

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS

In the Matter of the Arbitration Between:

TOWN OF LEXINGTON

-and-

AFSCME, COUNCIL 93, LOCAL 1703

ARB-23-9872

Arbitrator:

Timothy Hatfield, Esq.

Appearances:

Melissa Murray, Esq.

- Representing Town of Lexington

Evan Berwald, Esq.

- Representing AFSCME, Council 93  
Local 1703

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 Town had just cause to suspend the grievant for three days for a physical altercation that occurred on December 23, 2022. The Town, however, did not have just cause to find the grievant in violation of the Drug and Alcohol Policy, and all references to a failed test must be removed from his personnel file. Finally, the Town did not violate the collective bargaining agreement when it temporarily removed the grievant from safety sensitive functions.



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Timothy Hatfield, Esq.  
Arbitrator  
May 16, 2025

### **INTRODUCTION**

On February 17, 2023, AFSCME Council 93, Local 1703 (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 July 31, 2023, September 25, 2023, and November 17, 2023.

The parties filed briefs on March 1, 2024.

### **THE ISSUES**

The parties were unable to agree on a stipulated issue. The proposed issue before the arbitrator is:

#### **The Union proposed:**

Did the Town of Lexington wrongfully suspend the Grievant and remove him from safety sensitive functions, without just cause and/or progressive discipline, in violation of the collective bargaining agreement? If so, what shall be the remedy?

#### **The Town proposed:**

Whether the Town had just cause to suspend Mr. Grome for three days for an incident that occurred on December 23, 2022? If not, what shall be the remedy?

Is the removal of an employee from safety sensitive functions subject to review by an arbitrator under a just cause standard? If not, what shall be the remedy?

**Issue:**

As the parties were unable to agree on a stipulated issue, I find the appropriate issues to be:

1. Did the Town have just cause to suspend the grievant for three days for an incident that occurred on December 23, 2022? If not, what shall be the remedy?
2. Did the Town violate the collective bargaining agreement when it temporarily removed the grievant from safety sensitive functions? If so, what shall be the remedy?

**RELEVANT CONTRACT LANGUAGE**

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

**Article 5 Management Rights**

5.1: The parties agree that the Town Manager is the chief executive officer of the Town and is responsible for the supervision and administration of the Department of Public Works of the Town; that the Director of Public Works is in immediate control of the Department of Public Works; and that both the Town Manager and the Director of Public Works are public officers holding offices established under and with the powers provided by statute. The Town Manager and the Director of Public Works shall continue to control and direct the Department of Public works in accordance with the powers, rights and duties conferred upon them by statute, or rule or regulation of any agency of the Commonwealth of Massachusetts and in accordance with the express terms of this Agreement, provided, however, that in the event that any part or provision of this Agreement is in conflict with any federal or state statute, or any rule or regulation of any Agency of the Commonwealth of Massachusetts, said statute, rule or regulation, as it may be amended from time to time, shall prevail to the extent permitted by law so long as such conflict remains. As to every matter not expressly provided for in this Agreement, the Town Manager and Director of Public Works retain all the powers, rights and duties

conferred upon them by law and may exercise the same at their discretion.

5.2: Any dispute concerning the exercise of responsibility not expressly modified or abridged by this Agreement shall be subject to the grievance procedure through Step three (3) only.

#### Article 7 Grievance and Arbitration Procedure (In Part)

7.1: A grievance is hereby defined to mean a complaint involving the interpretation or application of the express provisions of this Agreement affecting any employee covered hereunder or any group of such employees having the same complaint. The word "employee" as hereinafter used shall include a group of employees having the same grievance, ...

#### Step 4

In the event that the grievance shall not have been disposed of after Step 3, either party, within thirty (30) days, but not less than fifteen (15) days, after the decision of the Town Manager, or his/her designee, is due, may request arbitration by the Board of Arbitration and Conciliation to determine the outcome of said dispute, in accordance with its Voluntary Labor Rules. The decision of the arbitrator shall be final and binding. ...

