

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of the Arbitration Between: *
*
TOWN OF BARNSTABLE *
*
-and- *
*
AFSCME, COUNCIL 93 *
*

ARB-14-3558

Arbitrator:

Timothy Hatfield, Esq.

Appearances:

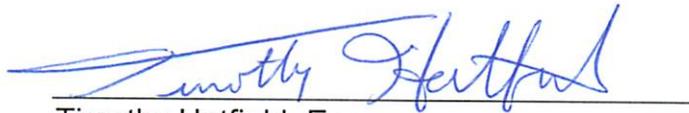
Albert Mason, Esq. - Representing The Town of Barnstable

Philip Brown, Esq. - Representing AFSCME, Council 93

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 Employer's termination of Russell Moore was for just cause, and the grievance is denied.



Timothy Hatfield, Esq.

Arbitrator

June 5, 2015

INTRODUCTION

On March 12, 2014, AFSCME, Council 93 (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.¹ The undersigned Arbitrator conducted a hearing at Barnstable Town Hall on October 29, 2014.

The parties filed briefs on January 12, 2015.

THE ISSUE

Was the action taken by the Employer in Joint Exhibit Two on February 13, 2014 for just cause?

If not what shall be the remedy?

RELEVANT CONTRACT LANGUAGE

The parties' Collective Bargaining Agreement (Agreement) contains the following pertinent provisions:

Article 8 – Overtime (In Part)

8.1 – Employees covered by this Agreement shall be paid at the rate of one and one-half (1 ½) times the regular rate of pay for work in excess of eight (8) hours in one (1) day or forty (40) hours in one week. For purposes of this article paid leave is synonymous with hours worked. In

¹ Pursuant to Chapter 145 of the Acts of 2007, the Department of Labor Relations "shall have all of the legal powers, authorities, responsibilities, duties, rights, and obligations previously conferred on the ... the board of conciliation and arbitration ... including without limitation those set forth in chapter 23C, chapter 150, chapter 150A, and chapter 150E of the General Laws."

the case of emergency operations as determined by the employer (snow and ice, hurricane, flood, etc.), employees will be paid one and one-half (1 ½) times their regular rate of pay for any hours worked outside their regular work schedule. ...

8.5 - ... Time worked during snow and ice emergency operations must be taken as paid overtime. ...

Article 10 – Rest Periods (In Part)

10.3 – Any employee covered by this collective bargaining agreement considered as performing their duties on an emergency status as may be determined by the division or Superintendent of Public Works, whichever the case may be, or their designees, whose duties shall carry them over into the following next regularly schedule shift, shall be allowed by their immediate supervisor reasonable time for a meal break. Such meal break shall not exceed one-half (1/2) hour and the employee taking such meal break shall not be docked or penalized in any way or suffer any loss of pay.

Article 24 – Management Rights (In Part)

24.1a – Among the Management rights that are vested exclusively with the Employer are the following: the right to hire, promote, transfer, suspend, demote, discharge, and to relieve employees from duty because of insufficient funds. Any demotions, suspensions or discharges resulting from disciplinary reasons shall be for just cause. The employee, however shall be given a written statement setting forth the reasons for such action and effective date of the change in status.

24.1b – The Employer shall have the freedom of action to determine the methods, the means and the personnel for all operations, including the scheduling of operations, the methods and materials to be used, and the extent to which its own facilities or personnel shall be used. The Employer may take whatever action is necessary to carry out its work in emergency operations. The Employer shall select and determine the number and types of employees required and shall assign work to such employees in accordance with the requirements determined by management; and to establish and change work schedules as necessary.

Article 27 – Miscellaneous Provisions (In Part)

27.3 – Personnel File: No material originating from the municipal Employer derogatory to an employee's conduct, service character, or personality, shall be placed in the personnel file unless the employee has had an opportunity to read such material. The employee shall acknowledge that

they have read such material by affixing their signature and the date of the actual copy of the material to be filed. Such signature does not necessarily indicate agreement with the contents, but merely signifies that the employee has read the material to be filed

27.9 – Emergency Operations: At the discretion of the employer, two (2) employees may be assigned to snow removal vehicles.

