

arbitration hearing at which the parties were afforded the opportunity to present evidence through the testimony of witnesses and the introduction of exhibits.

ISSUES

Did the Employer have just cause to terminate the grievant? If not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE 9 - DISCIPLINE

9.1 Just Cause. The Employer will discipline employees for just cause only. In most cases discipline will be progressive; however, discipline at a higher level may be imposed. Discipline will be in one or more of the following forms:

- a) Oral reprimand;
- b) Written reprimand;
- c) Suspension without pay;
- d) Discharge.

ARTICLE 11 – NORMAL WORKING HOURS AND PREMIUM PAY

11.1 Work Hours. The normal work week shall be forty (40) hours per week. The normal work day shall be eight (8) hours. The Employer retains the right to schedule the work day to meet the needs of the City.

- a. Office Personnel: The normal hours for office personnel shall be 8:00 a.m. to 4:30 p.m.

When the Employer or an employee desires a flex time schedule, they may by mutual agreement enter into a flex time schedule agreement specifying the terms and conditions of the flex time arrangement and the means of terminating the flex time arrangement at the option of either party. A flex time schedule shall be based on a 40-hour week. The flex time schedule agreement shall be in writing, signed by the Employer, the employee and the Union if the flex time schedule exceeds two (2) weeks in duration. . . .

FACTUAL BACKGROUND

Doris LaShomb applied for employment with the City of Cohasset in October 1999. LaShomb's application stated that she had a Bachelor of Science degree in applied psychology from Bemidji State University. During her job interview, LaShomb explained that she needed to complete an internship program in order to fulfill her degree requirements.

The City hired LaShomb, and she began work as an administrative assistant-deputy clerk/treasurer on January 3, 2000. This job primarily involves administrative and bookkeeping duties, such as handling utility bills and payroll accounts. Having a college degree was not a requirement for this position.

City clerk/treasurer Debra Sakrisan supervised LaShomb for the first few years of employment. The City introduced evidence concerning four reprimands issued by Sakrisan to LaShomb between 2001 and 2003 for relatively minor performance infractions. The City contends that this discipline illustrates a history of strained work relationships between Sakrisan and LaShomb. The Union, on the other hand, introduced a thank you note given by Sakrisan to LaShomb that suggests a more conciliatory work relationship. In any event, neither Sakrisan nor any other City employee provided any direct testimony concerning the nature of this relationship.

Sakrisan quit employment with the City with little notice in 2005. For the next two years, the City operated without a city clerk, and the City Council assigned those duties to LaShomb. In 2008, the City Council decided to transition from a city clerk format to a city administrator format and hired Susan Harper to fill the city administrator role. In that capacity, Harper served as LaShomb's direct supervisor.

The relationship between Harper and LaShomb was cordial at first, but began to sour early in 2009. In February of that year, LaShomb, who had continued to maintain direct lines of

communication with city officials after Harper's arrival, informed Mayor Hardy that Harper's failure to file a state form in timely fashion could result in a fine to the City. Harper confronted LaShomb on the following day and stressed that LaShomb needed to bring concerns to Harper before communicating with the mayor or council members.

On March 11, 2009, Harper presented LaShomb with her annual performance evaluation. In that evaluation, Harper raised concerns regarding LaShomb's interpersonal relationships and lack of respect for hierarchy. Harper also gave LaShomb a written reprimand for failing to follow the chain of command in asserting complaints. According to Harper, LaShomb reacted in a very negative manner.

The Union filed a grievance challenging the reprimand. Following an investigation, the City's Personnel Committee rescinded the reprimand on the grounds that the mayor's "open door policy" could be interpreted as permitting LaShomb's direct communications. The Personnel Committee, however, went on to explain that:

This dismissal does not mean that the personnel committee is excusing the grievant's behavior under the circumstances. There is a pattern of behavior described in the Grievant's Performance Review dated March 11, 2009 that needs to be corrected. . . . The Grievant has acknowledged the need to be more professional and respectful of others including her supervisor.