7.7: No decision made under this grievance procedure shall be in violation of the laws or diminish the authority and power of the Retirement Board of the Town of Lexington, and provided, further, that the decision of the arbitrator shall not diminish the authority vested in the Town Manager or the Director of Public Works under Article 5, Management Rights unless expressly modified or abridged by this Agreement.

#### **Article 8 Discipline and Discharge**

No employee who has completed his/her twelve (12) month probationary period shall be suspended or disciplined except for just cause. Any dispute as to whether the Town acted arbitrarily, capriciously, or unreasonably with respect to the discharge or discipline of an employee shall be subject to grievance and arbitration hereunder, provided however, that a probationary employee shall have no such access to the grievance and arbitration procedure.

**Article 13 Overtime (In Part)**

13.1 ...

13.5: It shall be recognized that the assignment of overtime work is the function of the Employer in keeping with its responsibility for meeting its obligations to the citizens of the community. Overtime assignments shall be on a voluntary basis except in case of emergency. The circumstances constituting an emergency shall be determined by the Director of Public Works or his/her duly authorized agent. ...

**Appendix A- POLICY REGARDING DRUG AND ALCOHOL TESTING (In Part)**

A. It is the Policy of the Town of Lexington to comply fully with the regulations mandating pre-employment/pre-duty, random, reasonable suspicion, post-accident, return-to- duty, and follow-up drug and alcohol testing in accordance with regulations issued by the U.S. Department of Transportation.

B. Performance of safety-sensitive functions is prohibited by employees having a breath alcohol concentration of 0.02 percent or greater as indicated by an alcohol breath test; by employees using alcohol or any medication containing alcohol while on duty or when reporting for duty; by employees who have used alcohol or any medication containing alcohol within the four hours prior to reporting to duty. ...

D. Any employee who voluntarily requests assistance in dealing with a personal drug addiction or alcohol problem, prior to being found to be in violation of this Policy, may participate in a rehabilitative program without being subject to disciplinary action.

**II. PROCEDURES**

A. **Types of Tests** The following tests are required:

1. ...

4. **Reasonable Suspicion** - A test must be conducted when two or more trained supervisors or managers observe behavior or an appearance that is characteristic of alcohol or illicit drug misuse. If a test cannot be administered, the driver must be removed from performing safety-sensitive duties for at least 24 hours. Testing for alcohol abuse must be based upon suspicion which arises just before,

during or just after the time when the employee is performing safety-sensitive duties. Testing for substance abuse may occur upon suspicion at any time the employee is on duty.

- ii. **Return-to-Duty-** A test must be conducted when an individual who has violated the prohibited alcohol or drug standards returns to perform safety-sensitive duties. Return-to-duty alcohol test results must indicate an alcohol concentration level of less than 0.02 before returning to a safety-sensitive function. ...
- iii. **Follow-up** - Tests are unannounced. At least six (6) tests applicable to the employee's violation must be conducted in the first 12 months after a driver returns to duty. A Substance Abuse Professional (SAP) may require the covered employee to undergo additional alcohol and controlled substance testing for up to 60 months following the return to duty.

## **B.CONDUCTING TESTS**

### **1. Alcohol**

*The Town requires breath testing for alcohol as part of the recruitment process for safety-sensitive positions.* The DOT rules require breath testing for alcohol for safety sensitive employees, using evidential breath testing (EBT) devices. Any result less than 0.02 alcohol concentration is considered a "negative" test and a second test is not required. If the alcohol concentration is 0.02 or greater, a confirmation test must be conducted. ...

### **2. REFUSAL TO PARTICIPATE**

A refusal to participate is defined as (1) a failure to provide adequate breath for alcohol testing without a valid medical explanation; (2) a failure to provide an adequate urine sample for controlled substances testing without a genuine inability to provide a specimen; or (3) engaging in conduct that clearly obstructs the testing process. If an employee refuses to participate in a required test, the Town will be so notified. Notification of a refusal to participate will result in the same consequences to the employee as a positive test result.

