

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS

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In the Matter of Arbitration between: \*  
\*  
TOWN OF MILLBURY \*  
\* ARB-16-5609  
and \*  
\*  
MILLBURY POLICE ASSOCIATION, \*  
LOCAL 128 MASS COP, AFL-CIO \*  
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Arbitrator:

James Sunkenberg, Esq.

Appearances:

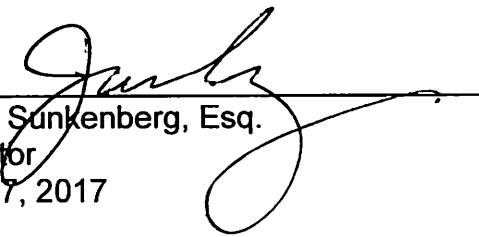
James P. Hoban, Esq. -Representing Town of Millbury

Kareem A. Morgan, Esq. -Representing Millbury Police Association,  
Local 128 MASS COP, AFL-CIO

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 grievance is not arbitrable.

  
James Sunkenberg, Esq.  
Arbitrator  
June 27, 2017

### **INTRODUCTION**

On November 10, 2016, the Millbury Police Association, Local 128 MASS COP, AFL-CIO (Union) filed a unilateral petition for arbitration. Under the provisions of M.G.L Chapter 23, Section 9P, the Department of Labor Relations (DLR) appointed James Sunkenberg, Esq. to act as a single neutral arbitrator with the full power of the DLR. On March 30, 2016, the Town of Millbury (Town) filed a Motion to Bifurcate and Dismiss, and on April 4, 2017, the Union filed an Opposition to the Motion to Bifurcate and Dismiss. On April 5, 2017, the undersigned Arbitrator denied the Motion to Bifurcate and Dismiss. On April 11, 2017, the undersigned Arbitrator conducted a hearing in Millbury, Massachusetts. The Union and the Town filed briefs on May 12, 2017.

### **ISSUES**

1. Is the Millbury Police Association, Mass. COP Local 128, AFL-CIO's grievance arbitrable?
2. If so, did the Town of Millbury violate Article XVII of the parties' Collective Bargaining Agreement, and, if so, what shall be the remedy?<sup>1</sup>

### **RELEVANT CONTRACT LANGUAGE**

#### **Article IX Grievance Procedure**

Any dispute with respect to wages, fringe benefits, hours of work, conditions of employment, workload or standards of performance shall be subject to the grievance procedure.

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<sup>1</sup> The parties agreed on these two issues. At the outset of the hearing, however, the Union sought to raise, for the first time, a third issue: Was the grievant disciplined without just cause in violation of Article VII of the collective bargaining agreement, and, if so, what shall be the remedy? The Town objected to this third issue, and I indicated that I would frame the issue at a later date. I decline to adopt the Union's third issue because it would expand the grievance beyond what the Union presented to the Town throughout each step of the grievance process.

**Step 1.** Within thirty (30) days of the event giving rise to the grievance, the union or police officer shall file the grievance in writing with the chief, with a copy to the Town Manager. The grievance shall contain a statement of the facts, a citation of applicable contract language and a statement of the remedy requested. The chief shall meet with the union and respond in writing to the grievance within seven (7) days of the filing of the grievance.

**Step 2.** Within seven (7) days measured from the date which the chief’s response is due, the union may file the grievance with the Town Manager. The Town Manager shall meet with the union and respond in writing within forty (40) calendar days from the date the grievance was filed with the Town Manager.

**Step 3.** Within thirty (30) days of the time in which the Town Manager response is due, the union may file the grievance for arbitration by notifying the Town Manager in writing....

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, or by order of a court.

**Article XVII Vacations**

**Section 3. Maximum Monthly Accumulation**

A. The below chart describes the maximum vacation leave accumulations allowed by each employee that can be maintained at one time:

“120” hours at any time	“15 days” of annual leave or less
“160” hours at any time	“20 days” of annual leave or less
“200” hours at any time	“25 days” of annual leave or less
“240” hours at any time	“20” days of annual leave or less

**Section 4. Compensation for Unused Vacation Leave:**

A. Any non-probationary employee who is laid off, discharged, retired or separated from the service of the Town for any reason, prior to taking his/her vacation, shall be compensated in cash for the unused vacation he/she has accumulated at the time of his/her separation. The maximum amount of compensation in cash for unused vacation leave an employee has accumulated at the time of their separation is capped at their specified monthly maximum accumulated earned vacation leave amount.

