

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of the Arbitration Between:

TOWN OF LONGMEADOW

-and-

LONGMEADOW ASSOCIATION OF
MUNICIPAL EMPLOYEES

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Case No. ARB-18-6909

Arbitrator:

Will Evans, Esq.

Appearances:

Albert Mason, Esq. -

Representing the Town of Longmeadow

John Connor, Esq. -

Representing the Longmeadow
Association of Municipal Employees

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 Town violated the collective bargaining agreement as identified in the grievance and demand for arbitration. The grievance is sustained. As a remedy, the Town is ordered to rescind the letter that Mario Mazza issued to Jason Richard on August 6, 2018, to remove any reference to the letter from Richard's personnel file, and to make the grievant whole for lost wages from June 18, 2018 until August 8, 2018 in a manner consistent with this opinion.

INTRODUCTION

On or about September 27, 2018, the Longmeadow Association of Municipal Employees (Association or Union) filed a Petition to Initiate Grievance Arbitration with the Department of Labor Relations (Department), alleging that the Town of Longmeadow (Town or Employer) violated the parties' collective bargaining agreement in effect from July 1, 2016 through June 30, 2019 (CBA). The Department designated the case as Category 2 and docketed the matter as ARB-18-6909. Under the provisions of M.G.L. Chapter 23, Section 9P, the Department appointed me, Will Evans, Esq., to act as a single neutral arbitrator with the full power of the Department. I conducted a hearing at Longmeadow Town Hall on February 6, 2019, at which time both parties had the opportunity to present testimony, exhibits and arguments, and to examine and cross-examine witnesses. On March 8, 2019, 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

Did the Employer violate the contract as identified in the grievance and the demand for arbitration?¹ If so, what shall be the remedy?

¹ In its September 27, 2018 Petition to Initiate Grievance Arbitration, the Union alleged that the Employer violated Articles 28 and 34, the Appendix, other relevant provisions of the CBA, as well as past practice, when it required Jason Richard to submit to an examination by the Employer's doctors. As a remedy, the Union requested that the arbitrator rescind a disciplinary letter and suspension, order the Employer to cease and desist from further violations of the contract, and make the grievant whole for all lost pay.

RELEVANT CONTRACT PROVISIONS

The parties' CBA contains the following pertinent provisions:

ARTICLE 4 MANAGEMENT RIGHTS

The Town shall have all the rights it had prior to the recognition of the Union and its predecessor, and the signing of this Agreement to manage, operate and control its Public Works Department, to schedule and assign work in the Department and to determine the methods and means of conducting the operation of the Department, including the making of reasonable written rules and regulations, subject only to the condition that the Town may not exercise its rights under this Article so as to conflict with any specific provision of this Agreement. The Town's right to contract out as to snow plowing routes shall be limited to three such routes.

The Union agrees to discuss a Town policy on physical fitness standards, which policy shall not become part of the labor agreement. The Union reserves the right to file a grievance as to the reasonableness of any such policy implemented by the Town for employees in this bargaining unit.

ARTICLE 5 STABILITY OF AGREEMENT

No agreement, understanding, alteration, or variation of the agreements, terms or provisions herein contained shall bind the parties hereto unless made and executed in writing by the parties hereto.

The failure of the Town or the Union to insist, in any one or more incidents, upon performance of any of the terms or conditions of this Agreement, shall not be considered as a waiver or relinquishment of any such term or condition and the obligations of the Union or of the Town to such future performance shall continue in full force and effect.

ARTICLE 28 SICK LEAVES AND ABSENCES

Medical Exams, Certificates. The Town reserves the right to require a signed doctor's release before permitting an employee to return to work after a medical absence.

Without cost to the employee, but only (1) for new employees as a condition of hire or (2) where there [is] evidence that an employee is incapable of full-time or satisfactory performance of his/her duties, or (3) if made a condition of promotion, the Town may require an employee to take a physical examination by a physician of the Town's choice. The complete report will be provided only to the employee;

however, the physician will be authorized to inform the Town of any condition which the physician believes may reasonably interfere with the performance of the employee's duties, together with any recommendation as to what action, if any, the Town should take to monitor or accommodate such condition.

