

STATE OF CONNECTICUT
DEPARTMENT OF LABOR
STATE BOARD OF MEDIATION AND ARBITRATION

IN THE MATTER OF	:	
TOWN OF FAIRFIELD	:	
and	:	Case 2023-A-0167
AFSCME COUNCIL 4 LOCAL 1303-366	:	

Hearing Date(s): June 27, August 10, August 16, and August 18, 2023
Hearing Location: Zoom videoconference
Date of Award: November 20, 2023

APPEARANCES:

Attorney Christopher R. Henderson	Attorney Christopher J. Sugar
Berchem Moses PC	AFSCME Council 4
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For Management	For Union

ARBITRATION AWARD

This arbitration arises from a dispute between the Town of Fairfield (“Town”) and AFSCME Council 4 Local 1303-366 (“Union”) regarding termination of the Grievant, Craig Kimball. Hearings were held on June 27,¹ August 10, August 16, and August 18, 2023 via Zoom videoconference.

The parties jointly offered nine exhibits (Exh. J-1 to J-9) which were marked as full exhibits. On behalf of the Town, Attorney Henderson made an opening statement and presented two witnesses who were questioned and cross-examined under oath: Cathleen Simpson, HR Director; and Dave Kelley, IT Director. On behalf of the Union, Attorney Sugar made an opening statement and presented one witness who was questioned and cross-examined under oath: Craig Kimball, Grievant.

The parties waived closing arguments in favor of written briefs which were submitted simultaneously on September 29, 2023. The Town filed a reply brief on October 13, 2023.

ISSUE

The parties stipulated to the following issues:

Did the Town of Fairfield have just cause to terminate the Grievant?

If not, what shall the remedy be consistent with the collective bargaining agreement?

RELEVANT FACTS

1. The Town and Union entered into a Collective Bargaining Agreement (“CBA”) for the period July 1, 2020 to June 30, 2023. Pursuant to the CBA, no permanent employee may

¹ The June 27 hearing was limited to rescheduling due to a request to postpone.

- be removed, dismissed, discharged, suspended, fined or reduced in rank except for just cause. (Exh. J-1)
2. Grievant began working for the Town part-time in 2005. In April 2009, he was hired full-time as a Help Desk Technician. (Exh. J-3; HR Director)
 3. Help Desk Technician job duties include investigating and resolving software and hardware problems throughout Town Hall and other facilities, using problem management database, maintaining records, preparing reports, assembling training materials and providing training to users; and other related tasks. The job requires “excellent hands-on experience and excellent skills in problem solving in all desktop Microsoft Office products” and databases. (Exh. J-3; Testimony of IT Director)
 4. Grievant was Town employee of the year in 2014. (Testimony of Grievant)
 5. Prior to IT Director’s tenure, the Town was fined \$1.4 million because of a software licensing mismatch. During his interview, Town officials asked IT Director to create a database to track computer deployments to make sure they are correctly licensed. In 2017, IT Director created a Computer Inventory Database and instructed IT staff, including Grievant, to enter deployed computers into the Database from which IT Director could run reports. Grievant responded that the Database “sounds like a great plan.” Grievant did not enter any deployed computers into the Database. (Exh. J-7; Testimony of IT Director, Grievant)
 6. Grievant was granted permission to adjust his regular work hours from 8:30am-4:30pm to 10:00am-6:00pm to accommodate his childcare needs. (Exh. J-3; Testimony of HR Director, IT Director, Grievant)
 7. Prior to July 1, 2022, Grievant was assigned to provide IT help desk services to the Town Police Department (“FPD”). Based on budgetary and efficiency decisions, the Town changed Grievant’s reporting command from FPD to the IT Department where he began reporting to IT Director. The transition was not a change in job but in reporting structure. IT Director continued to honor Grievant’s adjusted work schedule to accommodate his childcare needs even though it impacted operations. (Testimony of HR Director, IT Director)
 8. Grievant was not happy with the change in reporting structure. He felt that he had more leniency when reporting to FPD. (Testimony of Grievant)
 9. After receiving notice of the change in reporting structure, Grievant wiped and turned in his Town-issued cellphone and police department keys without authorization to do so even though he needed them to access his work location and be available to Town employees needing IT support. IT Director directed Grievant to retrieve and reactivate the Town-issued cellphone. (Exh. J-3; Testimony of IT Director, HR Director, Grievant)
 10. IT Director felt that things were not going well after the transition because Grievant was upset about it and because IT Director could not reach Grievant when he needed him. On July 8, 2022, IT Director issued Grievant a memo outlining job expectations, including hours of work, schedules, and requests for time off. (Exh. J-3; Testimony of IT Director)
 11. Grievant requested a lengthy vacation leave from July 25 to August 17, 2022 for childcare reasons. After consulting with HR and determining that the Town’s operational needs could be covered, IT Director granted the request. IT Director notified Grievant that “reliability is a key component to your position and operations. I want to ensure you are aware that you will have little time available to cover future absences.” (Exh. J-3; Testimony of HR Director)

