COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of the Arbitration between:	*	
	*	
TOWN OF MILLBURY	*	
	*	ARB-16-5605
-and-	*	
	*	
MASSACHUSETTS LABORERS' PUBLIC EMPLOYEE COUNCIL, LOCAL 272	*	

Arbitrator:

James Sunkenberg, Esq.

Appearances:

James P. Hoban, Esq.	-Representing Town of Millbury
Tom Coffey, Esq.	-Representing Massachusetts Laborers' Public Employee Council, Local 272

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 issue, and, having studied and weighed the evidence presented, conclude as follows:

AWARD

The grievance is arbitrable.

James Sunkenberg, Esq.
Arbitrator
May 26, 2017

INTRODUCTION

On November 9, 2016, the Massachusetts Laborers' Public Employee Council, Local 272 (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 James Sunkenberg, Esq. to act as a single neutral arbitrator with the full power of the Department. On February 14, 2017, the Town of Millbury (Town) moved to bifurcate the hearing, and on February 16, 2017, the Union assented.[1] The undersigned Arbitrator conducted a hearing in Millbury, Massachusetts on February 28, 2017. The Union and the Town filed briefs on March 31, 2017.

ISSUE

The parties stipulated to the following issue:

Is the Mass. Laborers Public Employee Council, Local 272's grievance arbitrable?

RELEVANT CONTRACT LANGUAGE

Article 18 Grievance and Arbitration Proceeding

A. For purposes of this Article, a "grievance" will be defined as an actual dispute arising as a result of this application or interpretation of one or more express terms of this Agreement; provided, however, that any matter arising under the purported exercise of management rights pursuant to Article 7 of this Agreement, will not be subject to this grievance procedure nor construed as being grievable.

B. The Town and the Union understand that the grievance procedure is designed as a procedure for prompt resolution of disputes. Therefore, no grievance may be commenced more than ten (10) working days after the occurrence of the incident or event upon which the grievance is based. For purposes of this Article, a "working day" shall be defined as Monday through Friday, excluding holidays.

[1] In its February 14, 2017 Motion, the Town also moved to dismiss the petition for arbitration as non-arbitrable. I declined to rule on arbitrability prior to holding a hearing.

C. All grievances will be handled in accordance with the grievance procedures set forth in this Article. A representative of the Union may accompany the employee in any meeting with a Town representative concerning a grievance. The employee, with or without the Union Steward, shall first attempt to orally settle the issue with the immediate supervisor. If agreement cannot be reached at this stage, then the following Grievance procedure shall be followed:

1. Step 1. Within ten (10) working days of the event giving rise to the grievance, the employee or the Union will file a grievance, in writing, either in person or through the Union Representative, with the Department Head, with a copy to the Town Manager. The grievance will contain (a) a concise statement of the facts, (b) a citation of applicable contract language, which shall include the Article and section of the Agreement under which the grievance arises, (c) the specific provisions of the Agreement that allegedly have been violated, and (d) the remedy sought. The date of the grievance is submitted to the Department Head will constitute the commencement date of the grievance. Within ten (10) working days of receipt of the grievance, the Department Head will submit to the Union a written decision regarding the grievance. If the Department Head is the immediate supervisor as mentioned in Section 3 above, then Step 1 will be omitted and the grievance will advance to Step 2.

2. Step 2. If the grievance is not resolved at Step 1 or answered by the Department Head within the time limit set forth above, the employee or the Union may appeal the grievance, in writing, to the Town Manager not later than ten (10) working days from the date the Department Head's response was due. The Town Manager will respond to the grievance, in writing, not later than twenty working days after the date of the receipt of the appeal.

3. Step 3. In the event that the grievance is not satisfactorily resolved at Step 2, either party may submit the matter to final and binding arbitration by the Department of Labor Relations, within twenty (20) working days of the Town Manager's decision, relative to any dispute concerning the interpretation or application of this agreement.

D. The award of the arbitrator shall be final and binding upon all parties, subject to the following conditions:

1. The arbitrator shall have no power to add to, subtract from, or modify this Agreement, and may only interpret such items and determine such issues as may be submitted to him or her by agreement of the parties.

E. Grievances may be settled without precedent at any stage of this procedure.

F. The Union's failure to initiate Step 1 within the appropriate time limit shall result in barring the grievance.

H. The time limits set forth in this Article may be extended by mutual agreement of the parties.

Article 21 Classification and Rates of Pay

B. When other municipal unions agree the Town may at its sole discretion move to a bi-weekly payroll cycle (every two weeks).