The Town may require an employee to provide information from his/her physician sufficient to support the opinion as to the extent of the disability, or, in the alternative, in the discretion of the employee, provide the physician with a release and instructions to discuss the question with the Superintendent or his designee. In any circumstance where abuse of the sick leave benefit is reasonably suspected, the Town may require the employee to produce appropriate evidence supporting applications for sick leave. For any sick leave application involving three or more days, the Town may require a doctor's certificate or other evidence supporting the application.

ARTICLE 34 SUBSTANCE ABUSE POLICY

The Substance Abuse policy attached hereto as Appendix B has been agreed upon by the parties.

APPENDIX B SUBSTANCE ABUSE POLICY AND PROCEDURES

The purpose of this program is to establish the fact that the Town and the Union agree that the workplace must be a drug-free environment, primarily because of safety concerns but also with efficiency and economy of operations as a factor. The main emphasis of the program, as it relates to an employee with a problem of alcoholism or drug dependency, is to provide a counseling and rehabilitation opportunity for the employee to keep his/her job, unless the seriousness of misconduct, negligence or absenteeism by the employee outweighs this purpose.

A. Testing Procedures- DOT/CDL

The Town participates in the DOT-regulated random and follow-up testing procedure established under federal law. Federal regulations supersede any Town or labor agreement policies with which there is a conflict. The Town and the Union have agreed to the following in cases of random DOT testing.

- (1) An employee who refuses or fails to take a test without good cause shall be subject to discharge and the Town shall have no responsibility to pay for any subsequent testing.
- (2) An employee who interferes with or in any way subverts the testing procedure shall be subject to discharge

- (3) In the case of a positive test result, the Town's financial responsibility is to pay for the initial test and one "return to work" test if allowed; all other testing shall be the financial responsibility of the employee.
- (4) In the event a split sample test yields a negative result, the Town shall pay for the split sample test.
- (5) During the period between a positive test result and an employee being able, under the rules, to resume driving/maintenance duties, the Town agrees to consider interim employment of the employee for duties not requiring the CDL.

In cases of post-accident and "reasonable suspicion" testing pursuant to DOT rules, it is agreed that the Town may look both to testing (and its results) and to the behavior which preceded the testing as separate grounds for possible discipline/discharge, subject to "just cause" principles.

B. Testing Procedures Non-DOT/CDL

Except under Section A or in the case of applicants for employment in the bargaining unit (as to whom the Union claims no jurisdiction), no drug testing shall be permitted on a random or universal basis except as herein provided. Testing of employees shall only be permitted when there is both reason to suspect drug or alcohol use and evidence that this suspected use has or is affecting job performance. Immediate alcohol testing shall be permitted based upon the reasonable suspicion standard herein provided.

Prior to any testing for drugs (other than alcohol), the Town will provide the employee and the Union with a written report evidencing reasonable suspicion. The employee or Union may ask that any available member of the Select Board or Personnel Board or a mutually agreed upon health professional review such report and decide whether or not testing shall proceed. If this review procedure is not completed within two (2) full calendar days after the report is given to the Union and the employee, the testing will be done and the results held back from release until the appeal is decided.

The Employee shall be provided with a test sample at the time drug testing is conducted. Drug testing to be performed is to be of the more expensive and accurate nature, so as not to subject the employee to the stress and embarrassment of a possible false positive result from the less expensive test.

The parties shall ensure the confidentiality of the testing process and results. Access to information about the test shall be limited to the Employee and only members of management and union officials with a compelling need for this information.

The following information shall be provided an Employee directed to undergo a drug test

1. A copy of the testing program procedures.
2. A description of the sample gathering protocol.
3. A list of the tests to be used.
4. The name and location of the laboratories to be used.
5. The test results in writing with an explanation of what the results mean.