## **C. Consequences of Alcohol/Drug Misuse**

- *General Consequence:* Drivers who engage in prohibited alcohol or drug conduct (that is, who test positive for alcohol use 0.02 or greater or have a positive test result for drug use) must be immediately removed from safety-sensitive functions. In determining the level of

discipline for alcohol tests which result in 0.02 or higher and for positive test results for drug use, the Department will not consider any similar offense committed by the employee which is more than five (5) years old. This means that a second offense under this policy will revert to a first offense status, when the original offense becomes five (5) years old.

- **Alcohol Misuse (0.02+):** An employee with an alcohol concentration of 0.02 or greater but less than 0.04 is not permitted to perform safety-sensitive functions for a minimum of 24-hours or until a retest shows that the employee's alcohol concentration has dropped below 0.02. In addition, the following levels of disciplinary action will be imposed:

First Offense: Reasonable effort will be made to reassign the driver to non-safety sensitive duties for the remainder of the shift and any portion of the next shift that falls within the 24-hour period from the test. Drivers who cannot be reassigned to non-safety sensitive duties will be sent home with pay for the remainder of the shift and any portion of the next shift that falls within the 24-hour period from the test. In addition, the driver will receive a written warning for alcohol-related misconduct rendering him/her unavailable for duty. ...

- **Alcohol Misuse (0.04+):** An employee with an alcohol concentration of 0.04 or greater is prohibited from performing safety-sensitive functions until at a minimum (a) the employee undergoes an evaluation, and where necessary, treatment; and (b) a substance abuse professional determines that the employee has successfully complied with any recommended course of treatment; and (c) the employee passes the requirements of a return-to-duty test. Employees who qualify for a return to safety- sensitive duties will be subject to unannounced follow-up testing. In addition, the following levels of disciplinary action will be imposed:

First Offense: Two (2) day suspension without pay to begin at the start of the driver's next shift. Any other time spent for inpatient rehabilitation, excluding the suspension period, may be charged to any available leave balances in accordance with existing benefit policies. An employee who refuses to fully participate in the treatment program recommended by the Substance Abuse Professional or fails to report for duty following a negative return-to-duty test will be placed on unauthorized leave. An unauthorized absence of five (5) or more days will be considered a resignation not in good standing. A failed return-to-duty test or follow-up test will be considered the same as a second offense. ...

**D. Information/Training**

1. All current and new safety-sensitive employees will receive written information about the testing requirements and how and where they may receive assistance for alcohol or drug misuse. All safety-sensitive employees must receive a copy of this Policy and sign the Confirmation of Receipt (Attachment 1).
2. All supervisory and management personnel in the Department of Public Works must attend at least two hours of training on alcohol and drug misuse symptoms and indicators used in making determinations for reasonable suspicion testing.
3. This Policy will be posted on employee bulletin boards and will be available to all employees. ...

**FACTS**

The Town of Lexington (Town) and the Union are parties to a collective bargaining agreement that was in effect at all relevant times to this arbitration. Thomas Grome (Grome / grievant) is a Heavy Equipment Operator in the Town's Department of Public Works (DPW). Sean Pfeiffer (Pfeiffer), at the time of the incident in question, was also a Heavy Equipment Operator in the DPW. Pfeiffer is also one of two employees who had an active role in the maintenance of brining equipment and preparation of the salt brine used by the Town during winter weather responses.

James Malloy (Malloy / Town Administrator) is the Town Administrator. John Zaccardi (Zaccardi) is the Superintendent of the Highway Division of the DPW, and selected Pfeiffer to lead the DPW snow/ice response on December 23, 2022. Marc Valente (Valente) is the Manager of Operations for the Town's DPW. David Pinsonneault (Pinsonneault) is the Director of the Town's DPW. Anne Graglia-Kostos (Graglia-Kostos) is the Town's Director of Human Resources.



