

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

ARBITRATION AWARD

In the Matter of:	:	Case No. 2022-A-0205
Town of New Fairfield	:	Date of Award: March 22, 2023
And	:	
Council 4, American Federation of State, County and Municipal Employees, AFL-CIO, Local 1303-213	:	
Evan White, Grievant	:	Hearing Date: January 4, 2023

APPEARANCES: Loraine Cortese-Costa, Attorney at Law
(For the Town)
Emily B. Demicco, Staff Representative
(For the Union)

I. ISSUE: (Agreed to by the Parties)

Was the written warning issued to Evan White, dated January 19, 2022 for just cause? If and only if the answer is no, what shall the remedy be?

II. PROCEDURAL BACKGROUND:

Council 4 of the American Federation of State, County and Municipal Employees, AFL-CIO, Local 1303-213 (hereinafter referred to as the "Union") filed a grievance asserting that the Town of New Fairfield (hereinafter referred to as the "Town") did not have just cause when it issued a written warning to Evan White (hereinafter referred to as "Mr. White" or the "Grievant").

The grievance was not resolved and was appealed to arbitration. An arbitration hearing was held virtually by Zoom on January 4, 2023 before a Panel of member arbitrators of the Connecticut State Board of Mediation and Arbitration. Both parties were provided an opportunity to offer testimony and cross-examine witnesses.

The Town and the Union both filed post hearing briefs by the agreed upon date of February 10, 2023. The Panel held an Executive Session on February 22, 2023.

The parties have complied with the grievance and arbitration provisions of the collective bargaining agreement. This grievance is properly before the Connecticut State Board of Mediation and Arbitration.

III. STATEMENT OF FACTS:

The Town has approximately 14,000 residents and employs approximately 250 employees, approximately 60 of which are employed on a seasonal basis. Mr. White is the Zoning Enforcement Officer for the Town and has approximately eight (8) years of service. The position of Zoning Enforcement Officer is generally a field position which requires the individual to spend some amount of time out of the office in order to perform the duties of the position.

Mr. White's supervisor was the First Selectman, Patricia Del Monaco (hereinafter referred to as "Ms. Del Monaco") until early in 2022. Ms. Del Monaco issued the written warning which is the subject of this grievance.

Ms. Del Monaco also issued Mr. White a Verbal Warning Reduced to Writing. There had been complaints about Mr. White coming to work late and leaving early. Ms.

Del Monaco wanted Mr. White to let his assistant know where he was during the workday and to keep a log of his activities. The Warning is dated December 20, 2021. (E-Ex. 1). Mr. White signed the Warning on December 30, 2021. Therefore, the Panel accepts that as the date of receipt. Neither Mr. White nor the Union filed a Grievance regarding this Verbal Warning and it is part of his Personnel File.

The Written Warning (Jt-Ex.2) lists two (2) specific dates where the Town found Mr. White did not provide accurate information regarding his location; January 11 and January 13, 2022, both of which were workdays.

On January 11, Mr. White informed his assistant, Mary Ann Rainone (hereinafter referred to as "Ms. Rainone") that he would not be in until 9:15 a.m. on January 12 as he was going to the Town Attorney's office to drop off paperwork. Later on January 12, Mr. White informed another employee, Cara Hernandez (hereinafter referred to as "Ms. Hernandez") that he would be leaving early to go to the Town Attorney's office to drop off paperwork.

The Union presented evidence that on the morning of January 12, Mr. White had a problem with his heating system and required service. (U-Ex.7). Mr. White testified that he changed his timesheet to indicate that he was taking compensatory time and changed his calendar to indicate that he would be in later. This testimony was un rebutted. The Union also presented evidence that Mr. White went to the Town Attorney's office in the afternoon of January 12. (U-Ex.6)

On January 13, Mr. White had scheduled a meeting at 9:00 a.m. with Gary Mead of Mead Construction. Mr. Mead arrived at the parking lot and called Mr. White and

reached his voicemail. Approximately three (3) minutes later, Mr. White returned Mr. Mead's phone call and told him he would send him the information he needed by email. Mr. White admitted that he had mistakenly forgotten that he had been scheduled to work at home that day and apologized to Mr. Mead. Ms. Rainone testified that Mr. Mead came into the office and was upset that Mr. White was not there. Mr. Mead testified that he never left the parking lot. Mr. Mead stated that he returned to his office and at approximately 9:30 am received a call from Ms. Rainone. Mr. Mead further stated that he had no issue with Mr. White.

Also noted in the written warning is an issue of Mr. White's health. He tested positive for COVID-19 on December 19, 2021. He took an in-home PCR test on December 21 and according to the Joint Exhibit 2 the Health Director was notified of the results on December 24. Mr. White did not notify the Health Director of the results as directed. Mr. White testified that he did not see the email.

IV. PERTINENT LANGUAGE FROM THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE 1 – RECOGNITION

Section 1.2 – Management Prerogatives. Except as specifically relinquished, abridged or limited by a specific provision of this Agreement, it is agreed that the Town has retained all rights and privileges, whether exercised or not, it had prior to the signing of this Agreement. The right to manage business of the Town and direct the working force of the Town Hall as defined herein, is vested exclusively in the Town, which right shall include, but shall not be limited to, the right to hire, promote and demote; to suspend, discharge or otherwise discipline for just cause; to maintain discipline and efficiency of employees and prescribe reasonable rules to that end; to layoff; to dismiss for proper cause; to determine the extent to which work or employment shall be increased or reduced, including the exclusive right to plan, direct and control Town Hall operations; and to change equipment or facilities.

