

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of the Arbitration Between:

CITY OF WORCESTER

-and-

NAGE, LOCAL 495

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ARB-16-5516

Arbitrator:

Timothy Hatfield, Esq.

Appearances:

William Bagley, Esq.

- Representing City of Worcester

Timothy McGoldrick, Esq.

- Representing NAGE, Local 495

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

AWARD

The City had just cause to terminate the employment of Lewis James, and the grievance is denied.



Timothy Hatfield, Esq.
Arbitrator
May 6, 2019

INTRODUCTION

NAGE, Local 495 (Union) filed a unilateral petition for Arbitration. Under the provisions of M.G.L. Chapter 23, Section 9P, the Department of Labor Relations (Department) appointed Timothy Hatfield, Esq. to act as a single neutral arbitrator with the full power of the Department. The undersigned Arbitrator conducted a hearing in Worcester on June 15, 2018.

The parties filed briefs on September 19, 2018.

THE ISSUE

Whether the City had just cause to terminate the employment of Lewis James? If not, what shall the remedy be?

RELEVANT CONTRACT LANGUAGE

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

ARTICLE 11 GRIEVANCE PROCEDURE (In Part)

5. The award of the arbitrator shall be final and binding upon all parties, subject to the following conditions:

- a. The arbitrator shall make no award for grievances initiated prior to the effective date of this Article.
- b. The arbitrator shall have no power to add to, subtract from, or modify this contract or the rules and regulations of the City and the Charter, Ordinances and Statutes concerning the City, either actually or effectively.
- c. The arbitrator shall only interpret such items and determine such issues as may be submitted to him by the written agreement of the parties.
- d. Grievances may be settled without precedent at any stage of the procedure until the issuance of a final award by the arbitrator.

e. Appeal may be taken from the award to the Worcester Superior Court as provided for in paragraph 6.

6. Appeal from the arbitrator's award may be made to Superior Court on any of the following bases, and said award will be vacated and another arbitrator shall be appointed by the Court to determine the merits if:

a. The award was procured by corruption, fraud, or other undue means;

b. There was evident partiality by an arbitrator, appointed as a neutral, or corruption by the arbitrator, or misconduct prejudicing the rights of any party;

c. The arbitrator exceeded his powers by deciding the case upon issues other than those specified in sections 5(b) and (c), or exceeded his jurisdiction by deciding a case involving non-grievable matters as specified in Section 1, or rendered an award requiring the City, its agents, or representatives, the Union, its agents or representatives, or the grievant to commit an act or to engage in conduct prohibited by law as interpreted by the Courts of this Commonwealth;

d. The arbitrator refused to postpone the hearing upon a sufficient cause being shown therefor, or refused to hear evidence material to the controversy or otherwise so conducted the hearing as to prejudice substantially the rights of a party;

e. There was no arbitration agreement on the issues that the arbitrator determined, the parties having agreed only to submit those items to arbitration as the parties had agreed to in writing prior to the hearing, provided that the appellant party did not waive his objection during participation in the arbitration hearing; but the fact that the award orders reinstatement of an employee with or without back pay or grants relief that would not be granted by a court of law or equity, shall not be grounds for vacating or refusing to confirm the award.

FACTS

The City of Worcester (City) and the Union are parties to a collective bargaining agreement that was in effect at all relevant times to this arbitration.

The grievant, Lewis James (James), worked for the City of Worcester (Worcester) in the Department of Public Works & Parks as a Parking Control Officer (PCO) since 2009. The PCOs inform the public about parking regulations

and, when necessary, issue citations for violations of the parking regulations. PCOs, who have been trained on how to recognize their surroundings and deal with difficult situations, encounter difficult situations in the course of performing their duties, but are expected to perform those duties in a professional and courteous manner.

On April 11, 2014, James met with Ali Khorasani, Assistant Director of Engineering, and Richard Carrico (Carrico), Senior Parking Control Officer (SPCO) to discuss four different complaints lodged against James between December 2013 and April 8, 2014. This meeting was classified as a counseling session for James and included the following dialogue according to a memo drafted by the City:

Suggestions mentioned: remain professional, courteous and remove yourself immediately to avoid heated exchanges as an alternative contact your supervisor to avoid further escalation.

All attendees agreed, it is better to remain professional and remove yourself without adding additional conflict, the goal is to minimize repeated patterns of citizen complaints towards PCO Chris Lewis James.