27.9.1 – In the event of an emergency resulting from natural causes (snow storm, ice storm, flooding, hurricane, tornado, earthquake, etc.) or man-made disaster (nuclear and otherwise), the department will be required, at times determined by the Superintendent or his/her designee, to make use of all available personnel, equipment and resources to minimize the effects of the emergency situation on the Town and to restore the community as quickly as possible to normal conditions. All department employees covered by this agreement who do not voluntarily do so and are physically able shall be subject to involuntary call on an as needed basis to assist in fulfilling the department's responsibilities for performing emergency operations.

27.11 – Employee Assignments: Employee assignments to motor vehicles or equipment during routine and emergency operations are solely those of the Superintendent or his/her designee with respect to individual employee's capabilities and the number of employees per vehicle or equipment as may be judged necessary to ensure the safety and efficiency of operations.

FACTS

The Town of Barnstable (Town or Employer) and the Union are parties to a collective bargaining agreement that was in effect at all relevant times to this arbitration. The grievant, Russell Moore (Moore), was employed by the Town in the Department of Public Works (DPW) as an Equipment Operator for eighteen years. Moore's yearly evaluations were predominantly positive. The job description of an Equipment Operator includes the following:

Job Environment

Work is conducted throughout the town. Required to work beyond and/or before normal shift hours during snow and ice operations and other emergencies. ...

Essential Functions

Operates trucks and other equipment of moderate complexity for all public works projects ...

Operates vehicles and equipment for snow and ice control work ...

Considered essential personnel for emergency operations ...

During the beginning of the winter season of 2012-2013, Moore failed to respond to four out of six calls to work during snow and ice events (call outs) between December 27, 2012 and January 28, 2013. On January 28, 2013 Highway Supervisor Michael Perry (Perry) held a meeting with Moore and Union Shop Steward Brad Milley (Milley) to discuss the situation. After being informed that he had missed four out of six call outs, Perry informed Moore that he needed to do a better job of responding to calls or he would be subject to a reprimand course of action. Moore responded that he would try to do a better job, but, that he could "only do his best at trying."

On February 17, 2013, Moore failed to respond to two more call outs and was issued a written verbal warning for his failure to fulfill his duties and responsibilities pertaining to public safety snow and ice operations. The Union filed a grievance on Moore's behalf. At a February 23, 2013, grievance meeting, the parties met in an attempt to reach compromise. At the time of the meeting, Moore had missed more than seven call outs on nights and weekends. Perry concluded that he would rescind the verbal warning, but if Moore continued to miss call outs, regardless of his excuses, the verbal warning would be reissued.

On March 21, 2013 and March 22, 2013, Moore again failed to respond to call outs. On March 27, 2013, Perry reissued the verbal warning that had been conditionally rescinded. Moore was informed that this was a notice and

opportunity to correct himself in the future and that should he fail in the future to fully meet the duties and responsibilities of his position that he would be subject to further disciplinary action. The Union again filed a grievance. In his April 2, 2013, Step 2 Grievance Response, Daniel Santos (Santos), Director of Public Works states that:

I have received your Grievance dated March 28, 2013 where you dispute the issuance of a documented verbal warning issued on March 27, 2013. The verbal warning was regarding your failure to fulfill your duties and responsibilities pertaining to snow and ice operations.

I have reviewed the facts and circumstances involved in this Grievance as well as the Collective Bargaining Agreement, and your position as Equipment Operator I.

Article 27.9.1 of the Agreement states: "In the event of a ... snow storm, the Department will be required ... to make use of all available personnel" and further that all "... employees ... who do not voluntarily do so shall be subject to involuntary call ..."

The Position Description states that "Required to work beyond and/or before normal shift hours during snow and ice operations ..." and further it is stated that "Considered essential personnel for emergency operations."

Therefore the Grievance is denied.

The following winter season, on January 3, 2014 Moore, without authorization, left work during a snow and ice event and failed to respond to phone calls and messages. On January 6, 2014, Moore again failed to respond to a call out. On January 9, 2014, Santos suspended Moore for three days² stating:

² Evidence presented at the hearing indicated that the Employer, while intending to suspend Moore for three days without pay, mistakenly never deducted the pay from his earnings due to a payroll system flaw that was not immediately

As the Director of the Department of Public Works, it is my responsibility to ensure that this Department operates in a proper and efficient manner. Therefore, I must express my dissatisfaction with, what in my opinion, has been your inappropriate and unprofessional judgment and conduct.

