MMLA Employee Discipline

Labor Seminar Part II

BAR EXAM



|  |  |
| --- | --- |
| **SCENARIOS**  Scenario #1  **William White is a high school physics teacher.**  He has been employed by the Anytown school district for 12 years. During that time his evaluations have been relatively consistent and positive, and he has been commended for creating a classroom environment where students feel comfortable asking questions and are engaged in the learning process.  On Friday morning you receive a call from the Anytown high school principal. A female student reported to her guidance counselor that Mr. White made comments on two separate occasions that the only way she could bring up her grades was through sexual favors. The principal and superintendent are wondering about next steps.  **Background**. One of the classes White teaches at the high school is an integrated math and physics class for students who tend to be at-risk academically and have struggled in math and science. Some of the students also face behavioral issues, and some have been diagnosed with attention deficit disorder and other learning challenges. In his effort to engage this student population, White has developed a teaching style that is less hierarchical, and he encourages collaboration and a more relaxed classroom atmosphere. The result has been that students have a more familiar relationship with Mr. White than some other teachers, with more flexible boundaries and less formality.  The complainant, a seventeen-year-old female student is a member of this class. It was in this class that the student, disappointed with the grade she was then receiving asked White, in front of her classmates, whether there was any way she could “pay ... for a better grade.” A male student in the class asked, “You mean short of sexual favors?” Rather than correcting the male student for making a comment that encouraged trading sex for grades, White allegedly engaged in the dialogue himself. Responding, “Yes, that is the only thing that would be accepted.” Students laughed. White then continued by saying, “Don't be ridiculous” and told the female student that the only way to raise her grade would be better work. He then encouraged her to come after school for extra help if she had questions.  Two days later, the female student went to White’s classroom after school for extra help. White was there assisting another female student. The first female student again asked White, “[C]an't I just pay you for a better grade?” White responded, “Well, no ... you know that the only thing that I would accept is a sexual favor.” The second female student exclaimed, “Mr. W!” and laughed. However, the first female student made a complaint to her guidance counsellor about White’s comments.  **What questions do you have?**  **What’s your advice to the principal?**  **Next steps?**  **What is Mr. White’s status going forward?**  **What are your thoughts regarding discipline?**  **Standard?**  Would it make a difference if after an interview of Mr. White, he sent the investigator a letter expressing remorse and an intent to improve his classroom approach?  What if in the letter he admitted to “the weakness of an appropriate boundary between myself and my students” and the “need to create much clearer guidelines, not only for the students in my classroom, but for my own behavior towards students as well.”  And also stated, “Allowing ... sexually inappropriate comments in the class to go unchallenged, and even to take part in that banter myself is completely out of line....”  Scenario #2  **Lori Fernandez is a “high maintenance” or needy employee**. She needs a lot of attention and whines a lot. She can be prickly when asked to help on something outside of her daily routine. But until recently she always showed up on time and got her work done.  About three months ago Lori’s boss, Emily Manager, began noticing changes. Lori showed up late a few times. One time she caught Lori nodding off at her desk. Then one day Lori came to see her in her office and she said she needed to take a 30-day leave to deal with a medical problem. However, she wouldn't say what was wrong with her and refused to submit medical certification forms for FMLA leave. Eventually, she dropped the leave request, but ended up writing a letter to OSHA saying the town had violated safety regulations.  Emily gave Lori a warning letter stating that she had been late for work several times and would be further disciplined if she didn't get to work on time. After receiving the letter, Lori was angry and didn't show up for work for two days. She did not call in to report her absences. When she came to work the third day, Emily marched over to the HR Director's office and said she intended to fire Lori on the spot for her failure to report to work and failure to call in the last two days in violation of the Town’s attendance policy.  The HR Director has called you as Town Counsel to loop you into the conversation.  ***What questions or advice do you have for Emily and the HR Director?