James Barry (Officer Barry) is a Lexington Police Officer who spoke with Grome at the police station.

On December 23, 2022, a snow and ice removal operation commenced. Due to the impending Christmas holiday, the foreman, crew chiefs and leadmen were all unavailable. Zaccardi chose Pfeiffer to lead the operation. At the end of the evening, Grome returned to the DPW building from plowing, saw Pfeiffer, and began yelling and swearing at him. Grome was mad that he had more seniority than Pfeiffer and should have been the lead in the operation that evening. The verbal altercation continued and turned physical when Grome grabbed Pfeiffer by his beard and Pfeiffer shoved Grome in the chest. At this point, Pfeiffer told Grome he could smell the alcohol on his breath and told him to go sleep it off in the snow operations office. Grome instead proceeded to clock out and leave the premises heading for the police station. Both Grome and Pfeiffer called Zaccardi to report the incident, and Zaccardi and Valente both began heading to the DPW building.

Grome went to his car and consumed two beers before driving to the Lexington Police station to report an assault. Grome, who was at the station for about an hour, reported that Pfeiffer struck him. Officer Barry, during his interview of Grome, reported smelling alcohol on Grome and asked him if he drank that night. Grome stated that he had two beers in his car before driving to the Police Station but denied that he was drinking on the job. Grome declined to take a Breathalyzer test and was allowed to leave and drive home. Zaccardi and Valente interviewed Pfeiffer and some of the remaining DPW employees upon their arrival at the DPW building, but were unable to speak to or observe Grome in person as

he had left the premises and did not return. At no time did Grome submit to a Breathalyzer test.

On December 24<sup>th</sup>, Valente informed Pinsonneault of the incident. Pinsonneault then contacted Graglia-Kostos to discuss the incident and the subsequent investigation which they agreed to perform jointly. Valente interviewed Grome and Pfeiffer independently prior to placing them both on administrative leave. Both Grome and Pfeiffer received administrative leave letters on December 27<sup>th</sup>, instructing them to “tell the truth at all times” and to provide a written statement. Both Grome and Pfeiffer submitted written statements prior to being formally interviewed by Pinsonneault and Graglia-Kostos.

Pinsonneault and Graglia-Kostos reviewed a video of the incident, the written statements of Grome and Pfeiffer, and the police report generated from Grome’s complaint. Grome’s written statement contained both inconsistencies and untrue statements. In his written statement, Grome claims that Pfeiffer punched him first and that he then grabbed Pfeiffer’s beard. The video of the incident clearly shows this statement to be factually inaccurate and shows Grome being the instigator of both the verbal and physical altercation.

Grome continued with his factually inaccurate claims by stating that he drove to the neighboring town of Bedford, after clocking out, to buy beer that he proceeded to drink on the way to the Lexington police station. When confronted with a timeline of when he clocked out of work and a time stamp of when he arrived at the police station which made that story impossible, Grome admitted to having beer in his car that he drank on the way to the police station. Grome claimed that

he purchased the beer the day before to drink on his way home. Finally, Grome claimed to have texted the Town's Human Resource Department after leaving the police station to report the incident, but the Human Resource Department is not equipped to receive text messages.

Based on his statements concerning having beer in his car, drinking and driving, and the statements of Pfeiffer and Officer Barry that Grome smelled of alcohol on the night in question, Graglia-Kostos asked Grome during his interview if he had a problem with alcohol abuse. Grome responded "yes". Grome was then asked if he would like some help and again responded "yes". The Town then provided Grome with information about the Employee Assistance Program.

On January 10, 2023, Malloy suspended Grome for five days for instigating a physical altercation, for being untruthful during the investigation, for his lack of self-control and poor judgment. Malloy stated that this incident would be considered a first offense of alcohol misuse (0.04+) based on the policy contained in the collective bargaining agreement. Finally, Malloy removed Grome from safety sensitive functions until such time as he completed a substance abuse program.