Following a year of strained relationships, Harper met with LaShomb on May 19, 2010 and issued three written reprimands for the following alleged conduct:

- 1) The use of self-generated and unapproved forms for overtime and flex time and the changing of a computer program and the related access in order to "lock out" a fellow employee who needed access.
- 2) The alteration of work hours without the approval of the city administrator.
- 3) The after-the-fact submission of a PTO request form to utilize a lunch hour for a doctor's appointment.

The Union timely filed a grievance challenging this discipline which has not yet been resolved.

A few days later, LaShomb asked City Council member and Personnel Committee Chair Nyle LaGrange if she could discuss some administrative concerns with regard to Harper's performance with the Personnel Committee. The Personnel Committee has responsibility for overseeing various human resources and administrative matters for the City. For a reason not made clear by the record, LaGrange instead arranged for the full City Council to meet with LaShomb.

On May 26, LaShomb presented her concerns in a closed meeting of the City Council. The following were among the concerns expressed:

- Harper's purchase of a generator without seeking bids;
- Expenditures made by Harper that were not authorized by City policy;
- Public disclosure of LaShomb's grades in a college course that she was taking; and
- The manipulation of budgeted expenses from one year to the next.

As the written summary of this meeting indicates, it is clear that the City Council was taken aback by these allegations.

The City Council told LaShomb that they would investigate the allegations and report back. A few days later, the City Council met with Harper in another closed session, but no summary of this meeting is included in the record. At the arbitration hearing, LaGrange testified that the City Council had investigated these concerns and had found no support for LaShomb's claims. But, no report exists of this investigation, and LaGrange's testimony did not explain in what way LaShomb's claims were inaccurate.

On July 23, 2010, LaShomb took action to invest \$400,000 of City funds. The City Council had passed a resolution in April of that year which authorized only Harper to invest City

monies. The parties dispute whether LaShomb, who for many years took care of City investments, was aware of this resolution.

On July 29, Council member LaGrange and Mayor Hardy attended a staff meeting at City Hall. During the meeting, the topic of succession planning and college degrees was discussed. At some point, LaShomb took a telephone call from her college registrar's office indicating that someone had attempted to "hack" into her online college record. LaShomb became upset and agitated, apparently thinking that it was Harper who had tried to pry into her records.

About twenty minutes later, Harper told LaShomb that she needed to go home because of her disruptive behavior. LaShomb refused to leave unless directed to do so by members of the City Council. While Harper attempted to contact Council members, LaShomb collected some material from her desk and filing cabinets. Harper claims that LaShomb removed City documents in the process, while LaShomb maintains that she took only personal items and Union documents (LaShomb served as a Union officer). Harper characterized LaShomb as belligerent during this series of events, while City employee Greg Tuttle, who witnessed the events, testified that he thought that Harper had treated LaShomb unfairly. Eventually, Council member LaGrange returned to City Hall and persuaded LaShomb to go home.

The City provided LaShomb with a Loudermill hearing on August 16 at which the grounds for possible discipline were summarized, and LaShomb was given an opportunity to respond. The City terminated LaShomb on August 31 with the following grounds cited in its Disciplinary Memorandum:

1. The use of self-generated and unapproved forms for overtime and flex time under Article 11 of the Collective Bargaining Agreement relating to work hours, and the changing of computer programs and the related access in order to "lock out" a fellow employee who needed access as part of her job description as Deputy Clerk/Treasurer;

2. The alteration of work hours without the approval of the City Administrator as required in Article 11 of the Collective Bargaining Agreement;
3. The after the fact submission of a PTO request form to utilize a lunch hour for a doctor's appointment in violation of Article 11 of the Collective Bargaining Agreement;
4. The circumvention of the Personnel Committee and your supervisor's authority by taking City and personnel issues directly to Council members and exhibiting abusive behavior toward, and violating the direct orders of, your supervisor;
5. Misrepresentation of facts at work, failure to control your temper at work, and discourteous behavior toward other employees and members of the public. This behavior has led to a hostile environment and altercations at work and complaints from the public; and
6. Making unfounded and disparaging comments about the City, the City Administrator and your fellow employees in public, and making late night and week end phone calls to City Council members and the City Administrator.

