

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of the Arbitration Between: *

CITY OF TAUNTON *

and *

MASSACHUSETTS LABORERS' *

DISTRICT COUNCIL *

Case No. ARB-17-5744

Arbitrator:

Will Evans, Esq.

Appearances:

Mark S. Gould, Jr., Esq. - Representing City of Taunton

Salvatore Romano - Representing Massachusetts Laborers' District Council

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 Grievant was not deprived of accrued sick and vacation time in violation of the provisions of the contract as a result of being out of work. The grievance is denied.

Will Evans, Esq.
Arbitrator
November 15, 2017

INTRODUCTION

The Massachusetts Laborers' District Council (Union), seeking to resolve a dispute with the City of Taunton (Employer or City), filed a Petition to Initiate Grievance Arbitration on January 19, 2017 with the Department of Labor Relations (DLR), which docketed the matter as ARB-17-5744. Under the provisions of M.G.L. Chapter 23, Section 9P, the DLR appointed Will Evans, Esq. to act as a single neutral arbitrator with the full power of the DLR. The undersigned Arbitrator conducted a hearing at the DLR's Boston office on May 9, 2017, at which time both parties had the opportunity to present testimony, exhibits and arguments, and to examine and cross-examine witnesses. On August 18, 2017, the parties filed post-hearing briefs. After careful review of the record evidence and in consideration of the parties' arguments, I make the following findings of fact and render the following opinion.

THE ISSUE

Was the Grievant deprived of accrued sick and vacation time in violation of the provisions of the contract as a result of being out of work? If so, what shall be the remedy?

RELEVANT CONTRACT LANGUAGE

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

ARTICLE 8, Section 1. All employees of the City of Taunton, qualifying in accordance with Article IV Section 2 of this Agreement, shall be entitled to sick leave benefits after the employee has completed ninety (90) days of employment. These benefits shall be retroactive back to the first day of

employment. Sick leave accumulation shall be unlimited, and shall not lapse. All permanent employees who had been in the service of the City of Taunton for six (6) years or more on July 24, 1946, shall be considered to have had the maximum sick leave to their credit on that date without consideration of such leave as they may have had prior to that date. Employees who had been in service less than six (6) years shall be allowed one and one-quarter (1 1/4) days for each completed month of service without regard to such leave as they had in the meantime. Employees shall be entitled to their sick leave as it becomes earned whether they have the maximum sick leave to their credit or not. Sick leave shall not be taken in advance.

ARTICLE 8, Section 3 (4). If the employee has neither sick leave nor vacation leave credits, he/she will be placed in a leave without pay status, unless circumstances indicate that other appropriate action should be taken. Failure to notify the Division or Department Manager of absence will result in the employee being placed on a leave without pay status.

ARTICLE 10, Section 1. Effective July 1, 1982 vacation leave shall henceforth be accumulated on a fiscal year cycle. All employees covered by this Agreement shall be eligible for vacation credits on a pro-rata basis. In the first year of employ vacation shall be pro-rata from date of employment through June 30th, based on a two-week per year accumulation: i.e. Employment date Feb. 1, (Feb-June) equals 5 months times .8333. (10 vac. days divided by 12 months) = 4.17 days vacation to be credited as of July 1st. Each July 1st thereafter, through year four (4) an employee would be entitled to two (2) weeks' vacation. Should an employee choose not to take an earned vacation period in a given year, said person may use it the following year in addition to the earned vacation period for that year. However, no employee may accrue more than one (1) year of additional vacation period.

In the case of death any monies owed to the employee covered under this article shall be made in full to the employee's beneficiary and/or estate as designated by the employee.

All employees working for the City of Taunton while involved with the C.E.T.A. program will be credited for that employment for the purposes of computing vacation accrual.

ARTICLE 10, Section 2. Any employee thereof, covered by this Agreement, who has worked continuously, shall be granted an annual vacation without loss of pay as follows:

5 years through 9 years = three (3) weeks vacation
10 years through 16 years = four (4) weeks vacation
17 years through 24 years = five (5) weeks vacation
25 years and over will receive six (6) weeks vacation

The additional week shall be granted on the employee's anniversary date of employment. Upon retirement, death, or termination during any given year, any eligible person will be credited for outstanding earned vacation. The employee must notify his/her Department Manager two (2) days before the requested single vacation day.

ARTICLE 19, Section 2. For the purpose of this Agreement, the term “grievance” means any difference or dispute between the Employer and the Union, or between the Employer and any Employee with respect to the interpretation, application, claim or breach or violation of any of the provisions of the Agreement.