12. On August 25, 2022, HR Director informed Grievant via email that since his return to work from vacation, he has been “habitually and frequently absent.” The memo also stated “[t]his is to impress upon you that unreliability, including habitual and frequent use of sick leave, negatively impacts operations and ongoing unreliability is considered unsatisfactory performance. Please understand that unsatisfactory performance may result in disciplinary action up to and including dismissal.” (Exh. J-3; Testimony of HR Director)
13. On August 26, 2022, HR Director informed Grievant that he is expected to report to work and remain at work as scheduled; that he must request time off to cover absences; that misuse of time is serious misconduct subject to disciplinary action up to and including dismissal; and that the employee assistance program (“EAP”) is available if he is having personal issues that are impacting work performance. (Exh. J-3)
14. On September 8, 2022, IT Director issued Grievant a memo regarding unsatisfactory performance for “inability or unwillingness to report to work and remain at work as scheduled as well as your failure to follow directives.” The memo indicated that failure to obtain approval for time off prior to leaving work is insubordination; that it is a final warning; and that “failure to make immediate significant improvement with your performance in these areas may result in disciplinary action up to and including dismissal.” (Exh. J-3; Testimony of HR Director, IT Director)
15. Grievant continued to take unauthorized leave and have issues around completing his work. Grievant still had not retrieved and reactivated his work cell phone. (Exh. J-3; Testimony of HR Director, IT Director)
16. On January 12, 2023, HR Director notified Grievant via email that the Town completed “an administrative investigation concerning allegations of unsatisfactory performance associated with attendance and insubordination” and put him on notice that a pre-disciplinary Loudermill meeting will be scheduled at which he will have an opportunity to respond to the allegations. The email also stated that “disciplinary action up to and including dismissal is being contemplated.” (Exh. J-4; Testimony of HR Director)
17. A pre-disciplinary Loudermill meeting was held on January 31, 2023. Grievant, Union President, Union Vice-President, and Union’s Attorney appeared at the meeting. (Exh. J-5; Testimony of HR Director)
18. On February 7, 2023, IT Director issued Grievant a one-day suspension without pay. IT Director thought that a lengthier suspension was warranted but imposed a shorter one due to operational needs of the department and in hopes that it would result in Grievant “taking ownership” of the need to follow directives and report to and remain at work as scheduled. (Exh. J-6; Testimony of HR Director, IT Director, Grievant)
19. In the notice of suspension, IT Director also stated “[p]lease understand that your behavior has negatively impacted operations and future acts of insubordination and/or poor attendance will not be tolerated.” He also provided Grievant with performance expectations and information about the EAP. IT Director concluded the memo stating “[p]lease understand that failure to make significant and immediate improvement with your performance may result in further disciplinary action up to and including dismissal.” (Exh. J-6)
20. The performance expectations set for Grievant on February 7, 2023 included complying with attendance schedule; abiding by policies, rules, regulations and procedures; entering newly deployed computers in the Database; maintaining a daily field log of assignments