The directive to submit a drug test sample shall be based upon facts sufficient to constitute reasonable suspicion of controlled substance use.

Objective facts that shall be used in evaluating an employee's condition include but are not limited to:

1. Balance: sure/unsure/questionable
2. Walking: steady/unsteady/questionable
3. Speech: clear/slurred/questionable
4. Attitude: cooperative/uncooperative/questionable
5. Eyes: clear/bloodshot/questionable
6. Odor of alcohol: none/strong/questionable

It is required that the observations of these objective facts by any supervisory witnesses be documented, along with any explanations by the employee concerning his/her condition.

Reasonable suspicion shall be based on information as to observations and objective facts and the rational inference(s) which may be drawn from this data.

The credibility of sources of information whether by tip or informant, the reliability of submitted information, the degree of corroboration, the results of Town inquiry and/or other factors shall be weighed in determining the presence or absence of reasonable suspicion.

The following are representative but no all-inclusive examples of such circumstances.

1. An employee deemed impaired or incapable of performing assigned duties.
2. An employee experiencing excessive vehicle or equipment accidents.
3. An employee exhibiting behavior inconsistent with previous performance. An employee who exhibits irritability, mood swings, nervousness, hyperactivity, or hallucinations.
4. An employee who is subject to substantiated allegations of use, possession or sale of drugs and has not agreed to participate in a rehabilitation program.

If the Reviewer concludes that drug screening by means of urinalysis is warranted, such testing shall be conducted immediately or within (3) months on a random basis as determined by the Town in the Town's sole discretion and on Town time. If these procedures are not followed, employees may refuse to submit to the test without being disciplined. Alcohol testing shall be performed without prior committee review based upon reasonable suspicion as hereinbefore provided.

If drug testing is warranted, an Employee may voluntarily participate in a recognized rehabilitation program as a substitute for the said permitted three (3) month random testing. Said participation is subject to the requirements and obligations of the rehabilitation program as hereinafter provided.

Except as to a grievance that the Reviewer has not followed the procedure outlined in this Article, the decision of the Review Committee to require alcohol or drug testing shall be final and binding and not subject to the Grievance and Arbitration procedure. The test sample taken from the Employee shall be secured by the Town physician, the Nurse Practitioner or a Testing Laboratory designated by the Town. Failure to provide the test sample as directed will result in disciplinary action.

In cases of post-accident or "reasonable suspicion" testing based at least in part upon misconduct or negligence of the employee, it is agreed that the Town may regard such misconduct or negligence as separate ground for possible discipline/discharge, subject to "just cause" principles.

It is the intention of this article that an Employee who is found to test positive on the drug screening shall be treated within the Employer/Employee relationship. It is incumbent upon the Employee to submit a proposal to the Town to be reviewed by the physician designated by the Town for approval. It is the intention that such proposal includes a drug rehabilitation clinic, whether on an out-patient or in-patient basis. The Employee may utilize sick days for such in-patient programs. Leaves of absence without pay for such reasonable periods will be allowed if the employee has no other accrued leave available. The Employee shall be expected to comply with all the requirements and such regulations of the substance abuse rehabilitation clinic and the failure to abide by all such conditions and requirements shall be a basis for termination of employment.

The Employee agrees to submit to random urinalysis testing at the discretion of the Town for a period of one (1) year after returning to work after commencing said program. If any test during such time yields a positive result, the Employee shall be immediately subject to disciplinary action which may be termination of employment.

The Town shall bear all costs of testing and rehabilitation after any available insurance coverage has been pursued and exhausted.

It is agreed that the Parties will make every effort to protect privacy and confidentiality.