The union filed a grievance challenging the termination on September 7, 2010. The City denied the grievance at each step of the grievance procedure, and this matter proceeded to arbitration. Less than a week after the arbitration hearing, the City abolished Harper's position.

POSITIONS OF THE PARTIES

Employer:

The Employer contends that it had just cause to discharge the grievant. The Employer claims that LaShomb engaged in a pattern of misconduct that included repeated acts of insubordination and abusive behavior. The Employer further argues that discharge is an appropriate remedy in that LaShomb has demonstrated that she cannot work in an appropriate manner with supervisors.

Union:

The Union asserts that the Employer's discharge decision is not supported by just cause. The Union argues that the alleged acts of misconduct are either unsubstantiated or only minor in

nature. The Union claims that the discharge decision, in reality, was not based upon these alleged acts, but in retaliation for LaShomb alerting the City Council to Harper's inappropriate conduct. Finally, and in any event, the Union contends that discharge is too severe of a sanction because it is inconsistent with basic notions of progressive discipline.

DISCUSSION AND OPINION

In accordance with the terms of the parties' collective bargaining agreement, the City bears the burden of establishing that it had just cause to support its disciplinary decision. This inquiry typically involves two distinct steps. The first step concerns whether the City has submitted sufficient proof that the employee actually engaged in the alleged misconduct or other behavior warranting discipline. If that proof is established, the remaining question is whether the level of discipline imposed is appropriate in light of all of the relevant circumstances. *See* Elkouri & Elkouri, HOW ARBITRATION WORKS 948 (6th ed. 2003). Each of these steps is discussed below.

The Alleged Misconduct

The Employer's discharge decision is premised on the six allegations listed in the August 31 Disciplinary Memorandum. These allegations are addressed in the order listed.

1. The use of self-generated and unapproved forms for overtime and flex time under Article 11 of the Collective Bargaining Agreement relating to work hours, and the changing of computer programs and the related access in order to "lock out" a fellow employee who needed access as part of her job description as Deputy Clerk/Treasurer.

LaShomb testified that she created these forms for the purpose of avoiding any misunderstanding about whether her use of overtime and flex time was authorized. Given the tension that existed between LaShomb and Harper with regard to these issues, the use of such forms, which were used only by LaShomb, was a reasonable way of addressing these issues. If

Harper disapproved of these forms for some reason, she could have instructed LaShomb to discontinue their use.

LaShomb acknowledged that she might have inadvertently locked another employee out of the Caselle software program when the City switched over to a new version of Caselle. But, this was quickly remedied after it was discovered. While Harper speculated that LaShomb did this on purpose, LaShomb denies this accusation and the affected employee did not testify.

Based on these circumstances, I find that this allegation is not substantiated as an appropriate basis for discipline.

2. The alteration of work hours without the approval of the City Administrator as required in Article 11 of the Collective Bargaining Agreement;

The Union acknowledges that LaShomb changed her work schedule from a flex-time arrangement to a regular hours arrangement without first obtaining the express approval of Harper. The Union points out that while Article 11 specifically requires the approval of a supervisor before a covered employee may switch to a flex-time schedule, that provision does not similarly state that an employee must obtain supervisory approval when seeking to switch back to a regular schedule. Although the Union's argument in this regard is factually accurate, I think that there is an implicit requirement that an employee may not change the hours of work without discussing that matter with his or her supervisor. As such, I conclude that this allegation is substantiated as an appropriate basis for discipline.

3. The after the fact submission of a PTO request form to utilize a lunch hour for a doctor's appointment in violation of Article 11 of the Collective Bargaining Agreement.