ARTICLE 19, Section 4. Arbitration Procedure shall be as follows:

- a) The Union and the City will attempt to agree on an impartial arbitrator to hear and decide the unresolved grievance. Both parties agree that the arbitrator's decision will be final and binding; the cost of the arbitration will be borne equally by the City and the Union. If the City and the Union cannot agree on the individual to serve as an impartial arbitrator within a reasonable time, the arbitrator shall be selected by the American Arbitration Association and/or the Massachusetts Department of Labor Relations (DLR) with mutual agreement by both parties, pursuant to the Voluntary Labor Arbitration Rules of said Association. Either party may submit a request to the American Arbitration Association for appointment of an impartial arbitrator.
- b) Union Stewards and Officers shall be granted sufficient time off during working hours to investigate and/or resolve grievances and/or complaints. Union Stewards and Officers shall be granted such time off without loss of pay.

ARTICLE 20, Section 1. The Employer agrees to notify all employees of accrued sick leave, vacation, personal days and compensatory days each quarter.

RELEVANT STATUTE

M.G.L. c. 152, § 69

No cash salary or wages shall be paid by the commonwealth or any such county, city, town or district to any person for any period for which weekly total incapacity compensation under this chapter is payable, except that such salary or wages may be paid in full until any overtime or vacation which the said employee has to his credit has been used, without deduction of any compensation herein provided for which may be due or become due the said employee during the period in which said employee may be totally incapacitated, and except that such salary or wages may be paid in part until any sick leave allowance which the employee has to his credit has been used, any other provisions of law notwithstanding except as otherwise provided in a collective bargaining agreement. An employee who is entitled to any sick leave allowance may take such of his sick leave

allowance payment as, when added to the amount of any disability compensation herein provided, will result in the payment to him of his full salary or wages.

FACTS

Kerin Corrigan (Corrigan or Grievant) was employed by the City of Taunton as a Clerk in the Water Department for approximately ten years. On October 13, 2015, Corrigan fell at work, severely injuring her shoulder, and was taken by ambulance to Milton Hospital. As a result of her injuries, Corrigan was out of work from October 14, 2015 to December 27, 2015. During this time, Corrigan received workers compensation benefits, which she supplemented with accrued vacation and sick time to cover her normal wages. Additionally, while out on leave, Corrigan continued to accrue vacation and sick time, which was listed on her paystubs.

Corrigan returned to work on December 28, 2015 and requested to be placed on light duty. Notwithstanding her request, Corrigan continued to perform all her regular duties. While actively working, Corrigan accrued vacation and sick time, some of which she used for medical appointments. On July 29, 2016, Corrigan underwent shoulder surgery for the injuries she sustained on October 13, 2015, and has remained out of work ever since.

Although Corrigan never requested leave pursuant to the Family Medical Leave Act (FMLA), the Employer placed Corrigan on FMLA leave beginning on or about August 3, 2016 without providing notice. The Employer allowed Corrigan to accrue vacation and sick leave benefits during the FMLA leave. After Corrigan had exhausted her 12 weeks of FMLA leave and remained unable to return to work, the Employer notified her on or about November 30, 2016 that she was no

longer accruing vacation or sick time. According to payroll records, Corrigan last accrued vacation and sick time in October 2016, and had balances of 0.12 days sick time as of November 2, 2016 and -1.74 days of vacation as of November 16, 2016. At some point during her leave, Corrigan applied for workers compensation benefits, which were granted retroactively to July 29, 2016.

THE UNION

The Union argues that the Employer violated the provisions of the contract by failing to notify Corrigan before November 30, 2016 that she was no longer accruing sick and vacation time. The Union also contends that several Taunton employees have been permitted to accrue vacation and sick time while out on workers compensation in the past. In fact, Corrigan herself was allowed to accrue sick and vacation time in 2015 and 2016 while receiving workers compensation benefits. As such, the past practice dictates that Corrigan be allowed to accrue sick and vacation time while out of work and receiving workers compensation benefits.

The Union also argues that the Employer violated the provisions of the FMLA by placing Corrigan on such leave without notice and while she was already receiving workers compensation benefits. The Union contends that the FMLA requires prior notice to the employee and provides greater job protection than the workers compensation statute. Furthermore, while there might be limited situations where FLMA and workers compensation benefits overlap, the Employer must provide leave under whichever law provides the greater rights and benefits to the employee. Finally, the Union argues that the Employer treated

Corrigan differently than other employees by placing her on FMLA leave and did so in order to terminate Corrigan once the FMLA leave expired.

