STATE OF CONNECTICUT
DEPARTMENT OF LABOR
BOARD OF MEDIATION AND ARBITRATION

ARBITRATION AWARD

In the Matter of Arbitration Between	:	
	:	
TOWN OF EAST HARTFORD	:	
	:	*Award Date:* *12/09/2022*
and	:	*Location:* *Virtual Hearing*
	:	*Case #:* *2022-A-0226*
AFSCME, COUNCIL 4, Local 1174	:	

Arbitration Panel

Ruben E, Acosta, Esq., Neutral Arbitrator, Chair
Michael C. Culhane, Management Arbitrator
Donald Sevas, Labor Arbitrator

Appearances:

For the Town:	*Floyd Dugas, Esq., Berchem and Moses*
For Local 1174:	*Jason Wells, Staff Rep., Council 4-AFSCME*

A. Issue Presented

The parties jointly framed the issue as follows: ***(Tr 5-6)***[1]

Did the Town of East Hartford terminate Clifford Prete without just cause? If so, what shall be the remedy?[2]

B. **Procedural History**

On October 12, 2021 Clifford Prete **("the Grievant")** while driving a Town of East Hartford **("Town")** vehicle, during work hours, was involved in a collision with a vehicle driven by a private party. The incident was reported to the East Hartford Police Department ("EHPD") by the Grievant and they investigated the accident. Ultimately EHPD determined that Mr. Prete was at fault and they notified the Department of Public Works. On February 11, 2022, the DPW Director summoned Mr. Prete to a Loudermill Meeting where he was informed that, due to the accident, and in view of his previous disciplinary record, the Department was considering

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[1] *Tr designation references the page(s) of the Verbatim Hearing Transcript prepared.*
[2] *As stated by the Union, a signed copy of the joint issue statement was filed with the SBMA Office.* ***(Tr 5)***

terminating his employment. The latter information was included in Loudermill Meeting Report dated March 30, 2022. On April 11, 2022, the Grievant was informed that his employment was in fact being terminated.

On April 12, 2022 Clifford Prete filed a grievance to challenge his termination. As established in the record, the parties agreed to waive "the timelines and steps" for the grievance and the same proceeded directly to arbitration. Consistent with Article XIII of the parties' collective bargaining agreement, the Union submitted Mr. Prete's grievance to arbitration before the State Board on Mediation and Arbitration **(SBMA)** on April 29, 2022. In accordance with the SBMA rules the matter was scheduled for July 26, 2022 for a virtual hearing.

At the virtual hearing all parties appeared before the undersigned arbitrators and were afforded an opportunity to present evidence, testimony, examine and cross examine a total of eight witnesses. Exhibits were provided in advance of the hearing to the Arbitration Panel ("the Panel") and the same were admitted into evidence during the course of the hearing and party objections were noted for the record. A transcript of the proceedings was prepared at the Town's request, and cost. Copies of the same were provided to the Panel and the Union advocate.

At the hearing the parties agreed to submit hard copies of their post hearing briefs *to the Arbitration Panel no later than August 26, 2022. The parties, however, waived the filing of post hearing briefs. Upon receipt of the briefs, the Panel held an executive session on September 16, 2022, to deliberate upon the record as a whole and now issues the foregoing decision in full and complete resolution of all the issues presented.*

As the record below shows, and by the parties agreement, it is clear that Mr. Prete's grievance was processed in accordance with the grievance and arbitration provisions in the of the parties' collective bargaining agreement and this grievance is properly before the SBMA.

C. Statement of the Facts

According to both parties, the facts in the case are relatively undisputed.

1. Clifford Prete **("the Grievant")** is a twenty-three year employee of the Town of East Hartford **("Town")**. He worked in the Department of Public Works, Waste Division, and drove a Side-Arm Truck. **Tr 4**
2. Mr. Prete was involved in an accident on October 12, 2021 during work hours whereby his vehicle **(V#1)** collided with a passenger car **(V#2)**. The driver of the second car testified at the virtual hearing, **Tr. 22-33** Mr. Prete did too. **Tr 94-104**
3. As a result of the accident, V#2 was totaled. As testified by the present Director of Public Works, Marilynn Cruz-Aponte, the Town reimbursed the owner's insurance a total of $23,784. **Cruz-Aponte Test., Tr. 50, Town Brief at 9**
4. V#1 was damaged and the repairs cost $13,374.12. **Id.**