The Union filed a grievance on behalf of Grome. In his Step III response, Malloy reduced the suspension to a three-day suspension and the incident was reduced to a first offense of alcohol misuse (0.02+) based on the policy contained in the collective bargaining agreement. Grome was still required to participate in a substance abuse program and could no longer perform safety sensitive functions until the program was completed.

Upon receipt of the Step III response, the Union filed for arbitration, resulting in the instant arbitration hearing.

### **POSITIONS OF THE PARTIES**

#### **THE EMPLOYER**

The Town had just cause to suspend the grievant for three days due to his participation in a physical altercation with Pfeiffer, as well as his poor judgement and blatant untruthfulness. The evidence is clear that Grome was the aggressor in the fight on December 23, 2022, and that he pulled Pfeiffer's beard causing him to react instinctively and push Grome away. The Town has submitted uncontroverted evidence that Grome was involved in a physical altercation with a co-worker and that he repeatedly provided false or inconsistent statements regarding the fight before, during and after the Town's investigation.

#### **Just Cause**

The burden of proof to demonstrate just cause for discipline falls on the employer. The standard that an employer must meet to establish just cause includes: 1) the employee is on notice of a rule or policy, the infraction of which may result in discipline; 2) the employee committed an infraction of the rule or policy; and 3) the amount of discipline issued is in keeping with the seriousness of the offense.

There is no question that Grome was involved in a fight at work and that he was aware that fighting at work was significant and not allowed. This is evident by the fact that he immediately called his supervisor after the fight and went to the police department to file a police report.

Town Manager Malloy issued a clear directive to Grome in his December 27, 2022 administrative leave letter: “[t]ell the truth at all times, including with respect to the information that you provide in the investigation.” Grome acknowledged receiving this letter. Also included in this letter was the additional notice that “[f]ailure to comply with these directives or any conduct on your part that could reasonably be seen as interfering with the investigation will serve as independent grounds for discipline, separate and apart from any disciplinary action that is warranted based on the outcome of the investigation.” Despite the Town Manager’s directive, the evidence is clear that the grievant engaged in extensive untruthfulness, thereby also engaging in insubordination. Untruthfulness that extended to the arbitration hearing when he stated that he lied to the Town when he told it that he had an alcohol problem.

The Town presented undisputed evidence showing that the discipline of Grome and Pfeiffer was consistent with discipline issued in the past for similar incidents and untruthfulness. The last fight that the Town is aware of, occurred in January 2010. Like this present matter, that situation involved physical contact between employees. In that case, the employee who was determined to be the aggressor and whose testimony did not reflect the testimony of the other witnesses was given a 3-day suspension and the other employee was given a written warning. The evidence shows that the Town’s treatment of Grome has been fair and consistent with other employees.

Removal From Safety Sensitive Positions

The Town is responsible for the safety and well-being not just of its employees but the residents and visitors of the Town. The Town is under no obligation to allow an employee who has recently engaged in a fight at work and subsequently stated that they have a problem with alcohol abuse to continue in safety sensitive positions or operating equipment that poses a risk of danger to either themselves or others. In this case, Grome voluntarily sought assistance dealing with an alcohol problem and the Town accommodated him. The Town continued to allow him to work and receive his full pay notwithstanding the fact that he was limited in what he could do. It is incredible for someone to think that they could get in a fight with a co-worker, lie about going to a store in Bedford to buy beer, admit to drinking beer in their car after work, and admit to having a problem with alcohol abuse, and say that you want help and that there would be no impact on their working situation.

The Union argues that the Town's removal of Grome from safety sensitive functions was disciplinary and not allowed under the collective bargaining agreement. The Town disagrees. First and foremost, the collective bargaining agreement provides that "[a]s to every matter not expressly provided for in this Agreement, the Town Manager and Director of Public Works retain all the powers, rights and duties conferred upon them by law and may exercise the same at their discretion." This situation is unique and to the extent the Union believes that it does not fit squarely into one provision of the collective bargaining agreement, the Town's actions are an appropriate exercise of its Management Rights.