Within any seven (7) year period, the Town will give an employee who has a positive test one and only once [sic] chance to return to work, and this opportunity does not exist in (a) refusal to test situations, or (b) where a second incident takes place during the re-testing period before the employee is allowed to return to regular duty, or (c) in any case where a test is given in connection with conduct by the employee that causes or results in or created a serious threat of serious bodily injury or substantial damage to property, or rises to the level of conduct in reckless disregard of safety. This provision does not require the Town to discharge an employee or in any manner reduce the discretion of the Town in the circumstances described herein.

FACTS

Jason Richard (Richard) has been employed by the Town as a Skilled Laborer in the Department of Public Works (DPW) since March 5, 2013. In this position, Richard performs various duties for the Town, such as operating woodchippers and chainsaws, and driving 6-8 wheelers and small dump trucks. Richard holds a Massachusetts commercial driver's license (CDL), which requires him, as a municipal employee, to provide a valid United States Department of Transportation (DOT) Medical Examiner's Certificate every five years at the time of his license renewal.

As a condition of hire in 2013, the Town required Richard to undergo a medical examination that included a physical, eye and hearing test, and drug screen. Once hired, the Town did not require Richard to undergo further medical examinations in order to maintain his employment.

In or around the spring of 2018, after experiencing pain and discomfort, Richard went to his doctor and learned that he needed a hernia operation. Richard provided a note to the Town from Dr. Mohamed Hamdani of RiverBend Medical

Group (Hamdani) indicating that Richard would require extended medical leave. Richard requested leave under the Family Medical Leave Act and underwent surgery in or around the second week of May 2018. At the time he requested leave, the Town's Human Resource Department (HRD) advised Richard that he would be subject to testing upon his return. Although Richard initially used accumulated sick leave, he became eligible and received short-term disability.

Richard recovered from his surgery and, on May 24, 2018, was cleared to return to work without restrictions effective June 18, 2018 by Hamdani. Richard submitted the note from Hamdani to HRD on May 24, 2018. On the same day, HRD Manager Erica Gelinas (Gelinas) informed Richard that, prior to returning to work, he must submit to an examination by WorkWise, a medical facility to which the Town refers employees for work injuries and medical examination. Gelinas believed that Richard was incapable of performing his duties due to the note from Hamdani indicating that Richard would require extended medical leave and the nature of Richard's surgery. Because he wanted to "do the right thing" and return to work, Richard agreed to submit to the examination and obtained the work order from Gelinas for WorkWise. The work order required Richard to submit not only to a physical examination, including both a DOT pre-placement and lift test, but also to drug testing.

WorkWise examined Richard on or about June 18, 2018, the day he was cleared to return to work by Hamdani. In addition to conducting the physical and drug test, WorkWise reviewed Richard's medical history and list of prescribed medications. Richard had been taking certain medications, which he had never

taken before or during work, to deal with chronic lower back pain since 2014. Because of concerns regarding these medications, the WorkWise examiner did not clear Richard to return to work. Relying on the WorkWise report, the Employer refused to allow Richard to return to work, and he remained on unpaid leave.

In or around August 2018, Richard provided additional information to a different WorkWise examiner and was cleared to return to work with the following restriction: "No commercial driving or performing safety sensitive tasks including no use of power tools as well as no climbing ladders or working from heights." On August 6, 2018, DPW Director Mario Mazza (Mazza) informed Richard that he could report back to work on August 8, 2018 for restricted duty assignment, which reflected WorkWise's recommendations. In his letter to Richard, Mazza stated, "your judgment and conduct in reporting to work while taking the above medications has been and is unacceptable and does subject you to an immediate termination."

While on restricted duty assignment, Richard received his regular pay, but was removed from the call list and had no standby duties, which eliminated any overtime opportunities. In the past, Richard usually worked overtime one additional day per month. At some point, in order to obtain full medical clearance from WorkWise and to work without restrictions, Richard ceased taking his prescribed medications. He was eventually fully cleared by WorkWise and resumed his full duties in late November 2018.