- and provide to IT Director daily; use the Town-issued cellphone and respond to calls and texts in a timely manner. (Exh. J-6; Testimony of IT Director)
21. The performance expectations also identified the following assignments to be completed by Grievant: enter deployed computers into the Database by February 13, 2023; and Upgrade software on two phones at FPD by February 20, 2023. Grievant did not complete those two tasks by the deadlines. (Exh. J-6; Testimony of IT Director, HR Director)
 22. As of February 28, 2023, Grievant had only submitted one daily field log to IT Director; had not entered any deployed computers into the Database; had not started the FPD phone system update; and had not retrieved or reactivated the Town-issued cellphone as originally directed in July 2022. (Exh. J-7; Testimony of IT Director, Grievant)
 23. On March 2, 2023, IT Director notified Grievant that he has not complied with the expectations set on February 7, 2023 in that he failed to provide a daily field log; to enter newly deployed computers into the Database; to update FPD software; and to reactivate the Town-issued cellphone and that such failures constitute insubordination. HR Director put Grievant on notice that a pre-disciplinary Loudermill meeting was scheduled for March 6, 2023 and that “disciplinary action up to and including dismissal is being contemplated.” (Exh. J-8; Testimony of HR Director)
 24. The pre-disciplinary Loudermill meeting was held on March 15, 2023. The Union indicated that Grievant had, by that time, reactivated his Town-issued cellphone. Grievant twice stated that he would not comply with the daily field log assignment because he thought it was stupid and unfair. Grievant was placed on paid administrative leave. (Exh. J-9; Testimony of HR Director, IT Director, Grievant)
 25. On March 17, 2023, Grievant was terminated for insubordination in refusing to comply with the notice of expectations. (Exh. J-9; Testimony of HR Director, IT Director, Grievant)
 26. On March 22, 2023, Grievant filed a grievance alleging that his termination was unlawful without just cause. The parties agreed to waive steps one and two of the grievance procedure and proceed directly to arbitration under step three. The Union submitted the grievance to arbitration on March 27. (Exh. J-2)

RELEVANT CONTRACT LANGUAGE

Article 4 Hours of Work

Section 1 - The regular work week shall be thirty-five (35) hours divided into five (5) consecutive days of seven (7) hours each, Monday through Friday inclusive with the following exceptions:

- a. The Library work week shall be thirty-five (35) hours, Monday through Saturday inclusive.
- b. The Public Works Operations and Open Space Manager's workweek shall be forty (40) hours composed of eight (8) hour work days from Monday through Friday inclusive.

Article 17 – Personal Leave

Section 1 - An eligible employee within the bargaining unit may be granted personal leave days during the year at the discretion of their respective Department Head. Personal leave shall be for unanticipated events that need an employee's attention and not in circumstances where another form of leave is provided for in this Agreement.

Article 24 – Grievance Procedure and Disciplinary Action

Section 1 - Any employee or group of employees who feel aggrieved concerning his/her or their wages, hours or conditions of employment, which wages, hours, and conditions of employment are controlled by this contract or by any rule or regulation which is not in conflict with this contract, including any claim of unjust discrimination, may seek adjustment as follows:

Step One - Within sixteen (16) days of the occurrence of the alleged grievance, the Association shall submit such grievance in writing to the immediate supervisor with a copy for the Director of Human Resources. Within seven (7) days (excluding Saturday and Sunday) after the immediate supervisor receives the grievance, he/she shall arrange to and shall meet with the representatives of the Association for the purpose of adjusting or resolving such grievance. The immediate supervisor shall render a decision in writing concerning such grievance within five (5) days (excluding Saturday and Sunday) of said meeting. If such grievance is not resolved to the satisfaction of the Association, the Association may within five (5) days (excluding Saturday and Sunday) of such decision initiate Step Two of this procedure.

Step Two - Further review of such grievance may be made by presenting in writing such grievance to the Director of Human Resources. Within ten (10) days after the Director of Human Resources receives such grievance, he/she shall arrange to and shall meet with the representatives of the Association for the purpose of adjusting or resolving such grievance. The Director of Human Resources shall render a decision in writing concerning such grievance within seven (7) days of such meeting. If such grievance is not resolved to the satisfaction of the Association, the Association may within ten (10) days of such decision initiate Step Three of this procedure.

Step Three - Step Three of this procedure shall be initiated by the Association submitting the dispute to arbitration by the Connecticut State Board of Mediation and Arbitration or with the American Arbitration Association with notice thereof to the Director of Human Resources. Said Board or American Arbitration Association arbitrator shall hear and act on such dispute in accordance with its rules and render a decision which shall be final and binding on all parties.