FACTS

This arbitration arises from a September 2, 2016 grievance (Grievance) that Union Steward Keith Caruso (Caruso) filed on behalf of the Union membership. The Grievance states, "The members of the DPW do not agree with the Bi Weekly Pay that was Forced on us. According to Article 21 item B no other municipal unions agree to Bi Weekly Pay." On September 6, 2016, Director of Public Works Robert D. McNeil III (McNeil) received the Grievance. On September 14, 2016, McNeil denied the Grievance at Step 1 as untimely filed because, "The Town implemented the change from a weekly to a biweekly payroll schedule on January 16, 2015, more than 1.5 years ago." McNeil also denied the grievance on the merits.

On September 27, 2016, the Union advanced the Grievance to Step 2 by submitting it to Interim Town Manager E. Bernard Plante (Plante). At Step 2 the Union argued that it filed the Grievance "as a result of the Millbury Police Association being moved back to a weekly pay cycle." The Union alleged that on September 2, 2016, the date on which members of the Millbury Police Association (Police Association) received their first weekly paychecks in accordance with Arbitrator Timothy Hatfield's June 14, 2016 Arbitration Award (Hatfield Award), "it became profoundly clear that the Millbury Police Association DID NOT agree to go to a bi-weekly pay cycle." The Union argued that these weekly paychecks "triggered a new event" and violated Article 21. On

October 20, 2016, Plante denied the grievance at Step 2 as untimely, again due to the "incident or event" upon which the Union based the grievance occurring on January 16, 2015. Plante also denied the grievance at Step 2 on the merits.

On November 9, 2016, the Union filed for arbitration with the Department. In its filing, the Union states the nature of the dispute as: "Town Dept's were moved to bi-weekly pay cycle. Was agreed upon as long as no Dept. was moved back to weekly pay cycle."

Background

The Grievance inextricably relates to a prior Union grievance. Specifically, on September 30, 2014, Town Treasurer Denise Marlborough (Marlborough) issued a memorandum to all Town employees informing them that, effective January 2, 2015, the Town would change from a weekly to a bi-weekly payroll cycle. On November 20, 2014, Marlborough issued a second memorandum to all Town employees informing them that, effective January 16, 2015, the Town would change to a biweekly payroll cycle.

Prior to the Town issuing the second memorandum, however, on October 7, 2014, former Union Steward Joseph Lobas (Lobas) filed a grievance (Lobas Grievance) challenging the Town's intended change to the payroll cycle. Additionally, on or around October 28, 2014, the Police Association filed a similar grievance challenging the Town's proposed change to the payroll cycle. Lobas submitted the Lobas Grievance to

McNeil with a copy to then Town Manager Robert Spain (Spain).[2] The Lobas Grievance states:

> SUBJECT: BI-WEEKLY PAYROLL THE NOTICE LETTER FROM: DENISE MARLBOROUGH TOWN TREASURER TO CHANGE FROM WEEKLY PAYROLL TO BI-WEEKLY AGREEMENT EACH HAD RIGHT [&] OPPORTUNITY TO MAKE DEMANDS THE TOWN AGREE FOR THE LIFE OF THIS CONTRACT. THE UNION LOCAL DISAGREE WITH THE DISCRETION TO MOVE TO BI-WEEKLY PAYROLL.[3] (sic)

At some point after submitting the Lobas Grievance, Lobas had a discussion with Spain on a Saturday at the transfer station where Lobas works as lead foreman in which Spain told him that, in the interest of saving the Town money at arbitration, if the Police Association took the matter to arbitration and prevailed, then the Town would also return the Union to a weekly payroll cycle. After this conversation with Spain, Lobas did not hear further regarding the Lobas Grievance, and he understood the parties to have settled the matter.[4] Additionally, during the Police Association grievance process Spain told Police Detective Andrea Warpula (Warpula), then President of the Police

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[2] Here, the testimony conflicts. Lobas testified that he submitted the Lobas Grievance to McNeil with a copy to Spain. McNeil testified that grievances are typically "handed to either myself or the town manager's secretary." McNeil never signed as received the Lobas Grievance and he testified that he did not receive it. Caruso, however, testified that he received a copy of the Lobas Grievance from the Town Manager's office the day before the arbitration hearing in this matter, or February 27, 2017. Because the Town did not refute Caruso's testimony regarding evidence that it maintains within its control, I find that Lobas submitted, and the Town received, the Lobas Grievance.

