substantial evidence or proof that the employee was guilty as charged?
6. Equal Treatment: Has the Employer applied its rules, orders and penalties even-handedly and without discrimination to all employees?

7. Penalty: Was the degree of discipline administered reasonably related to the seriousness of the offense, and the record of the employee in his service with the Employer?

A review of the exhibits and the testimony demonstrates how badly the Housing Authority has failed to satisfy the Seven Tests for just cause. Each of the test statements can be answered with a “no.” This dispute is extraordinary because there is such a lack of evidence to support the Housing Authority’s claims.

Disparate Treatment

Another relevant point of discussion is the unequal treatment of Moniz for his conduct. Several other Maintenance Aides failed to report for the same snow removal operation and were not disciplined. This is unfair, unacceptable, and violates workplace standards requiring all employees to be treated the same. This did not occur in this matter, and the reason is obvious; the Housing Authority does not have a standard for “stand by for weather call back.” Instead, you have a Housing Authority making selective unilateral decisions any way it wishes.

Conclusion

The Union has been able to dismantle the reliability of the Housing Authority’s case through cross-examination of its witnesses, while also providing affirmative testimonial evidence supporting Moniz’s accounts of the events. His testimony and credibility were never rebutted or impeached. Finally, the Union demonstrated that the Housing Authority failed to prove its claims by reliable, relevant or believable evidence. The Union requests that the grievant be made whole for his losses.

OPINION

The issue before me is:

Did the Employer have just cause to suspend Roger Moniz for seven days?

If not, what shall be the remedy?

For all the reasons stated below, the Employer did not have just cause to suspend Roger Moniz for seven days. The Employer did have just cause to suspend Roger Moniz for five days. Moniz shall be made whole for all losses sustained above a five-day suspension and all records of a seven-day suspension shall be removed from his file and replaced with documentation of a five-day suspension.

There is little dispute about the facts of this case. Moniz, as a Maintenance Aide for the Housing Authority, is responsible for snow operations as directed by his employer. The Maintenance Aides, including Moniz, were informed on Friday January 5, 2024, of a potential storm on Sunday January 7, 2024. On that Sunday, Bergeron attempted to contact Moniz to report for a snow operation. Moniz had fallen asleep, missed the notifications, and did not report for the snow operation.

Participating in snow operations is an essential function of the Maintenance Aide job. The Housing Authority informs all applicants for the Maintenance Aide position of this requirement prior to being hired, and Moniz testified that he was aware that snow operations were mandatory. Moniz had already received a one-day suspension for failing to report to work for a snow operation in 2022.

The Housing Authority investigated this latest incident, giving Moniz the opportunity to explain the circumstances of why he failed to report for the snow operation. Moniz explained that he had fallen asleep and missed the notifications.

The Housing Authority found this to be an unacceptable reason for missing the snow operation. The Housing Authority decided to suspend Moniz for ten days, which it reduced to seven days upon review of a request from Union Representative Jorge.

It is clear from the evidence presented that the Housing Authority was within its rights to discipline Moniz for his actions. A review of Moniz's prior discipline shows that he received a one-day suspension in 2022 for the same issue. Under these circumstances, a second suspension was warranted. Thus, the only remaining issue in dispute is the length of the suspension.

One of the elements of a just cause analysis is that the discipline issued be reasonably related to the seriousness of the offense committed and the employee's prior disciplinary record. Here, the Housing Authority's need to protect its residents during a winter storm is sufficient to discipline Maintenance Aides who fail to report for a snow operation¹. Where the Housing Authority overstepped the bounds of just cause was its decision to suspend Moniz for seven days. I find the jump from a one-day suspension to a seven-day suspension to be unsupported by the evidence presented and a review of Moniz's prior discipline. When weighing the needs of the Housing Authority against the protections afforded by the just cause language of the collective bargaining agreement, it is clear that a five-day

¹ I am not persuaded by the Union's argument that Moniz was subject to disparate treatment because two other Maintenance Aides, who also failed to report for the snow operation, were not disciplined. For a disparate treatment argument to prevail, the employees must be similarly situated. In this case, Moniz's absence was unexcused, while the other two Maintenance Aides were excused from the snow operation prior to the storm by the Housing Authority.

suspension is the appropriate level of discipline in this case. The progression from a one-day suspension to a one work-week suspension protects the Employer's legitimate business interests, while also placing the employee on notice that his continued actions in this area are unacceptable and subject to increased future discipline if uncorrected.

AWARD

The Employer did not have just cause to suspend Roger Moniz for seven days. The Employer did have just cause to suspend Roger Moniz for five days. Moniz shall be made whole for all losses sustained above a five-day suspension and all records of a seven-day suspension shall be removed from his file and replaced with documentation of a five-day suspension.



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