

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS

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In the Matter of the Arbitration Between: \*

TOWN OF BILLERICA \*

-and- \*

ARB-19-7232 \*

BILLERICA FIREFIGHTERS, IAFF, \*  
LOCAL 1495 \*

\*\*\*\*\*

Arbitrator:

Timothy Hatfield, Esq.

Appearances:

Kevin Feeley, Esq. - Representing Town of Billerica

Patrick Bryant, Esq. - Representing Billerica Firefighters,  
IAFF, Local 1495

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 Article 3, Section 3 of the collective bargaining agreement. The Town is hereby ordered to make the aggrieved firefighter whole in a manner consistent with this decision. I will retain jurisdiction of this matter until such time as the parties agree on the identity of the firefighter and the amount owed.



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Timothy Hatfield, Esq.  
Arbitrator  
April 10, 2020

### **INTRODUCTION**

On March 22, 2019, the Billerica Firefighters, IAFF, Local 1495 (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 Timothy Hatfield, Esq. to act as a single neutral arbitrator with the full power of the Department. The undersigned Arbitrator conducted a hearing at the Department's Boston office on September 16, 2019.

The Union filed a brief on September 30, 2019. The Town of Billerica (Town) did not file a post-hearing brief.

### **THE ISSUE**

Whether the Town violated Article 3, Section 3 by failing to make a temporary Lieutenant promotion for the Lieutenant vacancy at issue. If so, what shall be the remedy?

### **STIPULATIONS**

- 1) The situation at issue has not occurred previously to the knowledge of the parties.
- 2) Fire Chief Cole requires firefighters out for a physical reason to produce a note from a physician clearing them to return to work.
- 3) Lieutenant [Redacted] returned to work on March 11, 2019.
- 4) The facts in the joint exhibits submitted are accurate.

**RELEVANT CONTRACT LANGUAGE**

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

## Article 3

**Section 3: Filling a Vacancy In Officer Ranks**

An absence or vacancy in officer ranks anticipated to last more than thirty (30) days shall be filled by same (sic) employee on a continuing basis in the manner authorized by Civil Service laws and rules. The purpose of this provision is to provide for stability and continuity of supervision.

**FACTS**

The Town and the Union were parties to a collective bargaining agreement that was in effect at all relevant times to this arbitration. On January 29, 2019, Lieutenant [Redacted] (Lieutenant) informed Chief Cole (Chief) that he was scheduled for surgery in February. The Lieutenant presented a note from his physician dated January 15, 2019, stating: "It is my medical opinion that [Lieutenant] remain out of work until 3/18/19 after surgery on 2/11/19. If you have any questions or concerns, please don't hesitate to call." In addition, the Lieutenant told the Chief that his doctor expected no complications, and that he would be back to work in three weeks. The Chief did not fill the Lieutenant's vacancy through a temporary promotion. The Lieutenant returned to work on March 11, 2019.

The Union filed a grievance two days after the Lieutenant's surgery, asserting a violation of Article 3, Section 3 of the collective bargaining agreement. On February 27, 2019, the Chief denied the grievance, and the Union subsequently filed the instant petition for arbitration.

**POSITIONS OF THE PARTIES****THE UNION**

The Town violated the collective bargaining agreement because it was anticipated at the time the Chief learned of the planned surgery that the Lieutenant would be out of work for at least 30 days. From January 29, 2019 until the Lieutenant's surgery on February 11, 2019, the Chief had information from a physician stating in his medical opinion that the Lieutenant would be out 35 days. The Chief knew that the absence was related to major abdominal surgery and that the physician would be required to certify the Lieutenant as fit before allowing him to return to work. The simplest way to state the guiding principle is that, when presented with a written medical opinion asserting that a vacancy resulting from major surgery will last more than 30 days, the vacancy is anticipated to last more than 30 days, absent equally probative evidence.

"Anticipated" does not require that the duration of a vacancy beyond 30 days be certain or beyond doubt; it does not require the only plausible expectation to be that it lasts at least 30 days. The use of equivocal language such as "anticipated" means that the parties did not require a certainty about the expected duration of a vacancy. That especially is the case where the evidence supporting a vacancy of more than 30 days is based upon an unequivocal written medical opinion, and the evidence to the contrary is hearsay from a lay person.

The purpose of the contractual provision further supports the Union's contention that "anticipated" under the agreement must be interpreted to apply to the Lieutenant's vacancy lasting more than 30 days. It is standard to interpret contract language in light of the purpose of the language at issue. Here, the

collective bargaining agreement expressly states the provision's purpose: "to provide stability and continuity of supervision." The purpose means that if a ranking officer position is vacant for 30 days or more, then firefighters are subject to a rotating crew of supervisors for the duration, and the parties agree that this is harmful (or not as beneficial) as a consistent supervisor. A failure to properly anticipate the length of a vacancy will subject firefighters to a rotating group of daily supervisors, leading to instability and discontinuity of supervision. By contrast, a temporary promotion in an officer rank when a vacancy is anticipated to last more than 30 days but terminates before then, will subject firefighters to a single supervisor, providing the supervisory continuity and stability required by the contract.

A written medical opinion estimating the length of a vacancy deserves nearly conclusive weight. It was an error for the Chief to rely upon the Lieutenant's hearsay to determine that the vacancy would not last more than 30 days. The presumption created by the physician's written medical opinion was not rebutted by the Lieutenant's own claims about the expected duration of his absence because they were of inferior reliability. The Chief stated in the grievance answer that the Lieutenant claimed he expected to be back in three weeks if there were no complications. The physician's note was presented more than two weeks prior to the surgery and included an invitation that the Chief call the physician. Had the Chief spoken with the physician to confirm the Lieutenant's claims or had the Chief received a supplementary note from the physician clarifying his medical opinion

that it was much more likely to last less than 30 days, then the Chief would not have been required to make a temporary promotion.