While the Town disagrees that an employee's removal from safety sensitive functions is subject to a just cause standard, even if it were, the Town had just cause to remove Grome based on his admission that he had a problem with alcohol abuse, his voluntary request for help, the fact that he had been involved in a fight at work and his various troubling statements that he was drinking in his car, drinking on his drive home and had 1-2 beers before going into the police department to file a report. Except for the statement from Pfeiffer that he could smell alcohol on Grome, all of the additional information the Town received regarding Grome's drinking or having beer in his car came from Grome himself. The Union's argument that the Town removed Grome from safety sensitive functions based solely on an uncorroborated statement from Pfeiffer is not true. The Town removed Grome for safety sensitive functions based on his own statements, including most significantly that he had a problem with alcohol abuse.

#### No Contractual Right to Overtime

To the extent that the Union's argument is centered on the loss of overtime, that argument fails when compared to the Town's rights and responsibility to keep its employees and residents safe. Article 13.5 of the collective bargaining agreement provides that "the assignment of overtime work is the function of the Employer in keeping with its responsibility for meeting its obligations to the citizens of the community." In this case, the Town was justified in temporarily removing Grome from safety sensitive functions, even if it meant a loss of overtime, in order to meet its safety obligations to the citizens of Lexington.

Conclusion

For all of these reasons, the Town asserts that there was just cause for a three-day suspension and that the Town acted reasonably and within its authority to remove Grome from safety sensitive functions until he provided documentation that he was safe to return.

**THE UNION**

There are two proof issues in the arbitration of discipline cases. The first involves the proof of wrongdoing; the second, assuming that guilt of wrongdoing is established, concerns the question of whether the punishment assessed by management should be upheld or modified. The burden of proof is on the employer to prove guilt of wrongdoing, especially where the collective bargaining agreement requires just cause.

The Town Failed to Prove That Grome Was in Violation of a Policy and Could be Disciplined

The Town cannot produce any evidence Grome was in violation of a first offense under either Alcohol Misuse (0.02+) or Alcohol Misuse (0.04+) because he was never tested. Discipline is frequently overturned when it was determined that there was not a reasonable basis to require testing.

Here, the Town failed to follow its own standards and procedures. First, to have violated the policy, an employee must engage in prohibited alcohol or drug conduct. All witnesses and facts agree that no breathalyzer test was performed on Grome and his blood alcohol concentration was not measured. Therefore, Grome cannot be found to have violated the policy and cannot be disciplined thereunder.



Furthermore, Grome's conduct occurred off the clock. To sustain off-duty misconduct on company premises that warrants discipline, the employer must prove that the off-duty, on premises misconduct has a nexus to the employer's legitimate business interests. The Town failed to introduce evidence of what is required of it when an employee admits to drinking alcohol, off the clock, and potentially on Town property. Additionally, there was no evidence admitted establishing Grome has a problem drinking on the job, which defeats any nexus to the Town's interest that it must remain compliant with DOT regulations.

Based on the above, Grome was unjustly disciplined under the policy when he was removed from safety sensitive functions and overtime opportunities. Therefore, all language in his discipline letter and Step III decision referencing the policy must be rescinded and his suspension must be rescinded or reduced to reflect this lack of just cause.

The Penalty Was Not Commensurate With the Seriousness of the Offense and His Past Record

Under the policy, an employee can only be removed from safety sensitive functions if they are tested and found in violation. Further, the policy states that employees can enroll in EAP without being subject to discipline under the policy. Grome told Kantos and Pinsonneault he had an alcohol problem, and he elected EAP. He requested EAP prior to being found in violation of the policy. Therefore, Grome should not have been disciplined via removal from safety sensitive functions and overtime opportunities after he admitted having an alcohol problem.