POSITIONS OF THE PARTIES**The Union**

The Union argues that Article 28 of the CBA expressly provides that a signed doctor's release is the only condition precedent for an employee returning to work from medical leave. Although Article 4 "Management Rights" permits the Employer to establish reasonable rules and regulations, the Employer may not exercise such rights so as to conflict with a specific provision of the CBA. In the present case, Richard provided a release from his doctor in accordance with Article 28 and, as such, should have been allowed to return to work without restriction.

Although the Union acknowledges that, under certain circumstances, the Employer may require an employee to submit to a full medical examination and drug testing, none of the conditions required for such examination and testing were satisfied. Article 28 of the CBA allows the Employer to require an employee to take a physical examination by a physician of the Town's choice only under the following circumstances: (1) a new employee as a condition of hire; (2) where there is evidence that an employee is incapable of full-time or satisfactory performance of his duties; or (3) as a condition of promotion. The parties do not dispute that Richard was neither a new employee nor seeking a promotion. The Union argues that no evidence was introduced at hearing to demonstrate that Richard was unable to do his job. To the contrary, the Union argues that Hamdani's letter demonstrated that Richard was capable of performing his duties as of June 18, 2018. The Union also noted that the Employer admitted at hearing that the sole basis for its belief that Richard was unfit for duty was the fact he was out on extended medical leave prior to returning. Similarly, the Union argues that none of

the requirements for drug testing under Appendix B of the CBA were met. Specifically, the Employer's testing of Richard was not done pursuant to either (1) random testing under DOT/CDL regulations, (2) post-accident, or (3) based on reasonable suspicion that Richard was under the influence of controlled substances.

Finally, the Union argued that there is no evidence of an enforceable past practice requiring employees returning from medical leave to submit to medical examination. In support of the Union's position, bargaining unit member Scott Levalle testified that he was out on medical leave for 4-6 weeks and only provided a doctor's note upon his return to work. The Union argued that there was insufficient evidence to establish a consistent past practice, but more importantly, even if there were, the contract language is clear and unambiguous. A signed doctor's release is the only condition precedent for an employee returning to work from medical leave. Moreover, Article 5 of the CBA states that failure of the parties to insist upon performance shall not be considered as a waiver or relinquishment of any such term or condition. As such, the express terms of the agreement must govern.

For all the foregoing reasons, the Union requested that the arbitrator find that the Employer violated the CBA and make Richard whole in all respects, including back pay and interest.

The Town

The Employer argued that it violated no provision of the CBA, and that its actions were appropriate under the circumstances. Under Article 28 of the CBA,

where there is evidence that an employee is incapable of full-time or satisfactory performance of his/her duties, the Town may require an employee to take a physical examination by a physician of the Town's choice. The physician is authorized to inform the Town of any condition which the physician believes may reasonably interfere with the performance of the employee's duties, together with any recommendation as to what action, if any, the Town should take to monitor or accommodate such a condition. Due to Hamdani's note indicating that Richard would require extended medical leave and the nature of Richard's surgery, the Employer believed Richard was incapable of performing his duties. Based on this belief, the Town contended that it had the right under the Article 28 of the CBA to require Richard to submit to a physical examination before returning to work.

The delay, if any, in Richard returning to work was not caused by the Employer, but rather Richard's own answers to the WorkWise examiner. Until the Employer received the WorkWise report, it was unable to make a reasoned determination as to whether Richard was capable or not of performing his duties. Once it became aware of Richard's employment restrictions through WorkWise, the Employer allowed him to return to work in a restricted duty capacity. Neither the Town nor Mazza delayed Richard's return once the applicable restrictions became known. Furthermore, Richard received no discipline.

The Employer also argued that Richard knew prior to his taking leave that he would be subject to testing upon his return to work. Gelinas testified that both Mazza and HRD told Richard that he would have to undergo a DOT test upon his return to work. When the grievant applied for FMLA leave for the anticipated 6

weeks, he was advised upfront that a DOT test, which has a drug testing component, would be required upon his return.