Section 2 - No permanent (non-probationary) employee may be removed, dismissed, discharged, suspended, fined or reduced in rank except for just cause. If such an employee is so disciplined and the Association believes that such action was taken without just cause, the Association within ten (10) days (excluding Saturday and Sunday) of the date on which such employee is notified of such disciplinary action, may submit the grievance through the grievance procedure set forth in Section 1 of this Article, provided however, that the Association may initiate such grievance at Step Two of said grievance procedure. In the event a grievance concerning a disciplinary action is submitted to Arbitration, the Board of Mediation and Arbitration or the American Arbitration Association arbitrator shall have the power to uphold the disciplinary action or to rescind or modify such action, and such power shall include but shall not be limited to the right to reinstate a suspended or discharged employee with full back pay.

Section 3 - Failure to process a grievance within the time limits established in Section 1 and 2 of this Article presumes that it has been satisfactorily resolved to the last Step that it has been properly processed. Failure on the part of the Town's representative to answer a grievance in said time limits presumes that the claim made in the grievance is sustained and that the satisfaction requested in the grievance will be provided. The above set forth time limits may be extended by mutual agreement of the parties involved.

Section 4 - Nothing contained herein shall prevent any employee from presenting his/her own grievance and representing him/herself in all Steps of this grievance procedure. When a grievant is not represented by the Association, the Association shall be immediately notified and have the right to be present and to state its views at all stages of the procedure.

Section 5 - Either party may request the services of a mediator from the State of Connecticut while awaiting the services of the Board of Arbitration in any grievance.

Section 6 - Days shall not include Saturday and Sunday.

Section 7 - The costs for the services of an arbitrator shall be borne equally by the Town and the Association; however, in the case where a grievant is not represented by the Association, the costs of the arbitrator shall be borne equally by the grievant and the Town.

EMPLOYER POSITION

The Town argues that despite ample notice and warnings regarding productivity, attendance, and work performance, Grievant failed to live up to the basic expectations of showing up and doing the job. Grievant continued to take unauthorized leaves from work and failed to complete assigned tasks. Grievant was given multiple warnings, notice of expectations, and a one-day suspension. He continued to fail to complete assigned tasks which exposed the Town to risk. During a second Loudermill pre-disciplinary meeting, Grievant stated that he refused to complete an assigned task because it was unfair. Grievant's insubordination left the Town with no choice but to terminate his employment. The Town argues that they had just cause to terminate Grievant and asks this Panel to deny the grievance.

UNION POSITION

The Union argues that Grievant, a 20-year employee with no prior discipline, was unjustly terminated in violation of CBA Article 24.2. Grievant, a single dad balancing obligations to the Town and new obligations imposed by IT Director, had no prior discipline until he reported to IT Director. The Union argues that some discipline is warranted – a suspension or performance improvement plan – but not termination. The Union argues that Grievant should be reinstated with full pay and benefits.

DISCUSSION

Grievant testified that, as a single parent, he needs flexibility to handle childcare needs and that, when reporting to FPD, he had more leniency in his attendance and was able to bring his children to work. He feels that all changed when he began to report to IT Director and wasn't happy about it.

HR Director and IT Director testified that Grievant did not have a consistent supervisor at FPD because they had a rotation of supervisors that didn't have time to supervise IT since they were focused on police matters. HR Director stated that if Grievant had an "unfettered ability to be out of the office" at FPD, that is not allowed. HR Director and IT Director testified that Grievant needed to be present and reachable during his scheduled workday and regularly was not. HR Director and IT Director testified that FPD had a similar issue with not knowing where Grievant was when they needed him.²

² HR Director testified that FPD complained that they didn't know where Grievant was when reporting to them. Because FPD did not communicate that until after Grievant's reporting structure was switched to IT Director, she felt it was not fair to raise it then. Grievant started with a clean slate under IT Director.

Very soon after the change in reporting structure, IT Director set expectations for attendance and performance with Grievant who continued to have issues with unauthorized absences³ and refused to retrieve and reactivate the Town-issued cellphone as directed. Grievant testified that he didn't want to carry both personal and work phones. For eight months, he refused to retrieve and reactivate the cellphone despite IT Director asking him to do so.