For the foregoing reasons, the Town violated the collective bargaining agreement and should be ordered to make employees whole by paying the wage premium to the top-ranked firefighter on the lieutenant promotional list at the time (who had not already been permanently or temporarily promoted) at the time of the Lieutenant's absence.

### **THE EMPLOYER**

The Town failed to submit a post-hearing brief. Joint Exhibit 3 is a letter dated February 27, 2019 from Chief Cole to Union President William Connors that states as follows:

William,

This letter is in response to the grievance submitted on February 13, 2019. The grievance was based on Article 3 Section 3 of the Local 1495 CBA that is written (sic):

An absence or vacancy in officer ranks anticipated to last more than thirty (30) days shall be filled by same (sic) employee on a continuing basis in the manner authorized by Civil Service laws and rules. The purpose of this provision is to provide for stability and continuity of supervision.

On January 29, 2019 [Redacted] presented me with a note from his doctor for a surgery that was to take place on 2/11/2019 and he should remain out of work until 3/18/2019. [Redacted] told me at the time his doctor was expecting no complications and that he should be back to work in three weeks. The note was for 35 days if there were complications and that he (sic) none were anticipated. Given that the member expressed anticipation that he would be back to work before 30 days it is my opinion that Article 3 Section 3 was not violated.

It is for this reason that your grievance and suggested remedy have been denied.

**OPINION**

The issue before me is: Whether the Town violated Article 3, Section 3 by failing to make a temporary Lieutenant promotion for the Lieutenant vacancy at issue. If so, what shall be the remedy? For all the reasons stated below, the Town did violate Article 3, Section 3 of the collective bargaining agreement.

The parties stipulated to the facts in this case. In summary, the Lieutenant met with the Chief and informed him that he was scheduled for surgery on February 11, 2019. He produced a note from his physician stating that he should remain out of work until March 18, 2019, a period of thirty-five days. In addition, he told the Chief that his doctor expected no complications and that he would be back to work in three weeks. With no facts in dispute, the issue is whether the Chief's reliance on the statement of the Lieutenant, instead of the Doctor's note, when deciding on how long the anticipated absence was to last, was reasonable or a violation of the collective bargaining agreement.

I find that the Chief's reliance on the Lieutenant's statements in the face of a clear, concise doctor's note was unreasonable. The Doctor's note was unequivocal; the Lieutenant was to remain out of work until March 18, 2019. The doctor didn't qualify his statement in any manner and stated that the Chief should call if he had any questions or concerns. A statement by the Lieutenant which directly contradicts to the doctor's note constitutes a "question or concern" that the doctor referenced in his note. In fact, had the Chief called the doctor to confirm the accuracy of the statement, then his reliance on the statement would not have been unreasonable and his anticipation of the absence lasting under thirty days

would have been justified. It is the sheer lack of any confirmation other than the Lieutenant's statement that is problematic.

Admittedly, this case presents a fact pattern that is borderline (an anticipated thirty-five-day absence vs. an anticipated absence of less than thirty days). However, allowing the Chief to decide the anticipated length of an absence when that decision contravenes clear and unambiguous medical documentation is a slippery slope. If allowed, at what point do the Chief's beliefs become unreasonable? What happens in the next instance when an officer presents a doctor's note that says the absence will be two or even three months, but the officer says that he will be back in four weeks. Can the Chief disregard the medical documentation when there is no follow up to confirm the contrary statement? Given the language of the collective bargaining agreement, the answer is no.

The last sentence of Article 3, Section 3 of the collective bargaining agreement provides further insight into the parties' expectations for filling officer vacancies. "The purpose of this provision is to provide for the stability and continuity of supervision." The parties' intent is that, absences that are clearly anticipated to extend longer than thirty days should be filled by a temporary promotion instead of a patchwork of supervisors. If there is any question that an absence will extend beyond the thirty-day mark, the parties have agreed that there should be a temporary promotion. Stated another way, an absence anticipated to last beyond thirty days, which includes a temporary promotion, ending prior to the thirty-day mark is preferred over an absence that was anticipated to last less than thirty days but was extended and did not include a temporary promotion. The



parties' mandate is clear if there is any doubt, as was the case here, they should error on the side of making a temporary promotion.

The Chief's requirement of a doctor's note stating the length of an anticipated absence should provide a clear benchmark for the restrictions of Article 3, Section 3. If there is any doubt stemming from the doctor's note itself, or from employee statements that contradict the note, it is incumbent on the Chief to seek additional information from the employee's doctor until he can reasonably anticipate the length of absence. In this case, with the anticipated length of absence clearly in doubt, and the parties' written preference for the stability of supervisor, it was unreasonable for the Chief to anticipate the Lieutenant's absence to be less than thirty days and not require a temporary promotion.

For all the reasons stated above, the Town did violate Article 3, Section 3 of the collective bargaining agreement.

### **AWARD**

The Town violated Article 3, Section 3 of the collective bargaining agreement. The Town is hereby ordered to make the aggrieved firefighter whole in a manner consistent with this decision. I will retain jurisdiction of this matter until such time as the parties agree on the identity of the firefighter and the amount owed.



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