5. The record reflects that the Grievant informed his supervisor of the accident, and notified the East Hartford Police Department **("EHPD)**, both in a timely fashion. That fact was not contested by the Town. **Union Brief at 4**
6. The EHPD investigator at the scene (Officer Apronti), initially determined that the driver of V#2 was a fault and issued her an infraction ticket. **Joint Exhibit 3**
7. In his October 16th report, the Officer concluded that the V#2 driver had failed to grant the Right of Way to V#1 (the vehicle driven by the Grievant) **Id.**
8. At some point the V#2 driver challenged her ticket in court and the investigator reviewed the matter further. **Union Brief at 5,** Tr. 29
9. After further investigation, On October 20, 2021 Officer Apronti filed a Supplementary Accident Report where he determined that the driver of V#2 actually had the Right of Way at the time of the accident. **Joint Exhibit 3**
10. In the report the Officer concluded that the V#1 driver violated the law **(CGS 14-245)** because he did not grant the V#2 driver the Right of Way at the intersection. He also stated that the "infraction ticket issued" to the V#2 driver "should be retracted from court. **Id.**
11. The record reflects that the Grievant was not issued an infraction ticket. **Tr 97** He alleges that he was not notified of the investigating officer's change of determination. **Union Brief at 5**
12. On or around February 11, 2022, the Department of Public Works became aware of the change in the investigation report and summoned the Grievant to a Loudermill Meeting at which times charges related to the "October 12, 2021 vehicle accident …" were discussed with him by Public Works Director John Lawlor. **Town Exhibit 1, Tr. 37, 58 Cruz-Aponte Testimony**.
13. As part of the meeting a discussion ensued concerning the fact that, in its Supplementary Case Incident Report, the EHPD had "determined" that the Grievant was at fault for the October 12th accident. Therefore, in the Department's view, that "instance warrants termination". **Id.**
14. As the Loudermill Meeting Report states, the latter conclusion (that termination was warranted) was reached "after reviewing (the Grievant's) record of multiple previous and progressive discipline …" **Town Exhibit 1**
15. The Grievant has a prior disciplinary record which, since 2011, includes a total of five verbal warnings, six written warnings and 2 suspensions.[3] **Town Exhibit 5, 6**
16. Although the Town claims a total of eight verbal warnings during the relevant time period, **Town Brief at 5,** their own exhibit, which was attached to the April 11, 2022 termination notice, shows the following:

a) 12/23/2011	(leaving before routes completed)
b) 01/25/2013	(same reason)
c) 02/14/2016	(leaving work w/out superv. approval)
d) 12/13/2018	(brakes and axle hot)
e) 07/01/2020	(failure to pre-trip truck)

Town Exhibit 5, 6

[3] *The 2011 cut off was used by the Town during its presentation and briefing of the case.*

17. Although the Town claims a total of seven written warnings during the relevant time period, their own exhibit, which was attached to the April 11, 2022 termination notice, shows the following:

a)	01/12/2012	(did not dump truck)
b)	02/26/2014	(not reporting to work)
c)	07/22/2015	(not cleaning truck)
d)	08/02/2017	(not coming to work)
e)	04/15/2018	(risking damage to truck)
f)	03/13/2020	(cleaning traps)

18. **Town Exhibit 5,6** also includes the following disciplinary/non disciplinary items:

a) two-day suspension, allegedly for disruptive behavior; 11/23/2012
b) a 04/29/2015 five-day suspension; 04/29/2015 (which was part of a settlement) **Union Exhibit 3**
c) two letters concerning attendance (07/31/2014)(12/09/2016)
d) Loudermill (04/18/19) with no follow-up provided.
e) counseling for clean traps, speeding; 03/03/2020

19. A review of the above service record items leads the Panel to determine that the above record can be used in support of the Town's case for disciplining the Grievant. As such the twenty-four month rule/bar contemplated under Article 11.2 of the collective bargaining agreement **(Joint Exhibit 1, page 26)** is inapplicable here.

20. On April 11, 2022 the Town terminated the Grievant's employment and he grieved the termination two days later. **Joint Exhibit 2, page 1.** By mutual agreement of the parties, the case proceeded directly to arbitration before the State Board of Mediation and Arbitration. **Joint Exhibit 2, page 3**

D. Relevant Contractual Provisions:

*The language below proceeds from **Joint Exhibit 1,** the collective bargaining agreement between the Town of East Hartford and Local 1174, Council 4, AFSCME, effective from July 1, 2021 through June 30, 2025, is contained in the grievance and/or cited by the parties in their respective oral arguments and/or post hearing briefs.*

ARTICLE XI – DISCIPLINARY ACTION

Section 11.0

a. Disciplinary action shall be for just cause and shall be applied in a fair manner and shall be consistent with the infraction for which the disciplinary action is being applied.