Furthermore, the Town is inconsistent about what a safety sensitive function is. No evidence was presented to establish it as an industry term. No two

witnesses could agree on what a safety sensitive function is. If the Town's witnesses and decision makers on Grome's discipline cannot agree on what a safety sensitive function is, it is unreasonable to blanketly remove him from overtime assignments without establishing if those assignments are safety sensitive functions or not. Not every vehicle, and not every job at the DPW and Highway Division requires the use of a CDL license.

Grome documented the overtime opportunities he missed because he was removed from all overtime opportunities. Grome credibly testified that he almost never declines overtime opportunities.

The Town's discipline of Grome does not match the seriousness of the alleged alcohol misuse offense. Grome should not have been removed from overtime opportunities and/or safety sensitive functions and his discipline decision must be amended to reflect this. Additionally, Grome is entitled to an award of back pay for the overtime opportunities he would have worked but for the unjust discipline removing him from such opportunities. In order to make Grome whole for the unjust discipline, he must be monetarily remedied for his missed overtime.

#### Suspensions for Untruthfulness and Fighting

The Town argues that the three-day suspension of Grome is in line with other suspensions for untruthfulness and fighting, offering three examples of prior discipline. The first two disciplines offered, however, were likely for untruthfulness during investigations into unauthorized use of Town property. Grome was not under investigation for unauthorized use of Town property. Therefore, the

underlying reasons for the discipline do not match and cannot be relied upon to show even-handedness of discipline.

In the final discipline relied upon by the Town, the employee was given a written warning for participating in an altercation even though he did not instigate it. No information was provided about any discipline issued to the aggressor in that matter. Assuming, *arguendo*, Grome is the aggressor in this matter, the discipline issued for the previous aggressor would be much more relevant.

Based on the above information, the comparator discipline cannot be relied upon as the final and binding discipline on Grome. The failure of the Town to rely upon relevant comparators to justify the level of discipline imposed on Grome requires that his three-day suspension be rescinded and/or reduced.

### Conclusion

Grome was unjustly disciplined by the Town when they found him in violation of the policy for alcohol misuse without conducting a breathalyzer test, for removing him from overtime opportunities without evidence he was misusing alcohol on-the-clock or at all, and for issuing a three-day suspension without reliable comparator discipline. Due to these failures, Grome's suspension must be rescinded and/or reduced, all references to violations of the alcohol policy must be scrubbed from his personnel record and Grome must be retroactively paid for the overtime opportunities he otherwise would have taken as is his habit.

**OPINION**

The issues before me are:

1. Did the Town have just cause to suspend the grievant for three days for an incident that occurred on December 23, 2022? If not, what shall be the remedy?
2. Did the Town violate the collective bargaining agreement when it temporarily removed the grievant from safety sensitive functions? If so, what shall be the remedy?

For all the reasons stated below, the Town had just cause to suspend the grievant for three days for a physical altercation that occurred on December 23, 2022. The Town, however, did not have just cause to find the grievant in violation of the Drug and Alcohol Policy, and all references to a failed test must be removed from his personnel file. Finally, the Town did not violate the collective bargaining agreement when it temporarily removed the grievant from safety sensitive functions.

**Altercation**

There is no dispute that a physical altercation occurred on the night of December 23, 2022, between Grome and Pfeiffer, who was serving as the lead for the snow operation. The video evidence shows Grome initiating a verbal confrontation with Pfeiffer, which turned physical when Grome grabbed Pfeiffer's beard and Pfeiffer shoved him away. The evidence is clear that Grome started the initial verbal altercation and was also the instigator of the physical interaction.

Additionally, the evidence presented supports the conclusion that Grome was untruthful about the events of that evening in both his interviews with Human

Resources and in his written and verbal statements submitted during the investigation. Grome was repeatedly untruthful about the physical altercation, his actions upon leaving work and heading to the police department, and how and when he obtained and drank the two beers in his car before driving to the police station. This untruthfulness occurred even after he was instructed by the Town Manager in his administrative leave letter that:

During your administrative leave, ... You are also required to:

- Preserve - do not alter or destroy- any evidence related to this investigation.
- Cooperate in the investigation and participate in any interview.
- Tell the truth at all times, including with respect to the information that you provide in the investigation. Untruthfulness includes making false statements and/or intentionally omitting significant or pertinent facts.