Specifically, you left work without authorization during an emergency snow and ice event at approximately 1:00 P.M. on Friday January 3, 2014. Furthermore, you failed to respond to phone calls and messages the following morning regarding your required participation in the continuing emergency snow and ice event; and you failed to respond to telephone calls and messages regarding a snow and ice call out on the evening of January 6, 2014. Your actions over these days demonstrate poor judgment and inappropriate conduct.

You have been counseled regarding the requirements of your job and responsibilities during snow and ice events, by me, as recently as April 2013. Therefore, based upon an overall review of your record, you are being suspended without pay for three (3) days. The suspension will commence on January 10, 2014 and end on January 14, 2014. You are to report to work at the start of your regular shift on January 15, 2014.

I am taking this opportunity to notify you that should you in the future fail to meet fully your duties and responsibilities, to and including conducting yourself in a professional and appropriate manner, then you will be subject to additional discipline, up to an including discharge from employment.

On February 6, 2014, Moore was called twice by foreman P.J. Kelliher (Kelliher) to come in for a snow and ice event. The calls were made at 4:20 AM and 4:30 AM and messages were left for him both times. Moore did not respond to either call and simply arrived at work at 7:00 AM. Moore made no effort to contact anyone to let them know why he didn't respond. Kelliher finally spoke to Moore around 11:50 AM to ask Moore why he didn't respond. Moore stated that he did not feel the need to respond some two to three hours after the call had

discovered. Moore did not notify the Employer of its mistake, and the money was not recouped prior to Moore's termination.

been made. Moore stated that the phone had been in the other room, and that he did not intend to answer his phone after 10:00 PM unless someone was dying or in jail. Moore acknowledged to Kelliher that he knew he would be called in to Santos' office about his failure to respond to the phone calls.

On February 13, 2014, the Town terminated Moore's employment. Town Manager Thomas Lynch in his termination letter stated in relevant part that:

This is to officially advise you that you are being terminated from your position as Equipment Operator I in the Highway Division of the Department of Public Works, effective February 13, 2014.

Please be advised that this termination is based on an overall review of your record including a three-day suspension issued on January 8, 2014 for unacceptable conduct and judgment during a snow and ice emergency. In addition, on February 5, 2014, you failed to respond to a sanding call-out and when questioned the following morning you responded that you only answer your phone after 10:00 PM if someone is dying or in the hospital.

The Union filed a grievance over Moore's termination that was denied at all steps of the grievance procedure and resulted in the instant arbitration.

POSITIONS OF THE PARTIES

THE EMPLOYER

Moore was employed as an Equipment Operator in the Highway Division of the DPW. The duties and the responsibilities of this position include work beyond and/or before normal shift hours during snow and ice storms, and Equipment Operators are considered essential personnel for emergency operations. Moore was expected to comply with the Town's mutually recognized and documented Public Safety Snow and Ice Emergency Operations Procedure. Regardless of whether he was a good employee during normal working hours, he

was of no use to the Department and the public if he failed to respond to a call for any type of precipitation that might form ice and/or accumulating snow. The safety and mobility of the community is of the utmost importance.

The termination of Moore was for just cause. Moore's termination occurred after he repeatedly failed to meet his public safety responsibilities. The Town initially issued him a verbal warning to correct his failings or to be subject to further disciplinary action. This first or initial written verbal warning was removed from his personnel file, with the admonition that, in the future, he needed to fulfill his public safety responsibilities. Thereafter, Moore again failed to meet his public safety responsibilities, and the Employer reinstated the warning. In January, 2014, the Employer suspended Moore for another instance of failing to meet his public safety responsibilities, and warned him that further disciplinary action would be taken if he failed to correct the problem. Finally, in February, 2014, Moore again failed to respond to a call out and when confronted, proceeded to joke about the incident. Throughout all of Moore's repeated failures to answer phone calls for work, the rest of his colleagues continued to respond to calls and meet their public safety responsibilities.

At the hearing, the Union raised certain arguments why the arbitrator should overturn Moore's discipline. The Town addresses those arguments below. The arbitrator should not find them to be persuasive.