B. An employee who has been unable to use their accumulated vacation leave because of sick leave or injury on duty leave shall be compensated June 30<sup>th</sup>

for the vacation leave that would otherwise have been lost under this paragraph.

**FACTS**

**Grievance**

This arbitration arises from a September 8, 2016 grievance involving Millbury Patrol Officer Anthony Belliveau (Belliveau). The grievance states:

Officer Belliveau was placed on a lengthy Administrative Leave while the Town conducted an investigation. While on leave Officer Belliveau was unable to utilize his vacation time. Due to the vacation cap, Officer Belliveau lost eight (8) vacation days. The Union requested, in writing, that he be paid out for five (5) days prior to him exceeding the cap. The Town did not pay Officer Belliveau for the days, and did not respond to the Union's request until a second letter was generated on August 29, 2016, requesting compensation for the eight (8) days he did in fact lose, or by allowing Officer Belliveau to carry the time in excess of his cap until he returns to duty and can utilize the time. The Town refused to compensate Officer Belliveau for the time, or add it in to his accruals, in a response dated September 6, 2016.

The grievance alleges that the Town violated Article XVII and "any and all other applicable articles" of the parties' collective bargaining agreement (CBA). The remedy sought states: "Compensate Officer Belliveau for the eight (8) vacation days that he lost, or add the eight (8) vacation days to his accruals and allow a temporary excess of his cap."

On September 15, 2016, Millbury Chief of Police Donald Desorcy (Desorcy) denied the grievance at Step 1. On or around September 18, 2016, the Union advanced the grievance to Step 2, and, on October 25, 2016, the Town denied the grievance at Step 2. On November 4, 2016, the Union advanced the grievance to Step 3 and notified the Town that it intended to file for arbitration. The Union filed for arbitration on November 10, 2016.

Background

On December 12, 2015, the Millbury Police Department (Department) participated in a “Guns for Goods” program that allowed members of the community to exchange unwanted firearms for a gift certificate to a local grocery store. Upon the conclusion of the “Guns for Goods” program, the Department secured the exchanged firearms in its armory. On December 21, 2015, two members of the Department discovered that one of the exchanged firearms, a handgun, was missing from the armory. Later on December 21, 2015, the handgun was recovered from a Department locker after it came to light that Belliveau and another officer had, without authorization, removed the handgun from the armory on December 20, 2015.

On December 22, 2015, Desorcy placed Belliveau on paid administrative leave, effective immediately, pending an investigation into allegations that Belliveau had engaged in misconduct “in connection with [the] Department’s collection and storage of unwanted firearms.” A criminal investigation commenced, and, on or around February 29, 2016, the Worcester County District Attorney’s Office declined to seek criminal charges. An internal investigation then commenced, and, on or around April 4, 2016, an internal Investigative Report issued, recommending a finding that Belliveau had engaged in conduct unbecoming an officer in violation of Department Rules and Regulations. On May 2, 2016, Desorcy served Belliveau with a Notice of Proposed Termination for conduct unbecoming a police officer in connection with the events of December 20, 2015.

Vacation Accruals

Based upon his length of service, Belliveau accrues 25 days of vacation time per year.<sup>2</sup> While out on administrative leave, Belliveau continued to accrue vacation time, which he could not use, in the amount of 16.66 hours per month. On December 1, 2015, Belliveau had 171.33 hours of vacation time. On January 1, 2016, he had 187.99 hours of vacation time. On February 1, 2016, he had 204.65 hours, which exceeded his cap of 200 hours. On March 1, 2016, Belliveau had 221.31 hours of vacation time. On April 1, 2016, he had 237.97 hours of vacation time.<sup>3</sup>

By letter dated April 15, 2016, then Union President, Detective Andrea Warpula (Warpula), wrote to Desorcy stating:

It has come to our attention that Officer Anthony Belliveau has exceeded his vacation cap for the month of April 2016. As you are aware, Officer Belliveau has been on paid administrative leave for the past four months and has been unable to utilize any of his accrued/earned time.

I am therefore writing on his behalf, to convey his desire to cash in five (5) vacation days immediately, which will bring him under his required cap, and prevent him from exceeding his cap in the months to come, should the administrative leave continue beyond the month of April.

Subsequent to this April 15, 2016 letter, Desorcy and Warpula verbally discussed the Union's request to "cash in" Belliveau's five vacation days, but they did not reach any agreement on the Union's request.<sup>4</sup>

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<sup>2</sup> Pursuant to Article XVII, Section 3(A), his maximum monthly accumulation is 200 hours, meaning that at the end of every month he loses any vacation time he has accrued in excess of 200 hours.