***  Scenario #3  A 20-year veteran police officer has, in the past year, been behaving more and more aggressively in the performance of his duties. Some examples:   * Responding to a shoplifting call, he enters an office containing the store’s Loss Prevention Officer, another store employee, and the shoplifter. The officer immediately grabs the only Hispanic person in the room (the others are Caucasian), and forcefully handcuffs him. The Hispanic man is the Loss Prevention Officer. * While directing traffic at an accident site, he yells at motorists without good cause. * He inappropriately draws his gun on a compliant traffic violator while another officer is downrange from the “target.”   After being placed on leave, the officer claims that he suffers from a psychiatric disorder that causes his bad behavior. He gets a letter from his physician stating that a properly prescribed drug (which is also a controlled substance) could alleviate the disorder. The police department has a strict drug policy which mandates that no officer is allowed to be under the influence of a controlled substance while on duty.  ***The Chief has called you for advice on next steps.***  ***Must the Chief allow this officer to take the drug and return to duty? What factors would play a role in your decision?***  Scenario #4  **Mel Madder is a good worker with 10 years’ service**. But he tends to get into verbal confrontations with fellow employees. When he does, he just doesn’t back down. He has had two such situations which nearly resulted in a fist fight. He was counseled by his department head, in the strongest terms, to avoid such behavior and has been told he could lose his job for fighting. He has never been suspended without pay. There is no written policy prohibiting fighting.  At the beginning of a snow emergency, Madder gets frustrated with a temporary worker’s inability to connect a snowplow to a truck. The employees exchange words, at close quarters, but are broken up. However, a few seconds later, they get into a grappling match while standing over the snowplow. Again, employees intervene. No punches are thrown, and no one is hurt.  ***What is the appropriate discipline under a “just cause” standard?***  P.S. The employee’s father is a well-respected member of middle management in the same Department.  **Name that Penalty?**  A-Imposed by the Employer B-Upheld by the Arbitrator  A B  1. Written reprimand with anger  management training  2. 3-5 days’ suspension  3. 10-day suspension with warning that  further offenses could result in  discharge  4. 6-month suspension and demotion  Scenario #5  Off-duty police officer Mace, still in his civil service probationary period, gets into a beef at a bar in another town and discharges his department issued mace. There is evidence that Mace has not been entirely truthful to the police in that town about the incident.  The police chief wants to have the officer dismissed under G.L. c.31, §34, which merely obligates the appointing authority to provide a written statement of reasons. No hearing is required under the statute, and there is no appeal available to Civil Service.  ***The employee demands a hearing. How should the Town respond?***  Scenario #6  **Alston Brooks started as a firefighter in Richardsonville in 2002**. He served on a full-time basis for 11 years without issue and was considered to be a good employee and very good firefighter. In 2010 he was assigned to Group 2, Station 5 and Trainer, then a lieutenant was one of his supervisors. Trainer had joined the fire department in 1984. The two reportedly had a good relationship.  In early 2010, Brooks suffered an on-duty injury that kept him out of work. Trainer called Brooks to check on him, but the call went to voicemail. Trainer thought he had ended the call but in fact he had not. As a result, he left a voicemail in which he said “fucking n\*\*\*\*r.” Brooks was shocked and hurt by the slur.  Brooks spoke with the chief of operations for the department and played the message for him. The chief of operations did not report the incident to the fire chief or any town officials. They decided to reach out to Trainer directly regarding the voicemail. Trainer stated that the slur was not directed at him but “some young gangbanger” who had cut him off in traffic. Further upset, Brooks hung up. Trainer called him a few days later and repeated his explanation. He also told Brooks that reporting the incident was the stupidest thing he could do and asked if he wanted him to lose his job.  A few weeks later, Brooks filed a formal complaint to the Fire Chief. The chief immediately notified Richardsonville’s HR director.  ***What concerns, if any, do you have about what has already been shared?***  ***What advice do you have for the HR director who has reached out for advice on next steps?***  ***Thoughts on possible discipline?***  **Post Investigation**. Following an investigation, the HR Director recommended progressive discipline, Tannen’s permanent transfer from Group 2, mediation between the two firefighters, development of an antidiscrimination policy, and antidiscrimination training, including training for supervisors on their duty to report incidents. A  closed-door disciplinary hearing was held for Trainer. The Chief recommended he be suspended for four tours. The board rejected this recommendation and suspended him for two tours with two tours held in abeyance.  