COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of the Arbitration Between:	*	
	*	
CITY OF WORCESTER	*	
	*	
-and-	*	ARB-19-7303
	*	
NAGE, LOCAL 495	*	

Arbitrator:

Timothy Hatfield, Esq.

Appearances:

William Bagley, Esq. - Representing City of Worcester

Michael Manning, Esq. - Representing NAGE, Local 495

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 Streets' Department policy requiring Collins to provide a doctor's note for sick leave on October 25 & 26, 2018 did not violate the collective bargaining agreement, and the grievance is denied.

Timothy Hatfield, Esq.
Arbitrator
July 19, 2021

INTRODUCTION

NAGE, Local 495 (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 virtual hearing via WebEx on October 27, 2020.

The parties filed briefs on November 27, 2020.

THE ISSUE

Whether the Streets' Department policy requiring Collins to provide a doctor's note for sick leave on October 25 & 26, 2018 violates the collective bargaining agreement? If so, what shall the remedy be?

RELEVANT CONTRACT LANGUAGE

The parties' collective bargaining agreement (Agreement) contains the following pertinent provisions:

ARTICLE 4 MANAGEMENT RIGHTS (In Part)

> In the interpretation of this Agreement, the City shall not be deemed to have been limited in any way in the exercise of the regular and customary functions of municipal management or governmental authority and shall be deemed to have retained and reserved unto itself all the powers, authority and prerogatives of municipal management or governmental authority including, but not limited to, the following examples: the operation and

direction of the affairs of the departments; … the scheduling and enforcement of working hours; the assignment of overtime; the determination of whether employees (if any) in a classification are to be called in for work at times other than their regularly scheduled hours and the determination of the classification to be so called; … the making, implementation, amendment, and enforcement of such rules, regulations, operating and administrative procedures from time to time as the City deems necessary; … except to the extent abridged by a specific provision of this Agreement or law.

ARTICLE 11 GRIEVANCE PROCEDURE (In Part)

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

a. The arbitrator shall make no award for grievances initiated prior to the effective date of this Article.

b. The arbitrator shall have no power to add to, subtract from, or modify this contract or the rules and regulations of the City and the Charter, Ordinances and Statutes concerning the City, either actually or effectively.

c. The arbitrator shall only interpret such items and determine such issues as may be submitted to him by the written agreement of the parties.

d. Grievances may be settled without precedent at any stage of the procedure until the issuance of a final award by the arbitrator.

e. Appeal may be taken from the award to the Worcester Superior Court as provided for in paragraph 6.

6. Appeal from the arbitrator's award may be made to Superior Court on any of the following bases, and said award will be vacated and another arbitrator shall be appointed by the Court to determine the merits if:

a. The award was procured by corruption, fraud, or other undue means;

b. There was evident partiality by an arbitrator, appointed as a neutral, or corruption by the arbitrator, or misconduct prejudicing the rights of any party;

c. The arbitrator exceeded his powers by deciding the case upon issues other than those specified in sections 5(b) and (c), or exceeded his jurisdiction by deciding a case involving non-grievable matters as specified in Section 1, or rendered an award requiring the City, its agents, or representatives, the Union, its agents or representatives, or the grievant to

commit an act or to engage in conduct prohibited by law as interpreted by the Courts of this Commonwealth;

d. The arbitrator refused to postpone the hearing upon a sufficient cause being shown therefor, or refused to hear evidence material to the controversy or otherwise so conducted the hearing as to prejudice substantially the rights of a party;

e. There was no arbitration agreement on the issues that the arbitrator determined, the parties having agreed only to submit those items to arbitration as the parties had agreed to in writing prior to the hearing, provided that the appellant party did not waive his objection during participation in the arbitration hearing; but the fact that the award orders reinstatement of an employee with or without back pay or grants relief that would not be granted by a court of law or equity, shall not be grounds for vacating or refusing to confirm the award.

ARTICLE 15 Sick Leave (In Part)

The City agrees to provide, in substance the following:

(a) To increase the maximum sick leave accumulation from the present one hundred and fifty (150) days to a maximum of one hundred and sixty-five (165) days. …

(e) That the administration of sick leave will be subject to such regulations as may be deemed necessary by the City Manager to effectuate the provisions of the allowance.

(f) Prior to the adoption of any proposed amendment of the Sick Leave Rules and Regulations, the City Manager or his representative shall give written notice to Local 495 and, if requested, meet with Local 495 to discuss the proposed amendment. …

RELEVANT MEMORANDUM OF UNDERSTANDING (In Part)

… WHEREAS, the City and the Union held an Exchange of Views meeting on February 6, 2002 for the purpose of discussing the variations of policies, procedures and practices within different divisions of the Department of Public Works as they effect the temporary reassignment of employees from their current division to another division of the Department of Public Works;

WHEREAS, the City and the Union have reached an understanding regarding the temporary reassignment of employees from their current division of the Department of Public Works;

> Now, THEREFORE, the parties wish to memorialize their understanding, as follows:
>
> 1. The Union acknowledges that the Department of Public Works is comprised of several different divisions that have diverse operational responsibilities and as a result, some of the policies, procedures and practices differ to a degree so as to be unique to each specific division. …
>
> 4. The City acknowledges its obligation to adhere to the provisions of the Collective Bargaining Agreement.
>
> _____
> fn.1 The City and the Union acknowledge that many of these unique divisional policies, procedures and practices are not in writing, but have been in place for many years.