Grome's actions during the verbal and physical altercation, and his repeated untruthfulness during the investigation certainly merit a three-day suspension on their own without any reference to a failed alcohol test. Additionally, the Union's arguments that this discipline is not supported by the facts, and/or is not in line with prior discipline of other employees is not persuasive.

#### Alcohol Policy

The Town has, however, failed to prove that Grome violated the Alcohol Policy based on its failure to properly follow the procedures outlined in the policy for Reasonable Suspicion testing. While there were certainly circumstantial indications that Grome had been drinking on the night of the incident, and the Town attempted to send two trained supervisors to the scene to witness Grome's behavior, Grome left the premises prior to their arrival. Subsequently, the Lexington

Police allowed Grome to leave the police station and drive home after he declined a request to take a breathalyzer test. As such, no test was ever performed and the requirements of the alcohol policy for reasonable suspicion testing were not completed. The Town is unable to prove a failed test and may not reference nor rely on an alleged test failure to support discipline of Grome. All references to a failed alcohol policy test from December 23, 2022 must be removed from Grome's personnel file and replaced by a disciplinary letter for a three-day suspension based on his actions during the verbal and physical altercation and his repeated untruthfulness during the subsequent investigation.

#### Safety Sensitive Functions

During the course of the investigation into the altercation of December 23, 2022, Grome was interviewed and asked whether he might have a problem with alcohol abuse. Grome responded "yes". Grome was then asked whether he would like to get some help, and he again responded "yes". Based on his responses, Grome was provided with information about the Employee Assistance Program.

Subsequently, based on Grome's responses, he was removed from Safety Sensitive Functions until such time as he submitted proof of his participation in a substance abuse program and was cleared to return to work without restrictions.

The assignment of safety sensitive functions to employees is at the sole discretion of management subject to any restrictions in the collective bargaining agreement, of which there are none in this case. Based on Grome's admissions and request for assistance, the Town was well within its rights to temporally remove Grome from safety sensitive functions, until such time as he participated

in a substance abuse program and was cleared to return. The right to assign work to employees, including overtime, rests exclusively with the employer. The Town must protect its workforce and its citizens in a manner it feels is appropriate and in this case that meant a removal of Grome, temporarily, from safety sensitive functions. The Union's argument that this decision was a punishment is unpersuasive given that the Town continued to pay Grome his full salary even though he was unable to perform all of the usual functions of his job until such time as he finished his program.

The Union's further argument that the overtime opportunities Grome missed were also a punishment is also unpersuasive as it should be noted that the right to overtime is not an absolute in the collective bargaining agreement. In fact, the collective bargaining agreement states:

It shall be recognized that the assignment of overtime work is the function of the Employer in keeping with its responsibility for meeting its obligations to the citizens of the community.

As such, the Town did not violate the collective bargaining agreement when it removed Grome temporarily from safety sensitive functions, including overtime opportunities performing safety sensitive functions, until such time as he finished an alcohol abuse program and was cleared to return to full duties.

### **AWARD**

The Town had just cause to suspend the grievant for three days for a physical altercation that occurred on December 23, 2022. The Town, however, did not have just cause to find the grievant in violation of the Drug and Alcohol Policy, and all references to a failed test must be removed from his personnel file.

Finally, the Town did not violate the collective bargaining agreement when it temporarily removed the grievant from safety sensitive functions.

A handwritten signature in blue ink, appearing to read "Timothy Hatfield". The signature is fluid and cursive, with a long horizontal line extending from the start.

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Timothy Hatfield, Esq.  
Arbitrator  
May 16, 2025