ARTICLE 10 – DISCIPLINARY PROCEDURE

Section 10.0 – Discipline and Discharge. No employee shall be discharged or otherwise disciplined except for just cause; except that the Town shall have the right in its sole discretion to discharge any employee during such employee's probationary period.

Section 10.1 – Progressive Discipline. Discipline shall be administered in a fair and equitable manner. Discipline shall be progressive and shall normally include the following actions:

1. oral warning;
2. written warning;
3. suspension;
4. discharge.

ARTICLE 12 – GRIEVANCE AND ARBITRATION

Section 12.0 – Grievance Procedure. This procedure is established to ensure an equitable resolution of problems arising out of the employer-employee relationship between the Town and the Union and to provide a means and method of settling disputes on as low an administrative level as possible and thereby achieve maximum efficiency as well as the highest morale among the employees.

Section 12.1 – Definitions. A Grievance for the purpose of this procedure shall be deemed to be an employee or Union complaint involving

a matter relating to the interpretation and application of the specific terms and conditions of this Agreement.

Section 12.3

Step Four – Arbitration

If the grievance shall not have been disposed of to the satisfaction of the Union by the Board of Selectmen, the Union shall have the right to submit the grievance for final resolution to the Connecticut State Board of Mediation and Arbitration, except in the case of a discharge, to the American Arbitration Association within ten (10) working days after the date of the decision by the full Board of Selectmen.

Section 12.4 – Decision Final and Binding. The decision of the arbitrators shall be final and binding upon both parties but shall not contravene or alter the specific terms of this Agreement. Nothing herein shall be construed as a waiver by either party of such statutory rights as either party may have to judicial review or enforcement.

V. DISCUSSION

It appears that all the employees in the Land Use Department, as well as those employees that share office space with that Department work in the Town Hall one hundred percent of the time. The sole exception to that appears to be Mr. White. As the Zoning Enforcement Officer, Mr. White is a field employee and, as such, he spends a great deal of his workday outside of the Town Hall.

Ms. Rainone is the Land Use Assistant and has been with the Town for twenty-three (23) years. She testified that homeowners and contractors complained about no returned telephone calls by Mr. White. It is unknown whether this allegation was for conduct before or after December 30; the date of the Verbal Warning. Ms. Rainone stated that she did not know where Mr. White was during the day. She did admit that she had access to his calendar and that he kept it up to date on an ongoing basis. Ms. Rainone's

recollection of the facts surrounding the events of January 13 involving Mr. Mead were contradicted by Mr. Mead in testimony and his nearly contemporaneous statement introduced as Union Exhibit No. 1.

Ms. Hernandez is the Health Department Administrative Assistant and works in the area. She testified at the hearing and was very upset with Mr. White. She stated that it "wasn't fair that she paid union dues and she had to come to work on time and stay until the end of the day" while Mr. White "could do whatever he wanted to do".

Both Ms. Rainone and Ms. Hernandez met with Ms. Del Monaco on several occasions to express their concerns/complaints concerning Mr. White. These meetings occurred both before and after December 30, 2021 and may have been held both jointly and individually.

As in most disciplinary matters, the Panel must decide whether the Town had just cause to discipline the Grievant. Just cause is typically defined as: "A reason that is legally acceptable or sufficient" and whether the employer was guided by reasonableness and fairness. In its simplest form, there must be satisfactory proof that the employee engaged in the act upon which the discipline is based. If the proof is insufficient that the employee committed a violation, discipline cannot stand.

In determining whether or not just cause exists, many arbitrators utilize the Seven Elements of Just Cause first outlined by Arbitrator Carol Daugherty in *Enterprise Wire Co.*, 46 LA 359 (1966). Under a traditional view, if any of the questions proffered under the *Daugherty* test is answered in the negative, then just cause does not exist. Today, this formulaic analysis of the Test has been rejected by many arbitrators.

The Panel is not constrained by the *Daugherty* test and rejects its formulaic application. However, that does not negate the *Daugherty* test as it can be helpful in determining whether just cause exists.

Daugherty Elements of Just Cause

1. Was the Worker Given Advance Warning of the Probable Consequences of his Conduct?
2. Was the Controlling Rule, Order or Standard Reasonably Related to Efficient and Safe Operations?
3. Was the Alleged violation of the Rule or Order fully investigated Before Discipline?
4. Was the investigation fair and objective?
5. Did the investigation uncover substantial proof of guilt?
6. Was the employer's treatment even-handed and non-discriminatory?
7. Was the disciplinary action reasonable related to the worker's record and the gravity of the offense?

The elements will not be separately discussed. The Panel would note the following:

1. There were only eight (8) days between the date of the verbal warning and the date of the written warning.
2. Both the Verbal and Written Warning state that the Town of New Fairfield policies and Code of Conduct were violated by the Grievant. None of which were provided to the Panel and therefore could not be considered.

3. No investigation occurred. The allegations of the employees were taken at face value and no independent evaluation was conducted to determine whether the evidence was credible or not. No consideration was given to the information the Grievant provided.

4. It was un rebutted that the Grievant kept an accurate and fully transparent calendar indicating his whereabouts. No instruction was provided as to what other information was to be provided in a "log". If there had been, the Town was fully within its right to require the Grievant to complete the information requested.

VI. AWARD

For the reasons set forth herein, the Panel unanimously finds that the Town did not have just cause to discipline the Grievant. The written warning shall be removed from the Grievant's personnel file and he shall be made whole.

BY THE ARBITRATION PANEL:

Linda J. Yelmini 2/28/2022
Linda J. Yelmini (Public Arbitrator & Chairperson)

Betty M. Kuehnel 3/15/23
Betty Martin Kuehnel (Labor Arbitrator)

Michael C. Cullane, Sr. (3-14-23)
Michael C. Cullane, Sr. (Management Arbitrator)