For all the foregoing reasons, the Union requests that the arbitrator sustain the grievance and order the Employer to make Corrigan whole for all lost accrued sick and vacation time.

THE EMPLOYER

The Employer argues that Massachusetts law is clear that employees are not entitled to accrue vacation and sick time while receiving workers compensation benefits for total incapacity. Citing both M.G.L. c. 152, Section 69 and relevant case law, the Employer argues that, although Corrigan is permitted to use sick leave allowances that have been previously earned, allowing Corrigan to accrue new benefits while totally incapacitated is inconsistent with the purpose of the workers compensation statute and results in the receipt of double benefits. Moreover, the Employer argues that any evidence of a past practice that violates M.G.L. c. 152, Section 69 and relevant case law should not be considered, if it results in the arbitrator ordering conduct prohibited by state law.

The Employer also argues that the parties' contract allows for accrual of vacation and sick time only when earned through working. Since Corrigan was not working and exhausted her previously earned benefits, she was not entitled to accrue new vacation and sick time under the contract. Finally, the Employer contends that the Union failed to present sufficient evidence to establish that a past practice existed whereby employees out on workers compensation benefits received vacation and sick time accruals.

For all the foregoing reasons, the Employer requests that the arbitrator deny the grievance.

OPINION

Based on the evidence presented at hearing, Corrigan continued to accrue vacation and sick leave benefits through October 2016. The issue that I must decide is whether Corrigan was entitled to accrual of new vacation and sick leave benefits after October 2016, when she had exhausted her previously earned leave benefits and was receiving workers compensation benefits for total incapacity.

The collective bargaining agreement does not specifically address whether an employee is entitled to accrue vacation, sick and personal leave while receiving workers compensation benefits for total incapacity. Article 8, Section 1, however, provides the following:

Employees shall be entitled to their sick leave as it becomes **earned** whether they have the maximum sick leave to their credit or not. Sick leave shall not be taken in advance. (Emphasis added)

Thus, the parties have agreed that sick leave must be “earned” by an employee and not taken in advance [of being earned]. Additionally, Article 8, Section 1 provides:

All permanent employees who had been ***in the service of the City of Taunton*** for six (6) years or more on July 24, 1946, shall be considered to have had the maximum sick leave to their credit on that date without consideration of such leave as they may have had prior to that date. Employees who had been ***in service*** less than six (6) years shall be allowed one and one-quarter (1 1/4) days for ***each completed month of service*** without regard to such leave as they had in the meantime. (Emphasis added)

In giving such terms as “earned” and “service” their normal and regular meanings¹, I am persuaded that the parties intended for an employee to render service through work in order to earn sick time. Therefore, Corrigan was not deprived of accrued sick time after October 2016 in violation of the contract since she did not earn the benefit in the service of the City.

Article 10, Section 1 governs vacation leave and provides that “all employees covered by this Agreement shall be eligible for vacation credits on a pro-rata basis.” As such, the parties agreed that, if an employee renders less than full-time service, he is eligible for vacation credits on a pro-rata basis. With this in mind, an employee who renders no service would be entitled to zero vacation credit under the contract. This interpretation is consistent with the provisions governing accrual of sick leave under Article 8 and, in particular, Section 3(4), which provides that “if the employee has neither sick leave nor vacation leave credits, he/she will be placed in a leave without pay status.” Thus, Corrigan was not deprived of accrued vacation time after October 2016 in violation of the contract since she was in a leave without pay status and vacation is credited on a pro-rata basis.

I am not persuaded by the Union’s argument that past practice dictates that Corrigan be allowed to accrue sick and vacation time after October 2016. For a past practice to be binding on both parties, it must be (1) unequivocal, (2) clearly enunciated and acted upon, and (3) readily ascertainable over a

¹ According to Merriam-Webster’s Dictionary, the first definition of “earned” is “to receive as return for effort and especially for work done or services rendered.” “Service” is defined as “the occupation or function of serving” and “the work performed by one that serves.”

reasonable period of time as a fixed and established practice accepted by both parties. Although employees who supplemented their workers compensation benefits with previously earned leave credits were allowed to accrue new sick and vacation benefits, the Union presented insufficient evidence to establish a past practice whereby employees who had exhausted their previously earned sick and vacation credits were allowed to accrue new sick and vacation benefits while on leave without pay and receiving workers compensation benefits.