In addition to unauthorized absences and not being able to communicate with Grievant on a secure Town-issued cellphone, IT Director was frustrated that Grievant was not completing assigned tasks. He felt that he could not direct Grievant in anything.

In February 2023, IT Director gave Grievant specific tasks with deadlines. He testified that he "gave him a ridiculous amount of time to get it done" yet Grievant did not do the assignments or ask for help in doing so.

IT Director testified that he asked Grievant if he was mad at him and that Grievant said yes and that he will stay mad at him forever.

Grievant's refusal to complete the tasks put the Town at risk. Failing to update the FPD phone software impacted their ability to respond to emergencies. Failing to enter deployed computers in the Database potentially exposed the Town to fines for violating software licensing agreements. Grievant's refusal to complete the tasks also put a strain on operations and required other IT employees to take on more work and created a backlog.

IT Director testified that he was not able to direct Grievant. He spoke to HR numerous times about how to handle an employee who outright refuses to take direction. He testified that it "makes me unable to do my job if I can't direct my staff to do things."

Grievant testified that after his suspension, his job duties changed in that he had to carry a work cellphone, update the Database, and create a daily log file. The credible evidence indicates that Grievant was always required to carry a Town-issued cellphone but turned it in because he didn't want to carry it and refused to retrieve and reactive it despite being asked to do so between July 2022 and March 2023. The credible evidence also indicates that Grievant was expected to update the Database starting in 2017 and did not do so. The credible evidence also indicates that the daily log requirement was a new assignment after his suspension due to his failure to complete his assignments and his unauthorized absences. We do not see this assignment as a change in job duties but as a reasonable reporting requirement.

Grievant testified that he knew there would be consequences for not doing what was asked of him but – despite several warnings to this effect – didn't know he would be fired for it. He testified that if he knew he would be fired, he would have filled out the daily log. It is inconceivable that a 20-year employee would feel it was okay to refuse to complete assignments with consequences short of termination.

Grievant clearly demonstrated his refusal to complete the reasonable tasks assigned by his supervisor when he twice stated in the pre-disciplinary Loudermill meeting that he was not going to complete the daily log because it was not fair and was stupid.

In his testimony, Grievant demonstrated that he did not feel that the rules should apply to him and that he did not feel that the accountability and expectations set by IT Director were reasonable given Grievant's status as a single parent. While this panel is sympathetic to Grievant's childcare needs, those needs do not excuse unauthorized absences or refusing to

³ IT Director testified that when he couldn't find Grievant, he would call FPD and ask them to see if he swiped in anywhere to see if he was at work.

complete assigned tasks while at work. In his testimony, Grievant made numerous non-credible excuses for why he did not complete his assignments.

The Union's argument that Grievant attempted to complete the assigned tasks is not supported by any credible evidence. The claim that Grievant, a tenured IT Help Desk Technician that trains users and takes the initiative to search for answers on the internet, did not know how or could not learn how to use the Database between 2017 and 2023 is not credible. The claim that Grievant's performance or ability to do his job was impacted by a car accident that occurred seven years earlier is not supported by any credible evidence.⁴ The credible evidence supports a finding that Grievant repeatedly refused to perform his job pursuant to the reasonable expectations set by his supervisor.

We find that the Town made several efforts to put Grievant on notice of performance expectations; that they communicated that the consequences for failing to meet those expectations could result in termination; that Grievant repeatedly refused to comply with the reasonable expectations; and that the Town's decision to terminate Grievant was not arbitrary, capricious, or unreasonable. Grievant's repeated instances of unauthorized absences and failures to complete assigned tasks coupled with his final act of insubordination in outright refusing to perform his job assignment gives rise to just cause for termination.

AWARD

The Town of Fairfield had just cause to terminate the Grievant, Craig Kimball. The grievance is denied.

/s/ Janis C. Jerman

Janis C. Jerman, Chair/Neutral Member

/s/ Peter Carozza DISSENT

Peter Carozza, Labor Member

/s/ Michael C. Culhane Sr.

Michael C. Culhane Sr., Management Member

⁴ Grievant testified that after the accident he had migraines and difficulty retaining new information but that it is not a problem anymore.