On October 26, 2015, an incident occurred between James and a woman which resulted in the woman filing a complaint with the City about James' demeanor. The woman found James to be disrespectful during an exchange about James not ticketing another person's car. When this individual, unhappy about James' responses, stated that she was going to call his supervisor, James responded "go ahead, I don't answer to him" and walked away.

On November 10, 2015, James was involved in an incident with City Manager Edward Augustus, Jr. (City Manager / Augustus). As James was

preparing a ticket for Augustus' car, Augustus arrived and stated that it was his vehicle. James responded in a rude manner. Augustus identified himself as James' boss, and James responded that "you are not my fucking boss." Augustus responded that he was his boss's boss, and stated that "if you're talking to me this way, I can only imagine how you talk to other people." James testified that he smirked and walked away. Upon his return to City Hall, Augustus called Parking Program Manager Michael Brennan (Brennan) and complained about his encounter with James, calling James' conduct rude and unprofessional.

On November 18, 2015, Brennan suspended James for three days for repeated discourteous and unprofessional conduct and behavior as a PCO, including the October 26, 2015 incident and the November 10, 2015 incident with the City Manager. Brennan reminded James that "he had been previously made aware of other complaints made by members of the public and these two most recent complaints highlight the fact that your current demeanor and behavior as a PCO is well below expected standards." Neither James nor the Union grieved this three-day suspension.

On April 26, 2016, James had an interaction with a pizza delivery driver. James ticketed the driver for parking in a bus zone while making his delivery. The driver, upon returning to his car, was upset about the ticket and heated words were exchanged. In his appeal to the City, the driver alleged that James had invited the driver to take a swing at him, and challenged him to a fight. James claims that the driver was the aggressor, and that he did not challenge

him to a fight as claimed. The circumstances surrounding this interaction resemble many of the prior complaints lodged against James, notwithstanding James' denial.

On June 22, 2016, while the City was still investigating the pizza delivery driver complaint, James was involved in an incident at a 7-11 store. James was in his City vehicle when he attempted to exit the 7-11 parking lot through an entrance lane instead of the exit lane. At the same time, another vehicle attempted to enter the parking lot. The driver made a gesture towards James, which James believed to be the middle finger. James backed his vehicle up into the parking lot to confront the driver, and they exchanged words. The driver of the vehicle entered the store and James remained on the premises, waiting for the driver to emerge from the store. Upon exiting the store and seeing James waiting for him, the driver began recording James with his cell phone. The individual first began by recording James' City vehicle, and then began recording James himself. The individual then put his phone up near James' face, at which point James slapped the individual's arm/hand, knocking the phone to the ground. The individual then stated that "I got you, I got you, you're going to be famous, dog." The video of this incident was posted later in the day to Facebook. James failed to report the incident to his supervisors.

The City notified James by letter dated July 11, 2016, that a termination hearing was scheduled for July 15, 2016 before Assistant City Solicitor Janice Thompson (Thompson). The City stated in the letter that:

You have repeatedly and consistently displayed an inability to meet acceptable standards of work performance for a Parking Control

Officer. You have, on multiple occasions over the past several years, demonstrated a persistent habit of being unable to properly exercise your duties as a Parking Control Officer in a calm, restrained and professional manner. Your most recent transgressions involved an incident in which you made unwanted physical contact with a citizen you encountered while on duty. This type of work performance from a PCO is inexcusable.

After the hearing, which James and his Union representative attended, Thompson recommended termination of James' employment with the City, which the City Manager accepted on August 22, 2016. The Union filed a grievance on the termination that was denied at all steps by the City and resulted in the instant arbitration.

POSITIONS OF THE PARTIES

THE EMPLOYER

The City's Employee Handbook (Handbook) provides that the City generally follows progressive discipline, but further provides that:

Certain offenses are serious and warrant suspension or immediate dismissal. Such examples include, but are not limited to: assault, making threats, stealing, fighting, or gross neglect of duty.

The record demonstrates that James has a history of engaging citizens in a less than professional manner. The City has provided James with ample opportunity to recognize that his behavior is both unprofessional and unacceptable. Prior to being disciplined in any manner, James received written materials explaining that he was expected to behave in a courteous and professional manner at all times, specifically when interacting with citizens. In addition, James was provided with training on how to deal with difficult and stressful situations.

In April 2014, after the City received multiple complaints about James' interactions with citizens, his supervisor met with him to review the complaints and to provide him with the tools to address difficult situations going forward. In November 2015, after receiving additional complaints that James had continued to engage in unprofessional behavior, the City progressed to a three day suspension, which James and the Union did not grieve.