Two days after serving his two-day suspension, Trainer was promoted to temporary fire captain effective September 10th.    **Return to work**. On September 21, Brooks returned to work. Two days after he returned to work, there was a message on the union’s blog titled, “Faceless Coward”, that called out someone for leaking alleged misconduct of a firefighter. Brooks notified HR and the HR director stated she would ask the union to remove it. The town did not investigate the post or the person who posted it and took no further action.  Whenever Brooks was sent to a Station other than his usual Station Five, he reported being isolated and shunned; either firefighters left the room or refused to acknowledge him.  On May 1, 2013, Tannen was recommended for permanent promotion to captain. In his new role as captain of training, Tannen told all the new recruits his side of the voicemail incident.  On December 18, 2013, Brooks told a lieutenant that he planned to ask for a transfer to another station. The next day, he found the work “Leave” written on the door to his seat on the fire engine under his jacket. Brooks was very upset and said something to the effect of “shooting up the place.” During his next shift a few days later, he confronted a group of firefighters at his station and said that “people go postal over matters like this.”  ***What questions do you have?***  ***What do you recommend as a next step?***  **Fitness for Duty and Suspension**. On December 27, 2013, a few days after Brooks made his comments, the chief told Brooks he was not allowed on town property until a fitness for duty could be done. The town police department circulated a flyer to its officers with a picture of Brooks and information about his comment about “going postal.”  The fitness for duty evaluation concluded that Brooks was not a threat to himself or others but that his ability to regulate his emotions was compromised. Over the next few months, the town’s evaluator and Brooks’ doctor evaluated Brooks and communicated regarding his condition.  In May, 2014, the town issued two investigation reports related to the December 2013 incident. The first concluded that there was no way to determine who had written the word “Leave” or what the intent was (the town suggested it could have been written during a call to a fraternity the night before). The second report concluded that Brooks violated the workplace safety policy with his “shooting” and “going postal” comments. The report said that these comments left Brooks’ co-workers in reasonable fear of violence in the workplace. The town suspended Brooks for two tours and imposed a return-to-work plan on him.  Another fitness for duty was conducted in February 2015. In this evaluation, the evaluator concluded that Brooks could return to work if three conditions were met. After receiving the report, the town attempted to meet with Brooks and his attorney with little success. An additional year went by, and Brooks ignored or failed to comply with the department’s attempts to meet.  On July 21, 2016, the HR director told Brooks that the town had scheduled a return-to-work evaluation for him on August 2. Brooks failed to attend.  **Litigation**  In May 2012, Brooks filed with the Massachusetts Commission Against Discrimination (MCAD). Brooks complained that he was discriminated against by the town and that he had been “shunned, isolated and mocked by his fellow firefighters at the direction and instruction of his superiors for three years with significantly worsening conditions.” The town attempted to investigate but Brooks refused to participate in the investigation and the complaint went nowhere.  On June 17, 2013, Brooks commenced a civil action against the town in Superior Court. The action was based on the same allegations included in the MCAD complaints. The case was dismissed in July 2014 because of Brook’s failure to comply with discovery requests.  On December 2015, Brooks commenced a lawsuit in Federal court against the Town, the union and various town officials, alleging civil rights violations under Federal law. A federal judge concluded that Brooks could not bring any claims he brought or could have brought in the earlier civil action. The judge granted summary judgment in favor of the town, finding no discrimination and that the town fired Brooks because he declined to attend meetings or to submit proof he was able to return to work.  **Termination**. After failing to show up at the August 2, 2016 return to work evaluation, the town sent a notice of intent to dismiss notice. Brooks had been absent from work for nearly two and a half years and failed to participate in the return-to-work process. A hearing was held on August 30 and the hearing officer issued a report recommending termination. The board voted to terminate Brooks at the October 5, 2016 meeting. Brooks filed an appeal.  ***Was the Town justified in terminating Brooks’ employment?***  ***Is Brooks precluded from raising discrimination as the motivating factor for his termination as he was in federal court?***  ***If not, is the Civil Service Commission the appropriate body to consider claims of discrimination under G.L. 151B?***  ***Is there anything you would recommend the Town do differently?*** | **NOTES** |
|  |  |