Infractions, coaching and counseling shall not be considered discipline by the Town of East Hartford or the Union, unless it is sent to, or placed in, the employee's official personnel file.

b. The following are types of disciplinary action that may be invoked against members of the Union. They may be independently invoked.

1. Verbal Reprimand (Documented);
2. Written Reprimand;
3. Suspension for a period not to exceed five (5) days;
4. Dismissal/Discharge

c. All disciplinary actions may be processed as grievances under Article XIII.

d. Just cause shall include, but shall not be limited to, loss of any license that is necessary to meet the qualifications of the position held by the bargaining unit employee. However, in the event that such a necessary license is suspended for a period up to one year, the Town may choose to:

1) Suspend such employee during the period of license suspension, without pay or benefits; or
2) Terminate the employment of such employee

If, however, a vacancy exists in a lower bargaining unit classification than the position held by the employee whose license was suspended, or if a qualified bargaining unit member in a lower classification is willing to exchange positions with the employee whose license is under suspension, the most senior qualified applicant in a lower classification and the employee whose license is under suspension shall be permitted to exchange jobs (and pay rates) during the period of license suspension. The Town reserves the right to test the applicant for the promotional position for appropriate qualifications prior to permitting any such exchange pursuant to this section.

Section 11.1 *At the time of any discipline, the employee and the President of the Union shall be furnished, in writing, a statement of the reason for such action, and the appeals procedure available under Article XIII. Any suspensions shall include the period of time such suspension shall be effective.*

Section 11.2 Any employee disciplinary action that may be taken by the Town shall be available for use in any subsequent disciplinary proceeding involving the same employee. *However, if for a period of twenty-four (24) continuous months no incident occurs for which written disciplinary action or reprimand has been issued, no such disciplinary action or reprimand preceding such twenty-four (24) month period of good behavior shall be used in support of any subsequent disciplinary proceeding.*

ARTICLE XV – MANAGEMENT RIGHTS

Section 15.0 *Unless expressly and specifically limited, modified, abridged or relinquished by a specific provision of this Agreement, the rights, powers and authority to manage the operations of the Town, whether exercised or not shall remain solely and exclusively*

vested by the Town. More specifically, the Town shall have the sole and unquestioned right, responsibility and prerogative of management of the affairs of the Town and the discretion of the working forces, including but not limited to the following:

a) To determine the methods and levels of care, maintenance and operation of equipment used for and on behalf of the purposes of the Town;
b) To establish or continue policies, practices and procedures for the conduct of Town business, including personnel policies, and from time to time, to change or abolish such policies, practices or procedures;
c) To maintain the efficiency of governmental operations and services and to set the standards of services to be offered by Town Employees;
d) To establish new or improved methods, procedures, practices, technologies or facilities which the Town may deem to be in is[sic] best interest and/or advisable for efficiency of operations and to modify any job description to accommodate such new or improved methods, procedures, practices, technologies or facilities;
e) To determine the standards of selection for employment, and to determine the number and types of employees required or desired to perform Town's operations;
f) To employ, direct, schedule assign, appoint, discipline, transfer, promote or demote employees, lay-off, terminate, or otherwise relieve employees from duty for lack of work, lack of funds or other legitimate reason in the best interest of the Town;
g) To establish, amend, abolish and enforce reasonable rules and regulations for the maintenance of discipline and foe the performance of work in accordance with Town requirements;
h) To determine the content of job descriptions and/or classifications and to revise same as deemed necessary and to ensure that incidental duties connected with Town operations, whether enumerated in job descriptions or not, shall be performed by employees;
i) To fulfill all of the Town's legal responsibilities;
j) To determine work schedules of employees.

E. **Standard of Review**:

In 1964 through 1972, Arbitrator Carroll Daugherty developed seven tests or questions which can be used to gauge whether the discipline or discharge of an employee for misconduct is based on "just cause". See Grief Brothers, 42 LA 555 (Arbitrator Daugherty, 1964); Enterprise Wire, 46 LA 359 (Arbitrator Daugherty, 1966); and Whirlpool Corporation, 58 LA 421 (Arbitrator Daugherty, 1972).

In Grief Brothers, Arbitrator Daugherty determined that a "no" answer to any one of seven questions would result in a finding of a lack of just cause. The seven tests or questions of just cause for discipline/discharge as outlined by Arbitrator Daugherty are:

(1) Did the Company give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?