<sup>3</sup> The Department posts time-off totals on a board accessible to Department employees, and it continued to post totals reflecting that Belliveau had exceeded his vacation cap until July 1, 2016.

<sup>4</sup> Desorcy testified that he informed Warpula that he would "look into this," as he "knew of no provision under the current collective bargaining agreement from which I could make that payment." Desorcy "didn't say no" and he "didn't say yes."

On May 1, 2016, Belliveau had 254.63 of hours of vacation time. On June 1, 2016, he had 271.29 hours. The Town returned him to his cap of 200 hours for July 1, 2016, resulting in Belliveau losing 71.29 hours of vacation time.

### Settlement Agreement

On June 10, 2016, the Town, the Union and Belliveau entered into a settlement agreement whereby Belliveau received a six-month suspension without pay and the Town cancelled termination proceedings against Belliveau. The settlement agreement required Belliveau to serve four of the six months immediately, i.e. the period from June 1, 2016 to October 1, 2016, with the remaining two months held in abeyance for one calendar year following Belliveau's completion of the four month suspension without pay. The settlement agreement contains, at paragraph 3, a waiver clause that states, in its entirety:

In consideration of the terms herein, the Union and Officer Belliveau agree to waive any and all rights they may have to file or assert any claim, complaint, or other action in any forum of any kind, including a grievance and demand for arbitration under the Collective Bargaining Agreement, an unfair labor practice charge pursuant to M.G.L. c. 150E, or a civil service complaint, against the Town and/or the town manager, board of selectmen, chief of police, officers, employees, attorneys and/or agents, both individually and in their official capacities, related to, arising out of, and/or incident to Officer Belliveau's conduct on December 20, 2015, discipline related to Officer Belliveau's conduct on December 20, 2015, and/or the Town's Notice of Proposed Termination directed to Officer Belliveau. The Union and Officer Belliveau expressly waive any and all rights to any hearing pursuant to Cleveland Bd. Of Educ. v. Loudermill, 470 U.S. 532 (1985), G.L. c. 31, §41, or any other similar federal or state authority, statute, or regulation.

### Second Request on Behalf of Belliveau

By letter dated August 29, 2016, Warpula wrote to Desorcy:

I am writing to follow up on a previous letter, dated April 15, 2016, regarding Officer Belliveau's vacation time. In that letter the union requested, on Officer Belliveau's behalf, to cash in five (5) of Officer Belliveau's accrued vacation days.

This request was made due to Officer Belliveau exceeding his vacation cap for the month of April, 2016, and each month going forward that he was unable to utilize his time due to being out of work on paid administrative leave.

We had a similar situation when Officer Daly was attending the K-9 Academy, and was unable to utilize any of his vacation time for a period exceeding three months. At that time it was agreed that he would be allowed to exceed his cap and the vacation time would be stored until he returned to duty and was able to use the time.

Officer Belliveau is scheduled to return to work on October 1, 2016. At that time we are requesting that any vacation time he lost while on administrative leave be restored. This can be accomplished by adding it to his accrued time and giving him a reasonable opportunity to utilize the time and get back under the allotted cap; or by compensating him monetarily in the first pay period subsequent to his return to duty.

By letter dated September 6, 2016, Desorcy denied the Union's request to restore or compensate Belliveau for his lost vacation time. Desorcy wrote, in relevant part: "Please be reminded that Officer Belliveau entered into a Settlement Agreement with the Town in which he released the Town from any claims arising out of and/or incident to his misconduct and resulting discipline. The Union also released the Town." On September 8, 2016, the Union filed the instant grievance and this arbitration followed.

### **POSITIONS OF THE PARTIES**

#### **The Union**

The Union argues that the dispute was not waived by the settlement agreement and thus is substantively arbitrable under the terms and provisions of the Collective Bargaining Agreement. The question of Belliveau's vacation time had not yet been decided when the settlement agreement was reached, and the Town therefore did not intend to extend the waiver to include Belliveau's unused vacation time. Additionally,



the loss of Belliveau's vacation time was the result of his administrative leave, not his conduct on December 20, 2015.