The Union's argument that the Employer violated the contract by failing to notify Corrigan of her accruals prior to November 30, 2016 is not supported by the evidence. Article 20, Section 1 provides only that the "Employer agrees to notify all employees of accrued sick leave, vacation, personal days and compensatory days **each quarter.**" (Emphasis added) The evidence at hearing demonstrated that Corrigan received notice of her accruals at least monthly when she received her paystubs. Furthermore, Corrigan testified that she received a notice from the City with her accruals in September 2016. Under such circumstances, I do not find that the City violated the contract by failing to notify Corrigan of her accruals prior to November 30, 2016.

I do not address the Union's claims that the Employer violated the provisions of the FMLA since they are beyond the scope of the issue in the present arbitration.

Finally, it is a well-established principle of arbitration that an arbitrator's interpretation giving a contractual term a lawful meaning is preferable to one that makes an agreement unlawful. I am persuaded by the Employer's argument that

M.G.L. c. 152, Section 69 precludes the parties from granting new sick and vacation leave to an employee such as Corrigan who has exhausted her previously earned sick and vacation credits, is on leave without pay, and is receiving workers compensation benefits for total incapacity. The worker's compensation statute provides, in relevant part, the following:

No cash salary or wages shall be paid by the commonwealth or any such county, city, town or district to any person for any period for which weekly total incapacity compensation under this chapter is payable, except that such salary or wages may be paid in full until any overtime or vacation which the said employee has to his credit has been used, without deduction of any compensation herein provided for which may be due or become due the said employee during the period in which said employee may be totally incapacitated, and except that such salary or wages may be paid in part until any sick leave allowance which the employee has to his credit has been used, any other provisions of law notwithstanding except as otherwise provided in a collective bargaining agreement. An employee who is entitled to any sick leave allowance may take such of his sick leave allowance payment as, when added to the amount of any disability compensation herein provided, will result in the payment to him of his full salary or wages.

In School Committee of Marshfield v. Marshfield Teachers Association, 383 Mass. 881 (1981), the Supreme Judicial Court found that, since M.G.L. c. 152, Section 69 is not among the statutes listed in M.G.L. 150E, Section 7, the workers compensation statute must prevail over conflicting terms in a collective bargaining agreement. In that case, the arbitrator found that the collective bargaining agreement required the employer to pay an employee his full salary minus the amount of workers compensation received. In overturning the arbitrator's award, the Court held that, regardless of any language to the contrary in the collective bargaining agreement or past practice, M.G.L. c. 152, Section 69

does not permit the payment of salary when an employee is receiving workers compensation benefits. Accordingly, the arbitrator exceeded his authority in ordering the employer to pay an employee his full salary minus the amount of workers compensation received.

The workers compensation statute does permit an employee to use previously earned leave credits to supplement workers compensation benefits up to 100% of the employee's regular full salary; however, an employee is not entitled to accrue new vacation benefits. The Massachusetts Appeals Court dealt squarely with this issue in School Committee of Medford v. Medford Public School Custodians Association, 21 Mass. App. Ct. 947 (1986). In the Medford case, an arbitrator found that the parties' collective bargaining agreement allowed employees to accrue vacation and longevity pay each year, regardless of whether they were receiving workers compensation benefits for total incapacity. The Court vacated the arbitrator's award on grounds that he exceeded his powers and stated:

By providing for payment of salary until vacation time "which the . . . employee has to his credit has been used," Section 69 contemplates only payment for vacation that an employee has earned and that he is entitled to but that he has not taken at the time of the incapacitating injury. This interpretation is consistent with the words of the statute as commonly understood. It also serves the statute's purpose of avoiding the receipt of double benefits by a person who is being paid total incapacity compensation under G. L. c. 152, Section 34.1 Moreover, adopting the plaintiff's interpretation of Section 69 could frustrate the goal of the statute twice over: a reading of Section 69 that would enable an employee to accumulate rights to new vacation pay during each year of his total disability would presumably also allow him to assert that parallel language in the Section permits a new annual sick leave allowance for the same period, so long as he has remained

"employed." Such a reading does not square with common sense. See Rein v. Marshfield, 16 Mass. App. Ct. 519, 523 (1983).

Since the parties intended to come to a lawful agreement, I find that Corrigan was not entitled to accrue vacation and sick time benefits after October 2016 since she had exhausted her previously earned leave credits, was on leave without pay, and was receiving workers compensation benefits for total incapacity.

AWARD

For all the foregoing reasons, the Grievant was not deprived of accrued sick and vacation time in violation of the provisions of the contract as a result of being out of work. The grievance is denied.

Will Evans, Esq.
Arbitrator
November 15, 2017