Lack of Declaration of Emergency

The Union argued that there was no declaration of an emergency by the Town for any of the call outs to which Moore had failed to respond. However, the

snow and ice procedure that was created by the Employer and the Union specifically refers to a snow and ice event, and further states that the safety and mobility of the community is of the utmost importance during any type of precipitation that may form ice and/or accumulating snow. There is no requirement that an emergency declaration must be made for the Employer to call in DPW workers. Noteworthy is the fact that out of all of the DPW workers, Moore was the only one, who continued to fail to respond to snow and ice calls after being repeatedly warned. The records show that other DPW employees responded to calls regardless of whether the calls were for snow, ice, sanding or any type of precipitation that may form ice and/or snow and whether it was formally designated as an emergency or not. No less was expected or required of Moore, especially after he had been warned about failing to respond.

Phone Availability

Moore holds an Equipment Operator position and is designated as essential personnel. Reasonable, prudent common sense and logic dictates that essential personnel should make a cell phone or a land line available when a snow or ice event is pending. Regardless of his explanation that he has no plug in his bedroom, Moore could have placed a charged phone near his bed so that he was available for any type of precipitation that could form ice and/or accumulating snow.

Prior Terminations

The fact that the only other employees terminated for failure to meet snow and ice responsibility were probationary employees is immaterial to Moore's

termination. Moore, as an experienced employee, should have been more aware of and compliant with his public safety responsibilities. Yet, after being repeatedly warned about failing to respond, he continued to do so. His failures, based on his years of service and knowledge of the position are in fact more egregious than those of a probationary employee. Public safety snow and ice responsibilities are the number one priority for all employees of the DPW during the winter months. For some reason Moore over the last two winters has failed to meet that responsibility, even after being notified and warned that he needed to meet these responsibilities. In addition, treating his last failure cavalierly with a joke certainly demonstrates that correction was not preeminently in his mind.

Removal of Disciplinary Language

The disciplinary section of the Snow and Ice Emergency Operations Procedure was removed after consultation with the Union because it was redundant rather than because a failure to follow the procedure would not result in discipline. As Union president Tubbs testified, it was redundant because the collective bargaining agreement contains language relating to discipline.

Signature Acknowledgement

Regarding the Union's argument that prior disciplinary action against Moore was not properly in his personnel file, the purpose of Section 27.3 provisions, which references an employee reading and signing derogatory materials before the Employer places those materials in the employee's personnel file, is to provide notice and opportunity to review derogatory information. Moore never denied receiving the written warnings, nor the notices

and opportunities to correct his actions. He grieved one of the verbal warnings, and it was conditionally rescinded. Ultimately, the Employer reinstated the verbal warning after Moore again failed to respond to a call. Moore was well aware of what was expected of him and why. Moore had ample opportunity to correct his failing in judgment and conduct and chose to do neither.

Moore's "Joking Response"

The statement about not answering the phone after 10 PM unless someone is dying or in jail shows that Moore was not intent on correcting his failings. His joke is indicative of a lack of real concern about his duty and responsibility to respond to public safety snow and ice calls.

Conclusion

Between the Town's repeated efforts to correct Moore's behavior, and the fact that there is no question that the responsibilities involved are mutually recognized important public safety responsibilities, there can be no logical reason for a finding that this termination lacked just cause. The Town of Barnstable respectfully requests that the termination be upheld.

THE UNION

The Town did not have just cause to terminate Moore. Just cause essentially embodies seven principles laid out by Carroll Daugherty:

1. Was the employee adequately warned of the consequence of his conduct?
2. Was the employer's rule reasonably related to the efficient and safe operations of the job?
3. Did management investigate before administering the discipline?

4. Was the investigation fair and objective?
5. Did the investigation produce substantial evidence of proof of guilt?
6. Were the rules, orders and penalties applied evenhandedly?
7. Was the penalty reasonably related to the seriousness of the offense and the past record?

A “no” answer to any of the above questions signifies that just and proper cause does not exist. In the instant case, no is the answer to many of the questions.

Was the penalty reasonably related to the seriousness of the offense and the past record

The termination of Moore was not reasonably related to the seriousness of the offense and Moore’s past record. Moore’s performance evaluations show that he has performed exemplary work for the DPW, specifically, Moore has been rated as “very dependable”. These performance reviews were further supported by the Town’s own witnesses, who testified to Moore’s positive impact on the DPW and his work for eighteen and a half years. The Town was aware of this record and still decided that termination was appropriate instead of a lesser punishment that would allow for rehabilitation.