Rather than improve his behaviors, James became more aggressive, including challenging a citizen to a fight. Ultimately, in this case, James engaged in conduct, while on duty, in uniform, operating a City vehicle, which was completely unprofessional and constituted an assault and battery, which could have subjected him to civil and criminal liability and the City to civil liability.

As the complaints against James demonstrate, his behavior towards others was becoming increasingly unprofessional and even more concerning, increasingly volatile and dangerous. Despite being told by his supervisors on multiple occasions to remove himself from difficult situations, James demonstrated that he was incapable of doing so. Given James' increasingly egregious behavior, and that he was given multiple opportunities to correct his behavior, the City was more than justified in terminating his employment, for the protection of the City and the citizens with whom James interacted in the line of duty. For the foregoing reasons, the City had just cause to terminate the employment of James, and the grievance should be denied.

THE UNION

The City alleges just cause in James' termination letter, but there is no definition of just cause in the collective bargaining agreement. The term has been defined in case law however. In Grief Bros. Cooperage Corp., the arbitrator set forth the seven step test for determining whether a company had just cause to discipline an employee. He stated that a no answer to any of the questions normally signified that just cause did not exist for the employer's disciplinary decision. The seven questions are:

1. Did the company give the employee forewarning or foreknowledge of the possible or probable disciplinary consequences to the employee's conduct?
2. Was the company's rule reasonably related to the orderly, efficient, safe operation of the company's business?
3. Did the company before administering discipline to an employee make an effort to discover whether or not the employee did in fact violate the rule or order of management?
4. Was the company's investigation conducted fairly and objectively?
5. At the investigation, did the "judge" obtain substantial evidence as proof that the employee was guilty as charged?
6. Has the company applied the rules and penalties evenhandedly and without discrimination to all employees?
7. Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee's proven offense, [and] (b) the record of the employee in his service with the company?

The City's Investigation was Insufficient

The main purpose of the just cause requirement in termination cases is that the City must conduct a proper investigation. In the present case, the City failed to conduct a proper, objective, substantial and detailed investigation to determine if there was proper evidence to support termination. The City conducted only a perfunctory investigation, taking many of the citizens' written claims as fact, and conducting no further follow up investigation.

The City investigators had no direct personal contact with the complaining parties, rather they simply relied on a recitation of facts forwarded to the City relative to the citizens' complaints or appeal of the issuance of the ticket in the first place. Inexplicitly, the City upheld James in issuing the ticket (disbelieving the citizen's rationale for appeal), yet somehow believed the citizen's additional comments that James reacted rudely or inappropriately. There was no effort by the City to even look into the underlying factual claims to any proper degree. This is not a proper investigation in a discharge matter.

Heresay Evidence in Violation of Due Process and Just Cause Rights

Not one of the unnamed complainants testified during the Loudermill hearing or the arbitration hearing, and they were never subject to cross examination before a trier of fact. In addition, the City redacted all personal information from the statements and refused to give the Union the information when requested. These statements should be given little to no weight in a termination hearing. The City has a troubling pattern of selectively crediting a

portion of the citizen's complaint and finding them not creditable in other areas, especially when the City's monetary interest is at stake.

Termination is not Warranted

Just cause requires the City to determine if the discipline administered is reasonably related to the seriousness of the employee's proven offense and the record of the employee in his service to the employer. Relevant to this issue, is the un rebutted testimony of James and Carrico, on the stressful and sometimes dangerous job of a PCO. Carrico acknowledged that you get spit at, screamed at and called nasty names because people are upset that they are being ticketed.

James testified about the thousands of tickets he issued each year without confrontation. The eight documented complaints that are the subject of the discipline and termination against him represent only a very small percentage of his body of work from 2009 to 2016. Even putting aside the veracity, credibility and evidentiary issues of the City's allegations, the alleged incidents themselves, in context of the reality and stress of a PCO, do not warrant termination.

December 19, 2013

A complaint was made that James was rude, unprofessional and swore while giving a ticket at the Library. James disputed the incident and noted that it only arrived after the ticket appeal had been denied.

March 20, 2014

A man complained that James bumped him during a confrontation over a ticket at an expired meter. James explained that he was walking away from the

confrontation as taught, and the man kept following him. The City attempted to gather further information but the complainant refused to respond.

Neither of these two incidents resulted in discipline, yet the City now attempts to use them inappropriately in future discipline, and in claiming that James had a pattern of behavioral issues.