Moreover, the settlement agreement does not adequately preclude any claims relating to Belliveau's vacation time. The settlement agreement specifically enumerates discipline that cannot be grieved, but it makes no mention of barring challenges to the denial of benefits. When a contract contains an arbitration provision, there is a presumption that particular grievances are arbitrable unless they are specifically exempted under the arbitration provision. Massachusetts courts rely on a two-part test to determine arbitrability: 1) the existence of an express provision excluding the grievance from arbitration or 2) the most forceful evidence of a purpose to exclude the claim from arbitration.<sup>5</sup> For the Town to argue that the Union waived this grievance over vacation time, the Town would have had to include specific language as to benefits accrual in the settlement agreement. Because the settlement agreement does not expressly waive grievances over vacation time, the presumption of arbitrability necessitates a finding that this grievance is arbitrable.

The Union next argues that the Town violated Section 4 of Article XVII by refusing to compensate Officer Belliveau for his unused vacation. Section 4(A) provides that non-probationary employees who are separated from the service of the Town for any reason receive a full payout of their accrued vacation time up to the cap. The Town argues that Section 4(A) does not apply to administrative leave, but the language preceding the phrase "separated from service of the Town for any reason" contemplates virtually all other forms of involuntary and quasi-involuntary separations. Section 4(B)

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<sup>5</sup> See Sherriff of Suffolk County V. AFSCME Council 93, 75 Mass. App. Ct. 340, 343-344 (2009).

similarly requires compensation of unused vacation time when an officer is involuntarily incapacitated due to injury or illness. It therefore follows that an involuntary administrative leave falls squarely within the definition of "separated from service" in Section 4(A).

Even if Belliveau was not entitled to a payout under Section 4(A), he should be able to recover under the provisions of Section 4(B). Administrative leave, much like becoming sick or injured, is involuntary and can begin at any time without notice. Being placed on administrative leave does not mean the officer committed wrongdoing. Section 4 of Article XVII does not allow for forfeiture in the case of officer misconduct, and allowing the Town to make case-by case determinations undermines the purpose of Section 4 altogether. Under the Town's position, even if an officer placed on administrative leave were exonerated at the end of an investigation, that officer would still forfeit any hours accrued in excess of the cap. The Town has violated Subsections A and B in its denial and has treated Belliveau in a disparate manner solely because he had accrued 171.33 hours prior to being placed on administrative leave.

The Union argues that this grievance is procedurally arbitrable, as the Union complied with all relevant grievance procedures and it was at no point time barred. The grievance is not time barred because there was an implicit agreement between the parties to suspend the discussion of Belliveau's vacation time until some undetermined future date. Belliveau also did not officially lose any vacation time according to the vacation accrual bank until July 1, 2016. There was never a denial, and thus a grievable event, of the vacation time until September 6, 2016, which created a dispute with regard to fringe benefits and gave rise to the current grievance. Additionally,

arbitrators in general prefer not to knock out grievances on procedural grounds, preferring to decide cases on the merits. The Union did not exceed the time limit for filing a grievance, they brought the issue to the Chief's attention, he left the issue open, the Union followed up on the issue, the Chief denied their request and they filed a grievance two days later. The grievance should be decided on the merits.

Finally, the Union argues that the denial of Officer Belliveau's request for a payout of his accrued vacation time constitutes discipline without just cause in violation of Article VII of the CBA between the parties.

#### The Town

The Town argues that the grievance is not procedurally arbitrable. Belliveau and the Union waived their rights to bring this grievance in the settlement agreement. Under Massachusetts law, a broad release is to be given effect even if the parties did not have in mind all the wrongs which existed at the time of the release.<sup>6</sup> Under the settlement agreement, Belliveau and the Union expressly agreed to relinquish any rights to file a grievance "related to, arising out of, and/or incident to" Belliveau's conduct on December 20, 2015, and/or the discipline related to that conduct. There is no question that Belliveau's loss of vacation time is related to, arising out of and/or incident to his conduct on December 20, 2015 and/or the discipline arising out of that conduct. Moreover, both the Union and Belliveau were acutely aware that this result would flow from his paid administrative leave status, and was already happening before they entered into the settlement agreement. They did not request an exception for lost vacation leave in the broadly worded release. Thus, the loss of vacation leave was

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<sup>6</sup> See Naukeag Inn, Inc. v. Rideout, 351 Mass. 353, 356 (1966).

proximately caused by Belliveau's conduct on December 20, 2015, and therefore arises out of that conduct.

In Bagley v. Monticello Ins. Co., 430 Mass. 454 (1999), the Supreme Judicial Court interpreted the phrase "arising out of" to be read expansively and to suggest a causation more analogous to "but for" causation. But for Belliveau's conduct, he would not have been placed on administrative leave pending an investigation. The release is broad enough to release any claim premised on Belliveau's loss of vacation leave arising out of that conduct based on the broad construction of the phrase "arising out of" that has been adopted by the Supreme Judicial Court.