Were the rules, orders and penalties applied evenhandedly

The Town waited until there were four “no responses” before initiating discipline. On December 27 and 29, 2012, Moore was marked as not responding to call outs and did not receive discipline. Moore was again marked as not responding to callouts on January 21 and 26, 2013. Perry then spoke to Moore about having better responses to call outs. Moore was again marked as not

responding to call outs four more times, once on February 8 and 15, and then twice on February 17th. After the fourth time that Moore did not respond to a call out, he received a documented verbal warning. This warning was rescinded after the DPW and the Union reached a compromise during the grievance process. After Moore did not respond to two more call outs on March 21st, the Employer placed the documentation for the verbal warning in Moore's personnel file. Because the Employer never obtained Moore's signature on the verbal warning as required by Article 27.3 of the collective bargaining agreement, the verbal warning should not be counted against Moore as a past discipline.

In January 2014, Moore did not respond to two snow events and left another event without authorization. The Town alleges that it suspended Moore for these actions, but in effect, the Town did nothing more than provide him with a warning, as he continued to be paid his salary during his time away from work. Moore was marked as a no response on February 5, 2014, and the Employer accelerated the speed and severity of his discipline when it terminated him. By paying Moore for not appearing at work in relation to the January discipline, and by failing to speak to him about not responding to calls on multiple occasions, the Town tacitly informed Moore that it considered this misconduct minimal, or in fact condoned his actions. Furthermore, this conduct lulled Moore into a false sense of security as to the number of times that the Town would accept him not responding to call outs.

The purpose of progressive discipline is to provide an employee notice of unacceptable conduct and an opportunity to correct that behavior. Absent

severe misconduct, discharge usually is found appropriate only when there have been several warnings and at least one suspension. In this instance, the only disciplinary history is a warning which was procedurally defective, and a substantively unenforced suspension. Moore was never informed that his conduct was unacceptable and needed to be corrected or else termination would issue.

Was the employee adequately warned of the consequence of his conduct

The Town did not provide Moore with adequate warning about the consequences of failing to return the DPW's calls during a sanding call out. The DPW's policy with respect to Snow and Ice Emergency Operations informs employees that "an employee must respond within 15 minutes to any official contact attempt. After 15 minutes another employee will be contacted to respond to the emergency." Nowhere in this policy are the employees informed that they will be disciplined for failure to call back the employer.

Although the Town has asserted that Article 27.9.1 in the Snow and Ice Emergency Operations Procedure informs employees of the consequences of their actions, this is not so. The explicit language of the parties' agreement requires an emergency and demonstrated need to discipline an employee for not reporting in, and not merely failure to respond to a call out. There was no declaration in February of an emergency, it was simply a sanding call out. To determine that without an emergency or any need for Moore to report in that he should be disciplined goes against the explicit language of the parties' agreement.

Was the investigation fair and objective

The Town appears to have determined that Moore could not rehabilitate his conduct and therefore should be terminated because of his statement to Kelliher. The Town has ignored the consistently excellent work evaluations of Moore. Additionally, nowhere in these evaluations has the Employer stated that Moore needs to improve his response to call outs. To only consider one off-hand comment about Moore's dependability while ignoring the voluminous evidence that he is considered a good and dependable worker is not a fair and objective investigation.

Conclusion

This termination is without just cause and the Union requests that Moore be reinstated to his former position and that he be made whole for all wages and benefits.

OPINION

The issue before me is: Was the action taken by the Employer in Joint Exhibit Two on February 13, 2014 for just cause?

If not what shall be the remedy?

For all the reasons stated below, the Employer's termination of Moore was for just cause, and the grievance is denied.

There is no dispute that Moore was aware as an Equipment Operator for the Barnstable DPW of his responsibilities regarding snow and ice events. Moore was an essential employee and thus, subject to recall for snow and ice events outside of his normal working hours. Somewhere along the way, Moore

decided that he no longer wished to work on nights and weekends, as was required of his position, and stopped responding to calls after hours. Moore's actions were in direct violation of his job description. His supervisors went to great lengths to address the problem beginning in January 2013, when Moore and Highway Supervisor Perry had their first meeting to discuss the fact that Moore had missed four out of six call outs for snow and ice. Perry was clear with Moore that he needed to do a better job of responding to calls or he would be subject to a reprimand course of action. Revealingly, Moore responded that he would try to do a better job, but that he could only do his best at trying.