[3] On an unknown date, someone, in handwriting that does not belong to Lobas, wrote the word "Withdrew" on the top of the Lobas Grievance. The Town did not present any evidence that the Union ever withdrew the Lobas Grievance.

[4] Spain did not testify at the arbitration hearing. McNeil testified that he was not aware of any agreement between the Union and the Town that would allow the Union to wait to grieve the payroll change. McNeil also testified that he did not have the authority to resolve a grievance relating to a payroll change, and only the Town Manager would have such authority.

Association, and Officer Daniel Daly (Daly), then Vice President of the Police Association, that if the Police Association prevailed at arbitration then the Town would move all three units back to a weekly pay cycle. [5]

The Police Association's grievance subsequently advanced to arbitration and resulted in the Hatfield Award, which issued on June 14, 2016. The Hatfield Award ordered the Town "to revert to a weekly payroll system consistent with this decision." On September 2, 2016, the Town returned the Police Association members to a weekly payroll cycle, but did not return the Union members to a weekly payroll cycle. The Union filed the Grievance the same day.

POSITIONS OF THE PARTIES

Union

The Union argues that the Grievance, which the Union filed on September 2, 2016, the same day that the Town returned the Police Association employees to a weekly payroll cycle, was timely filed and is therefore procedurally arbitrable under the parties' collective bargaining agreement (CBA). It was on that day that the Town officially acknowledged that the condition precedent under the CBA had not been met for either instituting or maintaining the bi-weekly payroll cycle.

Additionally, on September 2, 2016, the Town failed to honor Spain's oral settlement of the Lobas Grievance, which committed the Town to return all Union employees to the weekly payroll cycle if the Police Association prevailed at arbitration. Alternatively, the Lobas Grievance was effectively held in abeyance pending the outcome of the Police Association arbitration and the Town's execution of the

[5] The third unit is the Town's clerical workers. No member of that unit offered testimony at the hearing.

settlement agreement. In light of the Town's failure to honor its settlement, the Lobas Grievance could be allowed to be reactivated.

Finally, perpetuating the bi-weekly payroll cycle could be considered a continuing violation of the parties' CBA. As a continuing violation, every payroll cycle can be considered a separate violation, and a grievance may be filed at any time, although any back pay would ordinarily accrue only from the date of filing.

In any event, the Town should not be allowed to dishonor its settlement of this case without consequence.

Employer

The Town argues that the grievance underlying this arbitration was not timely filed, and, as such, if that grievance controls there is no agreement to arbitrate this dispute and the petition must be dismissed. The Union filed the Grievance at Step 1 on September 2, 2016, which was not within ten (10) working days of January 16, 2015, when all members of the bargaining unit received their first bi-weekly payroll direct deposit. Under the express terms of Article 18, the Union's failure to initiate the Grievance at Step 1 within ten (10) working days of the "incident or event" on which it is based is fatal and "shall result in barring the grievance." The Arbitrator must enforce the CBA as written and rule that the Grievance is time barred.

These facts do not implicate the continuing violation doctrine. The only "injury" or independent wrong under the CBA was the Town's conversion from a weekly payroll cycle to a bi-weekly payroll cycle. The conversion did not result in the loss of compensation to bargaining unit members or other "injury" which is repeated with each bi-weekly pay period. The continuing violation doctrine is only implicated in

circumstances where there is a new and discrete injury with each recurrence of the alleged violation of the CBA. In the absence of recurring injury from an independent wrong, the continuing violation doctrine has no application.

The purported Lobas Grievance does not preserve the Union's rights to contest the Town's payroll conversion because the Lobas Grievance was not properly initiated and, in any event, unambiguously reflects on its face that is was withdrawn. The CBA provides that a grievance be filed at Step 1 with the Department Head. The testimony was consistent that the first thing McNeil does upon receiving a grievance is countersign it. McNeil did not countersign the Lobas Grievance, and it was undisputed that no Step 1 response to the Lobas Grievance ever issued. McNeil testified without contradiction that his practice is to issue a formal Step 1 response whenever a formal grievance is initiated at Step 1 with him. Additionally, McNeil testified that he did not ever receive the Lobas Grievance. The weight of the evidence is that the Lobas Grievance was never properly filed with McNeil and, as a result, is barred. Additionally, the filling of a purported grievance at Step 1 with anyone other than the Department Head would be contrary to the required process under the parties' CBA and would be a bar to that grievance.