Furthermore, the Employer contended that the examination that Workwise conducted on the grievant, including the drug screen, is standard practice for positions requiring CDLs. Since Richard was not medically cleared by Workwise for full duty, a 45-day time period is allowed to clarify any abnormal issues in accordance with 49 CFR 391.43 (g) (4). Since the Employer was merely following orders from Workwise, the Employer abided by Article 34 when it provided interim employment for the grievant for duties not requiring the CDL.

Finally, the Employer argued that its actions were appropriate because management has obligations under Article 4 of the CBA to take reasonable and prudent actions in the interests of both the employee and public safety, including requiring DOT testing for safety purposes. In requiring Richard to submit to a physical exam by Workwise, Mazza and Gelinas were acting in the best interests of public safety and public policy, and their actions were in accord with the management rights clause of the CBA. These rights and corresponding obligations to the safety of the public and employees existed prior to any CBA and recognition of a union. Finally, the Employer argued that, based on past practice, employees returning from absences have been required to take reemployment tests upon their return to work. Gelinas stated that two bargaining unit members with CDLs were required to submit to DOT testing upon their return from medical leave and one other bargaining unit member whose position did not require a CDL submitted to a physical.

For all the foregoing reasons, the Town requested that the arbitrator deny the grievance.

OPINION

Article 28 of the CBA governs the present dispute and expressly provides the following:

The Town reserves the right to require a signed doctor's release before permitting an employee to return to work after a medical absence. Without cost to the employee, but only (1) for new employees as a condition of hire or (2) where there [is] evidence that an employee is incapable of full-time or satisfactory performance of his/her duties, or (3) if made a condition of promotion, the town may require an employee to take a physical examination by a physician of the Town's choice.

Based on the clear and unambiguous language of Article 28, the Town is permitted, at its discretion, to require a bargaining unit member to provide a doctor's note upon his or her return to work. The evidence presented at hearing showed that Richard satisfied the requirements of Article 28. Namely, he provided a note from Hamdani indicating that he was fit to return to work on June 18, 2018.

Only under the following limited circumstances may the Town require an employee to submit to a physical examination: as a condition of hire or promotion, or with evidence that the employee is incapable of full-time or satisfactory performance of his/her duties. Since the parties agreed that Richard was neither a new hire nor applied for a promotion, the issue in dispute was whether Richard was incapable of full-time or satisfactory performance of his duties at the time he sought to return to work (i.e., on June 18, 2018). Based on the evidence presented at hearing, the Town failed to establish that Richard was incapable of full-time or satisfactory performance of his duties.

The record at hearing indicated that the Town had not even observed Richard's performance before ordering him to submit to a physical examination by WorkWise that included drug testing. On the other hand, Richard testified credibly that he was physically able to return to work on June 18, 2018 and provided Hamdani's letter in support. The Town offered no objective evidence challenging Hamdani's assessment that Richard was capable of working as of June 18, 2018.

Similar to Article 28, Appendix B of the CBA allows the Town to perform drug testing of bargaining unit members either (1) randomly, (2) post-accident, or (3) based on reasonable suspicion that the employee is under the influence of controlled substances. Gelinas ordered Richard to submit to testing based not on personal observations, but on Hamdani's note indicating that Richard would require extended medical leave and the nature of Richard's surgery. The decision to order Richard to submit to drug testing was not random, post-accident, or based on reasonable suspicion of being under the influence. As such, in denying Richard's request to return to work on June 18, 2018 and requiring him to submit to both a physical examination and drug testing, the Employer violated the provisions of the CBA.

With respect to the Town's defenses, I find unpersuasive the argument that, due to Hamdani's note requesting extended medical leave and the nature of Richard's surgery, the Town believed Richard to be incapable of performing his duties.² The Town ignores the fact that Hamdani provided a subsequent letter

² Since it is beyond the scope of the issue given to me by the parties, I do not weigh in on the Union's suggestion that the Town might have violated state and

indicating Richard was capable of returning to work on June 18, 2018 without restrictions. The Town introduced no evidence challenging Hamdani's assessment and, to the extent that it had concerns, the Town failed to seek clarification or raise those concerns with Richard. The evidence at hearing demonstrated that, without even observing Richard, the Town deemed him incapable of performing his duties.