Unfortunately, Moore's "best at trying" did not change his pattern of behavior. Moore continued not to respond to call outs, including two calls on February 17, 2013. Having been previously warned that his actions in failing to respond to call outs would result in a reprimand, Perry issued Moore a verbal warning, which again placed Moore on notice that his actions were unacceptable. The Union intervened on Moore's behalf and the verbal warning was conditionally rescinded with the admonishment that Moore had to respond to call outs.

Having been put on notice twice that his actions were not acceptable and that he needed to change his behavior, Moore responded by again failing to respond to call outs on March 21, 2013 and March 22, 2013. As a result and as previously agreed, Perry reissued the verbal warning to Moore. Specifically, Moore was informed that this was a notice and opportunity to correct himself and that in the future should he fail to fully meet the duties and responsibilities of his

position, he would be subject to further discipline. The Union again filed a grievance, and Director Santos for the fourth time placed Moore on notice that his behavior was unacceptable and that he was required to work beyond and/or before his normal shift performing snow and ice duties.

The following winter, on January 3, 2014, Moore, without authorization, left work during a snow and ice event and failed to respond to calls and messages. Moore followed up that transgression by again failing to respond to a call out on January 6, 2014. On January 9, 2014, essentially one full year after first being warned of his wrongdoings, and after four prior notifications that he was going to be subject to further discipline if he continued to refuse to respond to call outs, Santos suspended Moore for three days. Santos admonished Moore that "I am taking this opportunity to notify you that should you in the future fail to meet fully your duties and responsibilities, to and including conducting yourself in a professional and appropriate manner, then you will be subject to additional discipline, up to an including discharge from employment." This admonishment was the Town's fifth attempt to place Moore on notice that his actions were unacceptable and needed to change.

Moore's actions continued unabated and on February 6, 2014, he again ignored two calls from his foreman Kelliher at 4:20 AM and 4:30 AM and simply arrived at work at his normal starting time. Moore made no effort to inform anyone why he didn't respond to the calls. When approached by Kelliher at 11:30 AM, Moore offered a dismissive comment that he only answered the phone

after 10 PM if someone was dying or in jail. Subsequently, the Employer terminated Moore from his position.

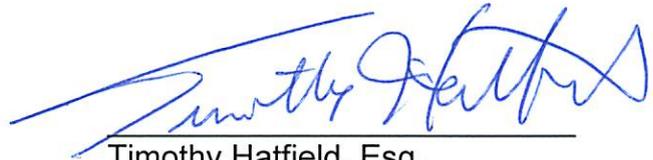
The Town tried on five occasions, over thirteen months, and two winter seasons to impress upon Moore that he was an essential employee, who was required to work above and beyond his normal hours in response to snow and ice events. Moore decided that he no longer wished to perform this essential function of his position and stopped answering his phone. The Union cannot legitimately argue that Moore was somehow unaware that his actions would lead to his ultimate termination, or that the Town had improperly accelerated the penalty to termination. Nor does the mere fact that the Town administratively failed to deduct the pay from Moore's earnings for his suspension, somehow negate the Town's admonitions that his behavior needed to change. The administrative error simply provided Moore with an unintended windfall, not an opportunity to continue his wayward actions without further discipline.

Additionally, the Union's argument that the Town failed to take into account that Moore was a long-time employee with excellent work evaluations is also unpersuasive as a rationale for a lack of just cause. Moore's supervisors acknowledged that Moore was a productive employee during normal work hours, but also stressed that his decision in the winter of 2013 to stop performing an essential function of his job, i.e. snow and ice removal on nights and weekends, was intolerable. The safety of the public during snow and ice events is of paramount importance to the Town, and Moore's actions in refusing to work were hindering that effort. Yet in spite of this, the Town tried on at least five occasions

to reinforce to Moore the need to perform all aspects of his position. Ultimately, Moore declined to perform the essential duties of his position in the manner mandated by his supervisors and was terminated for his actions.

AWARD

The Employer's termination of Russell Moore was for just cause, and the grievance is denied.



Timothy Hatfield, Esq.
Arbitrator
June 5, 2015