October 26, 2015

In this instance, a women was complaining that James would not ticket a car that was parked in a space that she had previously been ticketed in. There is no evidence that James was the PCO who had previously ticketed the women's car. James informed the woman that he did not feel that a ticket was warranted, and attempted to walk away as trained. The woman followed him trying to get his badge number. She filed a complaint that James was being uncooperative, and this incident served as part of the basis for a three-day suspension.

November 10, 2015

This incident involved the City Manager who received a ticket for an expired meter and angrily called Brennan complaining that James was rude and unprofessional during the encounter and used foul language. Brennan apologized to the City Manager, believing his boss without consulting James and testified that he moved very quickly because this incident was creating a public relations situation that needed to be addressed. Clearly, James was in no way presumed to be innocent in this matter. Ultimately, James was found to be in the right in issuing the ticket, even after the City Manager claimed that time remained on the meter. Inexplicably, Brennan chose to credit the remainder of the City

Manager's complaint even after a photo showed him to be wrong about time on the meter.

Brennan acknowledged that the City Manager never gave a written statement, and that his initial phone call was the only source of information that Brennan had on the incident. The City Manager was clearly given preferential and deferential treatment. Brennan acknowledged that the Manager was his boss, and that he believed the Manager after the initial phone call. Brennan was biased and conflicted and never should have been in charge of the investigation or the initial disciplinary decision. The entire investigatory process was a sham, and certainly not in compliance with any serious investigation required under a just cause standard. Just cause required that an investigation be done fairly, objectively, evenhandedly and without discrimination to the employee. The second James gave a ticket to the City Manager, his fate was sealed.

April 26, 2016

This is the incident with the pizza delivery man who accused James of challenging him to a fight when he issued a ticket for parking in a bus zone. This complaint was sent in with his appeal and forwarded with a note stating that it warrants some research and investigation. In fact, the City did no further investigation, never contacted the pizza delivery driver and simply took his statement as fact moving forward.

James was consistent in his testimony that the pizza delivery driver had parked in the bus zone and was the aggressor in the encounter as he was unhappy receiving the ticket. The driver was yelling while approaching the car,

got in James' face, and ripped the ticket from his hand as he attempted to place it on the car. James denied challenging him to a fight. The delivery man was never contacted by the City, never asked for further information, never testified at any hearing, and never was subjected to cross examination.

June 22, 2016

At the hearing, James admitted that he made a mistake on June 22, 2016 at the 7-11, acknowledging that he should have driven away and not backed up to exchange words with the driver of the truck. During the initial verbal exchange, they were parked several car lengths apart and had a conversation about James being cut off and given the middle finger. James stated that he never raised his voice, never swore, never threatened the driver, never made any threatening gestures and never moved from his initial spot standing outside his car door.

The driver of the truck next came out of the store filming James. The video of James is clear that he never left his spot and was standing still. The video shows that the driver was the aggressor, first filming James' car and then abruptly filming and moving towards James. James, who was standing between the door and his car, was trapped and testified he felt vulnerable when the driver invaded his personal space. The video depicts the driver reaching up over the car door and sticking the camera in James' face. James reacts defensively, and the camera falls to the ground. The driver is heard gloating that "I got you now, you're going to be famous dog." At that point, the fourteen second video ends. James testified that he got in the car and drove away and acknowledged that he

failed to inform his supervisors of the incident. The City only found out later in the day from a witness and the posting on Facebook.

The driver never complained to the City, was never contacted by the City, and never testified at any hearing. He simply posted the video on Facebook and had his "gotcha" moment, without ever submitting himself to further investigation for his involvement and his actions in this situation. James certainly could have avoided this situation by leaving initially, and he honestly and remorsefully testified to that fact. The City's characterization of James' conduct as a criminal assault and battery is simply an error of law. People have the right to defend themselves, and use reasonable force, if another person is approaching them and invading their personal space in an assaultive manner. The driver may have had some legal right to film another person in a public place, but that right does not extend to aggressively approaching another person, invading their personal space and jamming a camera into their face.

Level of Discipline

Even if the City proved some conduct requiring discipline, James' overall employment record with the City and his lack of significant prior discipline, would suggest punishment short of termination. Additionally, it should be taken into account that PCO's have a difficult job, with citizen confrontation in their line of work not only an occupational hazard, but also an established fact.