Under Article IX of the CBA, the grievance is time-barred even if it had not been waived in the settlement agreement. By February 1, 2016, Belliveau had exceeded his cap by 4.65 hours and those hours were lost. This process repeated itself each month until June 1, 2016, when Belliveau began to serve his suspension. By the time the Union filed the grievance on September 8, 2016, Belliveau had accrued and lost 71.29 hours in excess of his 200 hour cap. All of these vacation hours were lost more than thirty days (30) days before the filing of the grievance.

The purported issue for resolution raised by the Union for the first time on the day of the arbitration hearing is time-barred and was not properly before the Arbitrator.

The Town next argues that Article XVII does not entitle Belliveau to compensation for unused time in excess of his maximum allowable vacation leave accumulation of 25 days or 200 hours. In this regard, there are no exceptions to the bargained for maximum vacation leave accumulations set forth in the CBA and the parties did not agree to allow Belliveau to carry vacation leave over the express

maximum permissible accumulation. Similarly, the CBA provides for only three situations in which a bargaining unit member can be compensated for unused vacation leave, and none of those situations are present here.

There is no past practice of compensating bargaining unit members for vacation accruals in excess of their cap while on paid administrative leave during criminal and internal affairs investigations.

Finally, the Town argues that the alleged violation of Article VII is not properly before the Arbitrator, but, even if it was, Belliveau's loss of vacation leave in excess of his cap was not punishment, but rather the bargained-for outcome under the CBA in the circumstances.

**OPINION**

On June 10, 2016, the Town, the Union and Belliveau executed a settlement agreement that ended termination proceedings against Belliveau for his involvement in the unauthorized removal of a handgun from a secure armory within the Department. This agreement included a waiver clause that states, in relevant part:

[T]he Union and Officer Belliveau agree to waive any and all rights they may have to file or assert any claim...including a grievance and demand for arbitration under the Collective Bargaining Agreement...against the Town...related to, arising out of, and/or incident to Officer Belliveau's conduct on December 20, 2015, discipline related to Officer Belliveau's conduct on December 20, 2015, and/or the Town's Notice of Proposed Termination directed to Officer Belliveau.

The waiver clause expressly includes "a grievance and demand for arbitration under the Collective Bargaining Agreement." Article IX of the parties' CBA defines a grievance as, "Any dispute with respect to wages, fringe benefits, hours of work, conditions of employment, workload or standards of performance." Accordingly, this

waiver clause expressly and unambiguously waives any and all rights the Union and Belliveau “may” have to file or assert “any” claim, including, “Any dispute with respect to...fringe benefits.” Vacation benefits are fringe benefits. Thus, the only question regarding the applicability of this waiver clause to the current dispute is whether this is a grievance “related to, arising out of, and/or incident to” Belliveau’s conduct on December 20, 2015, and the discipline related to his conduct on December 20, 2015. I answer that question affirmatively, and therefore conclude that the grievance is not arbitrable because the Union and Belliveau have expressly waived their right to bring this claim.

The Union argues that Belliveau lost his vacation time as a result of being placed on administrative leave, and not as a result of his conduct on December 20, 2015. I disagree. Belliveau was placed on administrative leave, and subsequently lost vacation time, as the direct result of his involvement in the unauthorized removal of a handgun from the Department armory on December 20, 2015. Further, the administrative leave pending an investigation was necessary to determine whether he would receive discipline for his conduct on December 20, 2015. Under the plain meaning of the words at issue, his claim for vacation time lost while out on administrative leave directly relates to, arises out of and is incident to his conduct on December 20, 2015, and the discipline related to his conduct on December 20, 2015.<sup>7</sup>

Having determined that the grievance is not arbitrable because the Union and Belliveau expressly waived their right to bring it, I need not reach the outstanding

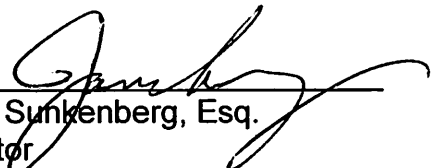
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<sup>7</sup> As the Town noted, Belliveau’s conduct is also the “but for” cause of his placement on administrative leave resulting in his loss of vacation time.

questions of whether the Union timely filed the grievance, and whether the Town violated the CBA.

**AWARD**

The grievance is not arbitrable.

  
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James Sunkenberg, Esq.  
Arbitrator  
June 27, 2017