While the management rights clause in the CBA gives the Employer the right to establish reasonable written rules and regulations, this right is restricted by the clause "the Town may not exercise its rights under this Article so as to conflict with any specific provision of this Agreement." Article 28 and Appendix B of the CBA clearly and unambiguously provide for the circumstances whereby an employee must submit to physical examination and drug testing. Since the management rights clause cannot be interpreted in such a way as to conflict with Article 28 or Appendix B, the Town did not have the authority to order Richard to submit to physical examination and drug testing based upon general language in the management rights clause.

Even if the Town did inform Richard directly that he would need to submit to examination prior to his taking leave, Richard is not an officer in the Union and cannot waive rights in the CBA on its behalf. Richard testified that he agreed to submit to examination because he wanted to "do the right thing" and return to work. The fact that Richard first obeyed and later grieved does diminish the Union's right to challenge the Town's actions.

federal law by assuming that an employee is incapable of performing his duties simply because he took extended medical leave or required surgery.

The Employer presented insufficient evidence to establish an enforceable past practice of requiring employees on medical leave to submit to physicals before returning to work. Even if some employees did submit to examination upon their return from medical leave, the Union presented evidence that other employees did not. More importantly, the Employer failed to establish that such a practice was unequivocal and clearly accepted by both parties over a reasonable period of time. Additionally, Article 5 limits the ability of the parties to alter the terms and provisions of the CBA without putting such changes in writing.

While I am sensitive to the fact that the Employer must act in the best interests of public safety, it presented no objective evidence that Richard posed a public safety risk before sending him to WorkWise. The record at hearing demonstrated that Richard provided a note from Hamdani evidencing his fitness for duty, and the Employer offered no explanation as to why it should not rely on Hamdani's assessment.

Although the Town argues that it did not cause the delay in Richard's return to work, the fact remains the Town ordered Richard to be examined and chose to rely on WorkWise's report to determine whether Richard was capable of satisfactorily performing his duties. Instead, the Town could have relied on Hamdani's May 24, 2018 note clearing Richard to return on June 18, 2018. Under these circumstances, I attribute the delay in Richard returning to work to the Employer.

As a remedy, I order the Town to make Richard whole for lost wages from June 18, 2018 until August 8, 2018, when Richard returned to work for restricted

duty assignment. I deny the Union's request to award damages for lost overtime opportunities, since there are too many variables in the evidence to justify such relief. Although I credit Richard's testimony that he usually worked overtime one additional day per month in the past, no evidence was introduced demonstrating that any overtime opportunities existed during the time he was prohibited from returning to work and/or was placed on restricted duty assignment. Furthermore, even if there were evidence of overtime opportunities, nothing in the record suggested that Richard would have received those opportunities rather than another bargaining unit member. For these reasons, I do not award damages for lost overtime opportunities.

Finally, I find that Mazza's August 6, 2018 letter is disciplinary since it characterizes Richard's judgment and conduct as being unprofessional, and it threatens termination. Because the letter flows from the Town's violation of the CBA, I order the Town to rescind the letter that Mazza issued to Richard on August 6, 2018, and to remove any reference to the letter from Richard's personnel file.

AWARD

For all the foregoing reasons, the Town violated the collective bargaining agreement as identified in the grievance and demand for arbitration. The grievance is sustained. As a remedy, the Town is ordered to rescind the letter that Mazza issued to Richard on August 6, 2018, to remove any reference to the letter from Richard's personnel file, and to make Richard whole for lost wages from June 18, 2018 until August 8, 2018 in a manner consistent with this opinion.

A handwritten signature in cursive script, appearing to read "Will Evans", is written over a horizontal line.

Will Evans, Esq., Arbitrator
September 26, 2019