(2) Was the company's rule or managerial order reasonably related to the orderly, efficient, and safe operation of the Company's business?

(3) Did the company, before administering discipline to an employee make an effort to discover whether the employee did in fact violate or disobey a 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 or proof that the employee was guilty as charged?

(6) Has the company applied its rules, orders, 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?

See generally, Alan Miles Ruben, Elkouri and Elkouri, How Arbitration Works, Chapter 15 (6th Ed. 2003) ; Bornstein, Gosline and Greenbaum, Labor and Employment Arbitration, Chapter 14 2nd Ed. 2002)

Another important consideration to put forth herein is that in matters concerning discipline the employer not only carries the burden of coming forward, but also the ultimate burden of persuasion. The quantum of proof is a fair preponderance of the evidence.

F. **Employer's Position**:

The Town argues that it had just cause to terminate the Grievant. First, because the offense committed by the Grievant was serious. According to the Town the seriousness of the offense is gauged by the amount of damage caused by the Grievant's, as well as the nature of his conduct (ie, denial of right of way). The Town further argues that, given the seriousness of the offense committed, a lack of forewarning, even if proven, does not negate just cause. Likewise, the Town argues that it conducted a fair investigation and thorough investigation of the accident. Moreover, the Town argues that the penalty imposed in this case was evenhanded and that there's no evidence that the same was discriminatory.

In closing, the Town contends that, given the Grievant's extensive disciplinary record, and the serious nature of the accident, the penalty imposed in his case was reasonable related to the seriousness of the offense. For the above reasons the Town contends that the Clifford Prete's grievance should be denied.

G. **Union's Position**

The Union argue that the Town has violated multiple tenets of the standards of just cause, however, in it is view, even the violation of one of those tenets supports a finding that the Town did not have just cause to terminate Clifford Prete. The focus of the Union's case revolves around questions 6 and 7 of the Daugherty just cause analysis.

In its brief the Union argues that the Grievant was not terminated for just cause because in at least three areas the Town did not follow the tenets of just cause outlined in the case of **Enterprise Wire**, as articulated herein. First, because the town did not forewarn the Grievant of the consequences which his conduct at the time of the accident would bring. The Union also contends that the Town did not conduct an investigation of the facts and circumstances involved in the October 12, 2021 accident before disciplining the Grievant. Even if in fact they can prove they did, the Union argues that their investigation was not fair or objective.

The Union additionally argues that the Town did not apply its rules, orders and penalties evenhandedly or without discrimination, particularly because no disciplinary termination has ever been meted in any case involving vehicular accidents like the one involved here. Lastly, the Union contends that the degree of discipline applied to the Grievant was not reasonably related to the seriousness of the proven offense. As proof they offered the testimony of three employees presently working for DPW, who were in circumstances similar to the Grievant but were not punished as severely.

In conclusion, the Union argues that the Grievant's termination was not for just since at least three of the tenets outlined by Arbitrator Daugherty can arguably be answered in the negative. Therefore, they ask that Mr. Prete be reinstated and made whole for any losses.

F. **Discussion**:

Upon reviewing the evidence and testimony presented in this case, as a whole, the Panel concludes that the Town of East Hartford did not have just cause to terminate Clifford Prete. Although the Town has proven that the October 12, 2021 accident Mr. Prete was involved in was a serious matter, such finding standing alone does not justify the decision the Town made on April 11, 2022. Neither does the fact that the Grievant had a prior disciplinary record, especially since that record involves a wide range of unrelated matters which transpired over an eleven year span.

While it is true that given the seriousness of the offense, forewarning and progressive discipline are not pressing requirements (as the Union argues), and while it is true that in the Panel's opinion the Town conducted a fair, objective and through investigation of the accident in question, such findings are insufficient to discredit the importance of the credible and probative testimony received by the Panel with respect to the way three employees, who were under similar circumstances, were treated. These employees had length of service, worked for the department, had vehicular accidents during a similar time period, and, arguably of a similar level of seriousness. These are also employees who due to their level of involvement had a foundation to credibly testify about the experience of yet other individuals. Truly, these individuals was something the Town should have tried to flesh out more vigorously and extensively for the record.