While James did not appeal his three-day suspension, the City relies heavily on it as a basis of progressive discipline and in the termination decision. A review of the incident itself gives a window into the investigation, or lack

thereof, that the City conducted before arriving at their "well established pattern" theory, and is certainly relevant to the appropriateness of the decision to terminate.

Conclusion

For all the foregoing reasons, the Union asserts that the grievance should be upheld, any and all documents relative to James' termination should be expunged, and James should be reinstated and made whole for all his losses.

In the alternative, the Union requests that James be suspended for thirty days and ordered to undergo a counseling and anger management program as a condition of his employment, but otherwise be reinstated and made whole for his losses.

OPINION

The issue before me is:

Whether the City had just cause to terminate the employment of Lewis James? If not, what shall the remedy be?

For all the reasons stated below, the City had just cause for the termination of Lewis James, and the grievance is denied. It is undisputed that as far back as March and April 2014, the City began meeting with James over numerous complaints that the City had received about his conduct, behavior and attitude while dealing with citizens as a PCO. These conversations were an attempt by the City to provide James with the necessary tools to effectively deal with the public while performing his duties.

Unfortunately for James and the City, James continued to have problems as he performed his PCO duties. Following the counseling sessions, James' poor interactions with a citizen over his refusal to ticket another car, and his run-in with the City Manager resulted in a three-day suspension. It is crucial to note that neither James nor the Union grieved the implementation of the three-day suspension. As such, James and the Union are now estopped from arguing the underlying merits of that suspension. By failing to argue the issue at the appropriate time, I am left to view the facts leading up to the suspension in the manner asserted by the City in the suspension letter.

It is clear that the City attempted to work with James through the process of progressive discipline, in an attempt to change the manner in which James performed his duties. What is equally clear however, is that this process failed to produce satisfactory results. James was either unable, or unwilling, to improve his work performance as directed by the City. Instead, James began to spiral in the opposite direction. Rather than avoiding confrontations with citizens, James had a verbal altercation with a pizza delivery driver that was inappropriate at a minimum and may have involved an offer of fisticuffs. Whether or not James ultimately offered to fight the individual does not change the underlying problem that James is unable to perform his duties as a PCO without having inappropriate interactions with citizens.

James' slide backwards hit a new and ultimately unacceptable low with the altercation at the 7-11. All of James' prior incidents centered on the issuance or, in one case, the non-issuance of a ticket. The 7-11 incident differed in that,

while James was on duty and in a City vehicle, he was not in the process of issuing a ticket. The most detrimental aspect of this interaction is the sheer number of times that James had the opportunity to walk/drive away from the situation and chose not to. Instead of reacting proactively, as directed repeatedly by the City, and removing himself from confrontational situations, James' actions prolonged and intensified the situation that ultimately turned physical.

James' initial mistake was backing up into the parking lot to confront the driver who he felt gave him the finger. Whether the driver did or did not give him the finger, James cannot willingly place himself, while on duty and in a City vehicle, in a situation where he is arguing/fighting with a citizen, especially after the City's repeated warnings, trainings, and a suspension. James still couldn't let the situation go even after he exchanged words with the driver, and the driver entered the store. Here, again, James had the opportunity to remove himself from the situation, and either couldn't or wouldn't. All James had to do was drive away when the other individual entered the store. Instead James chose to remain in the parking lot, waiting to continue the argument. This lapse in judgement led to the final unfortunate outcome.

James' poor decisions put him in a situation that mushroomed out of control. The driver of the other vehicle came out of the store first recording James' vehicle and then James himself. James had a third opportunity to remove himself from the situation and again refused. The decision to remain on the premises resulted in the driver shoving the recording phone in James' face, and James smacking the phone out of his hand and onto the ground. Only at

this point does James finally remove himself from the situation. Tragically, this decision was reached well after it was prudent. If James had used his training, and walked or driven away at any time prior to the physical altercation, he could have changed the outcome. The fact that he didn't, even after the City's repeated attempts to reform his behavior, is ultimately his final undoing.

The City moved through the steps of progressive discipline, attempting to modify James behavior. The counseling sessions didn't work. The three-day suspension didn't change his conduct. James' inability to conform his work behavior to acceptable standards resulted in his justified termination by the City.

For all the reasons stated above, the City had just cause to terminate the employment of Lewis James, and the grievance is denied.

AWARD

The City had just cause to terminate the employment of Lewis James, and the grievance is denied.

A handwritten signature in blue ink, appearing to read "Timothy Hatfield", is written over a horizontal line.

Timothy Hatfield, Esq.
Arbitrator
May 6, 2019