Even if the purported Lobas Grievance had been properly initiated by filing it with the Department Head within ten working days, which it was not, it is undisputed that the Lobas Grievance was not pursued and, in fact, is marked "Withdrew." Both Lobas and Caruso testified that the Union did not ever receive a formal Step 1 response. Further, the failure to receive a response at Step 1 operates as a denial of the grievance, and there is no documentary evidence suggesting that the Union preserved its rights and/or

that the Lobas Grievance was stayed. The Union attempted to establish that the former Town Manager indicated that he would follow the outcome of the Police Association grievance with all three unions, but any statements made to the members of the police union are irrelevant, and Lobas could not identify the date on which he purportedly spoke with the former Town Manager at the transfer station. The Union has the burden to prove that it timely and properly commenced its grievance at Step 1 and preserved its rights under the CBA throughout the grievance process. The Union has failed to carry its burden on this record, and the petition should be dismissed and the arbitration closed.

OPINION

The issue is whether the Grievance is arbitrable. The Town argues that the Union did not timely file the Grievance when measured from the initial payroll conversion, and that the Lobas Grievance did not preserve the Union's right to contest the Town's payroll conversion at a later date because the Lobas Grievance does not comply with the parties' procedures under Article 18 of the CBA, and, in any event, the Union did not pursue the Lobas Grievance. I disagree with the Town and conclude that the Grievance is arbitrable because the Town's actions upon receiving the Lobas Grievance preserved the Union's right to contest the payroll conversion at a later date.

McNeil did not sign the Lobas Grievance, and he testified that he never received it. The evidence, however, unequivocally establishes that the Town did receive the Lobas Grievance. Specifically, Caruso testified that he received a copy of the Lobas Grievance from the Town Manager's office the day before the arbitration hearing in this matter. The Town did not rebut this testimony about evidence that it maintains within its

control. Although McNeil did not sign off on having received the Lobas Grievance, the Town nevertheless received it.

Article 18, Section H of the parties' CBA provides that the parties may extend time limits by mutual agreement. Further, Article 18, Section E provides that the parties may settle grievances at any stage of the grievance procedure. Neither provision requires the parties to memorialize in writing any agreement. The CBA therefore provides the parties with latitude, both formal and informal, to resolve grievances outside the procedures contained in Article 18, Section C.

Here, the evidence establishes that Spain and Lobas effectively agreed to place the Lobas Grievance in abeyance pending the outcome of the related Police Association arbitration because they agreed to leave the matter open to be resolved at a later date based upon later events. By making an oral agreement with the Union to follow the outcome of the Police Association arbitration, Spain accepted the Lobas Grievance as submitted, thereby waiving the procedural challenges to the Lobas Grievance that the Town now seeks to assert.

Spain, not McNeil, possessed the authority to resolve the Lobas Grievance. Although Lobas could not identify the date on which he spoke to Spain at the transfer station, the testimony of both Warpula and Daly corroborates Lobas' testimony regarding that conversation, which was that Spain agreed that the Town, in exchange for avoiding multiple arbitrations on the same issue, would follow the outcome of the Police Association arbitration with the Town's other unions. The Union presented the consistent testimony of Lobas, Warpula and Daly on this point; the Town offered only the testimony of McNeil that McNeil was not aware of any agreement, and did not have

the authority to resolve a grievance of this nature. The weight of the evidence regarding how the parties handled the Lobas Grievance therefore favors the Union. Given that the parties placed the Lobas Grievance in abeyance, it is immaterial that someone, quite informally, wrote "Withdrew" atop the Lobas Grievance, and that the Union did not take further action while the matter worked its way through the Police Association grievance and arbitration process.

The Union did take further action, however, when it filed the Grievance on the same day that the Town returned the members of the Police Association to a weekly payroll cycle without returning the members of the Union. On September 2, 2016, the Union became aware that the Town was not complying with Spain's oral agreement to dispose of the Lobas Grievance based upon the outcome of the Police Association arbitration. By filing the Grievance, which is substantively identical to the Lobas Grievance, the Union reactivated the challenge to the payroll conversion that it preserved when Spain effectively agreed to place the Lobas Grievance in abeyance. Accordingly, the Grievance is timely.

AWARD

The grievance is arbitrable.

James Sunkenberg, Esq.
Arbitrator
May 26, 2017