The truth of the matter is that in a disciplinary case the employer always carries the burden of persuasion and, given the testimony referenced above, and the Town's inability to effectively discredit it, the Panel is left with no choice but to answer questions

6 and 7 of the **Enterprise Wire** just cause test in the negative. And such event inevitably means that a fair preponderance of the evidence received showed that the Town did not have just cause for the April 11, 2022 dismissal of the Grievant. Such evidence is capsuled in the testimony of union witnesses Thomas Russo, Peter Russo and Edward Peruccio. **(Tr. 70-83)** The latter testimony arguably establishes that the Grievant was treated more severely than employees who were in very similar circumstances. Moreover, said testimony provides a reasonable basis for the Panel to conclude that Mr. Prete's termination was not reasonably related to the seriousness of the offense he committed. Neither was said termination even handed or non-discriminatory.[4]

The above is clearly evident from Thomas Russo's credible assertion, that in his eighteen years of employment with DPW, he is aware of a fair number of employees with less than five years of employment, who have had multiple vehicular accidents, and have not received disciplinary consequences greater than a suspension. **Tr. 70** Likewise, Mr. Russo testified that at present many Town employees with less than two years of service, who have had multiple vehicular accidents, have never been disciplined by the Department of Public Works. Lastly, Mr. Russo also testified that, in his eighteen years of employment with DPW, no employees have ever been terminated due to his/her being involved in a vehicular accident. **Tr 70, 78** One of those employees was mentioned by name in **Tr 72.** (J.D.) Mr. Russo's credible and probative testimony was not discredited in any way by the Town. **Tr 78-80** Neither was any evidence introduced to raise any doubts about his capabilities.

Mr. Russo's claims were echoed through the testimony of a twenty-three year DPW employee, Edward Peruccio. **Tr 82-83** Mr. Peruccio testified credibly that he has been in 6-10 vehicular accidents. In at least one of those accidents, Mr. Peruccio claims there was physical damage of proportions similar to that in Mr. Prete's case. However, Mr. Peruccio only received a written warning from the Department of Public Works for the latter accident. In at least 6 of those accidents, Mr. Peruccio was the party at fault. **Tr 86** Similar testimony was offered by Peter Russo, a twenty-one year DPW employee. In his case he had a vehicular accident, when he first was employed (2005) which resulted in $50,000 of damages. As he testified, the Department only issued a verbal warning in his case. **Tr 89-90**

Again, in the two cases above, the Town was unable to discredit or rebut the testimony which the Union offered. Unfortunately for the Town that means that they failed, as required, to persuade the Panel through a preponderance of the evidence, that the disciplinary action they took in April 11, 2022 was even handed or non-discriminatory. In conclusion, as stated in the arbitration cases cited in Section E of this decision, to establish just cause in the instant matter, the Town of East Hartford had to persuade the Panel, through a fair preponderance of the evidence, that in the case of

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[4] *Of equal concern is the fact that the Town's argument in acting so swiftly is undercut by the fact that the Grievant was allowed to continue driving its vehicles for almost six months before it took disciplinary action. After all, the record shows that the determination that the Grievant was at fault was made by the Police Department on or around October 20, 2021.* ***Joint Exhibit 3***

Clifford Prete, they applied their rules, orders and penalties even handedly and without discrimination. This, frankly, the Town was unable to do.

Further, the Town had to persuade this Panel, through a fair preponderance of the evidence, that the degree of penalty administered in the case before us, was related to the seriousness of the employee's proven offense and his service record. As the record reflects, a number of long-term employees credibly testified during the July 26, 2022 virtual hearing that they committed similar infractions and were not terminated. Admittedly some were suspended. Similarly, these employees credibly testified that other bargaining unit members have been spared termination despite committing infractions similar in seriousness to the one that prompted the Grievant's termination.

Though the Town cross examined these employees, the Town failed to meet its ultimate burden of persuasion with regards to these events, namely, it failed to establish a legitimate business related reason for the discrepancy in the articulated difference in treatment. Namely the Town failed to establish a legitimate reason why the offenses committed by all the above, despite arguably being of equal seriousness to that committed by the Grievant, the same did not result in the termination of any of these employees. Therefore, in accordance with the arbitration principles and precedent cited in Section E of this Award, the Panel finds that the Town of East Hartford did not have just cause to terminate Clifford Pete's employment.

G. **Award**:

A fair preponderance of the evidence in the record for this proceeding proves that the Town of East Hartford did not have just cause to terminate the Grievant. Therefore, the Arbitration Panel unanimously reinstates the Grievant without back pay.

Ruben E. Acosta (Public Member, Chair)

Michael C. Culhane (Management Arbitrator)

Donald Sevas (Labor Arbitrator)