The factual background for this allegation is a bit murky. It appears that LaShomb requested to use one and a half hours of her banked paid time off (PTO) for a doctor's appointment, and that Harper approved this request. LaShomb subsequently submitted a revised

request to substitute her 30 minute lunch period for one-half hour of the PTO time. Harper apparently denied this request on the grounds that the medical appointment did not fall within the usual lunch break time period. While the parties disagree as to whether the revised PTO request was reasonable, it is hard to conceive that the making of such a request constitutes a legitimate ground for discipline. Accordingly, I conclude that this allegation is not substantiated as an appropriate basis for discipline.

4. The circumvention of the Personnel Committee and your supervisor's authority by taking City and personnel issues directly to Council members and exhibiting abusive behavior toward, and violating the direct orders of, your supervisor;

In support of this allegation, the Employer's Disciplinary memorandum listed the following three examples: a) making complaints to the City Council on May 26, 2010 about certain of Harper's work practices; b) unilaterally investing City funds in July 2010; and c) violating an order of the City Administrator by removing City files on July 29, 2010. I find that only the second of these allegations is substantiated as an appropriate basis for discipline.

Contrary to the City's claim, LaShomb did not circumvent either the City Administrator or the Personnel Committee in making complaints about Harper's work activities. LaShomb raised virtually all of these concerns directly with Harper, but was rebuffed. LaShomb then approached LaGrange about discussing these matters with the Personnel Committee. LaGrange, however, inexplicably arranged for a meeting of the entire City Council to hear these issues. This turned a matter of a circumscribed and legitimate administrative inquiry into a far bigger circus. While it is understandable that Harper was unhappy about the airing of these complaints in this forum, the selection of this forum was not LaShomb's doing.

LaShomb acknowledges that she invested \$400,000 in City funds in July 2010 in spite of the fact that the City Council had adopted a policy in April 2010 delegating that authority only to

the City Administrator. LaShomb testified that she invested the funds because she had taken care of this responsibility for a number of years and that she was unaware of the new policy. Looking at all of the circumstances, LaShomb should have been aware of the change in policy, and her action constitutes an appropriate basis for discipline.

With regard to the July 29 incident, it is undisputed that LaShomb removed some material from her work space when she was directed to go home by Harper. LaShomb testified that she removed only personal items and union-related files. The Employer submitted no evidence to the contrary.

5. Misrepresentation of facts at work, failure to control your temper at work, and discourteous behavior toward other employees and members of the public. This behavior has led to a hostile environment and altercations at work and complaints from the public.

The most significant examples listed in support of this allegation are the following: a) misrepresenting having a college degree; b) verbally abusing the City Administrator; and c) creating a disturbance at work on July 29, 2010. Here again, some of the allegations are substantiated, while others are not.

The City points out that LaShomb's 1999 application for employment inaccurately represented that she had earned a four-year college degree. During her job interview, however, LaShomb accurately explained that she actually was an internship short of earning that degree. While the misstatement on the application was improper, LaShomb's explanation coupled with the fact that the job does not require a college degree makes this a relatively minor infraction.

As to the second example, it is clear that LaShomb and Harper had a running battle that escalated over time. Harper testified that LaShomb frequently responded to Harper's directives with angry retorts and treated her with disrespect. LaShomb similarly testified that Harper contrived problems that did not exist and treated her with disrespect. Although the parties share

blame on this issue, since Harper was the boss, LaShomb's behavior is an appropriate basis for discipline.

The City claims that LaShomb created such an angry disturbance on July 29 that Harper had no choice but to send LaShomb home. The record clearly establishes that LaShomb became upset when she learned that someone had hacked into her private online college information. Both LaShomb and Tuttle, however, testified that LaShomb was working quietly at her desk when Harper directed her to leave the workplace.

6. Making unfounded and disparaging comments about the City, the City Administrator and your fellow employees in public, and making late night and week end phone calls to City Council members and the City Administrator.

In support of this allegation, the City relies on the testimony of Ron Floria who stated that LaShomb tended to talk about City business to the dismay of customers at his restaurant in Cohasset, and that on one occasion LaShomb openly disparaged Harper to restaurant customers. LaShomb denies these allegations. Although the evidence on this issue is mixed, I find that it does substantiate an appropriate basis for discipline.

The City further alleges that LaShomb made harassing telephone calls to City Council members late at night. The record does establish that LaShomb made several calls to the home of LaGrange after 9:00 p.m. While it is not clear that these calls were harassing in nature, their timing and frequency were inappropriate.

In sum, based on a consideration of these six allegations, the Employer has established some, but not all, of the misconduct alleged as the basis for its disciplinary action.

The Appropriate Remedy

This is a classic case of a personality conflict between a supervisor and a subordinate. In the usual case, the supervisor's view prevails because the subordinate owes a duty to respect and

follow the supervisor's directives. While this principle certainly warrants the imposition of significant discipline in this instance, there also are a number of countervailing considerations that support a sanction less severe than that of discharge.

One countervailing consideration is the fact that the supervisor's hands also are unclean in this matter. Harper acted with disrespect toward LaShomb, just as LaShomb acted with disrespect to Harper. Harper, moreover, began to contrive bases for discipline once the relationship had deteriorated. As the prior section recounts, much of the misconduct alleged by Harper was either overstated or nonexistent.

A second countervailing consideration is that the Employer's termination decision does not appear to be predicated on progressive discipline. The notion of progressive discipline is that an increase in the level of discipline should be proportionate with that sufficient to correct the grievant's behavior. *DISCIPLINE AND DISCHARGE IN ARBITRATION* 65-66 (Brand & Biren, eds., 2nd ed. 2008). Thus, an Employer generally should not resort to termination where a lesser sanction, such as a suspension, is likely to deter continued performance problems. Of course, such incremental steps need not be taken in response to very serious misconduct such as theft or violence in the workplace.

In this case, after several years of no disciplinary incidents, the Employer issued three reprimands to LaShomb on May 19, 2010. The Union promptly grieved this discipline. Then, three months later, the Employer terminated the grievant with three of the six supporting allegations being the same as those alleged in support of the earlier and as of yet unresolved reprimands. Under these circumstances, one must ask why the Employer decided to jump from the relatively minor reprimand stage to the ultimate penalty of discharge without first attempting to rectify the situation through a more progressive course of discipline.

The answer, I believe, lies with the May 26 City Council meeting. The evidence supports the conclusion that the principal basis for LaShomb's termination was a response to her revelations at the May 26 meeting. At this meeting, LaShomb recited a litany of concerns with Harper's performance. Based upon LaShomb's testimony, these concerns appeared to have arguable merit. While LaGrange testified that the City Council undertook an investigation and found no merit in the allegations, I find his testimony to be unpersuasive due to the absence of any investigative report or of any explanation as to how LaShomb's allegations lacked merit. I believe that the City Council was faced with the uncomfortable dilemma of having to choose between undertaking a possibly embarrassing investigation or standing behind their chief administrator. The end result was that they decided to support the administrator and fire the messenger.

I think it is important that a public employer not retaliate against an employee for bringing legitimate work-related concerns to the employer's attention. This serves the public interest by attempting to ensure the proper performance of public duties. This is the rationale behind such legislation as the Sarbannes-Oxley Act and state whistleblower statutes. The discharge of LaShomb under these circumstances is inconsistent with this principle.

Taking all of these circumstances into consideration, I conclude that the discharge should be reduced to a 20 day unpaid suspension. This conclusion reflects the fact that many of the allegations against LaShomb are unsubstantiated and that questionable behavior occurred on both sides of the employment relationship. On the other hand, this level of discipline is significant and hopefully sufficient to convey the message that LaShomb needs to improve her behavior if she hopes to retain her job into the future.

AWARD

The grievance is sustained in part and denied in part. The Employer's discharge decision is reduced to an unpaid suspension of 20 days. The Employer is directed to reinstate the grievant to her former position and to otherwise make her whole for lost pay and benefits. The City is further directed to modify the grievant's personnel file to reflect this determination. The arbitrator will retain jurisdiction for 90 days to resolve any remedial issues as may be necessary.

Dated: August 19, 2011

Stephen F. Befort
Arbitrator