FACTS

The City of Worcester (City) and the Union are parties to a collective bargaining agreement that was in effect at all relevant times to this arbitration. The grievant, Richard Collins (Collins) worked for the City in the Department of Public Works & Parks (DPW&P).

In 1992, former Streets Director Pete Paldino (Paldino) implemented a policy that required any employee wishing to use sick leave to produce a doctor's note prior to being permitted to use sick leave. This policy was never committed to writing.

In 2002, the Union and the City entered into a MOA that in relevant part states that:

> [T]he Union acknowledges that the Department of Public Works is comprised of several different divisions that have diverse operational responsibilities and as a result, some of the policies, procedures and practices differ to a degree so as to be unique to each specific division …
>
> _____

fn.1 The City and the Union acknowledge that many of these unique divisional policies, procedures and practices are not in writing, but have been in place for many years.

In 2015, upon the retirement of Paldino, James Kempton (Kempton) was named Acting Director. Kempton modified the rule so that employees who had more than 200 hours of sick time accrued would no longer be automatically required to produce a doctor's note on each occasion they were absent. This amendment to the policy was never committed to writing.

On Thursday October 25, 2018, Collins notified his supervisor that he would be absent from work. Collins had less than 200 hours of accrued sick leave at the time of his absence. Collins was out sick on Thursday October 25, 2018, Friday October 26, 2018, and Monday October 29, 2018. Upon his return to work on Tuesday October 30, 2018, Collins produced a doctor's note for his absences. Payroll for the City closed on Monday, October 29, 2018, prior to Collins' doctor note submission so he was docked pay for his absences on Thursday and Friday. Upon submission of the doctor's note on Tuesday, the City adjusted payroll for the following week to pay him for the missed days.

The City's payroll department has a stated City-wide preference for some form of accrued time being used for disputed absences instead of docking an employees' pay. Collins had adequate non-sick accrued time to cover his absences but was still docked two days' pay.

The Union filed a grievance November 3, 2018. The grievance was denied at all steps by the City and resulted in the instant arbitration.

POSITIONS OF THE PARTIES

THE UNION

The facts in this case are largely undisputed. The grievant made a proper request for sick leave in advance of his absences on Thursday October 25th, Friday October 26th and Monday October 29th. It is also undisputed that he submitted a valid doctor's note covering all three days' absences upon his return to work on Tuesday October 30th. The City declined to pay him for his absences on Thursday and Friday as payroll for that week closed on Monday prior to his doctor note submission on Tuesday. He was eventually credited with his proper pay and time usage in his following check.

The Union was faulted at the opening of the hearing for presenting a grievance for which there can be no remedy. The Union responds by asserting that the City's decision to short the grievant two days' pay in the face of an unequivocal agreement and regulatory requirements require a finding of a contractual violation. The City tries to cover its tracks in this case by hiding behind unwritten and changing requirements that are not uniformly applied. It presents an affirmative policy of trying to use other types of available leave before shorting an employee from a forty-hour paycheck, and then provides no justification for its deviation from that policy in this case.

In its defense, the City trots out Joint Exhibit 7, a 2015 MOU that preserves the parties' then understanding that the City's different divisions "have diverse operational responsibilities" that result in long-term policies "and practices (that) are not in writing." While such an omnibus platitude might cover a multitude of sins

in existence at the time of execution, it does not render unto the City license to go and create new rules as they deem fit at the time them deem fit to create them for purposes, they decline to even articulate a justification for.

The City's Sick Leave Rules and Regulations require that an employee requesting four days or less of sick time, if asked, may be required to provide a written certification documenting certain aspects of his need for the leave. Article 15(e) of the collective bargaining agreement incorporates those rules into the collective bargaining agreement. The Union requests a finding that Article 15 has been violated in this instance and requests a notice be placed on all Streets Department bulletin boards.

THE EMPLOYER

In the case, the Union seeks to invalidate an administrative policy requiring a sick note that has been in place for more than twenty-five years and, albeit with a minor relaxation of the policy, has continued to be enforced through the present. Article 4 of the collective bargaining agreement reserves to management "the making, implementation, amendment, and enforcement of such rules, regulations operating and administrative procedures from time to time the City deems necessary." Moreover, the Union has expressly acknowledged that each Division within the DPW &P has "diverse operational responsibilities and as a result, some policies, procedures and practices differ to a degree so as to be unique to each specific division."

It is clear from the evidence presented at the hearing that former Streets Director, Paldino, implemented a policy in 1992 to combat sick leave abuse within

the Streets Division. The policy required any employee wishing to use sick leave to produce a doctor's note prior to being permitted to use sick leave to cover absences. Labovites, Kempton and Culverhouse, all of whom have oversight of the Streets Division, each testified that they were aware of the policy.

When Kempton became the Acting Director in 2015, he relaxed the policy so that employees with at least 200 hours of sick time would not automatically be required to produce a sick note. While the City acknowledges that Kempton did not widely publish the modification, it cannot be disputed that the modification was actually a benefit to bargaining unit members. The Union also took issue with the fact that the policy is not memorialized in writing. This argument is irrelevant as the Union expressly acknowledged in the 2005 agreement that many of the unique policies, procedures, and practices within the various Divisions of the DPW & P are not in writing.

When Collins was absent from work on October 25, 26, and 29, he was not permitted to use sick time until he produced a doctor's note. Historically, employees have provided notes in person to the Department. More recently, employees are permitted to deliver notes by facsimile, email or even by texting a photograph of the doctor's note. Although Collins did not avail himself of these opportunities during his absence, when he produced the note on October 30, the City immediately made an adjustment to payroll and he was paid for his absences the following week. As such, the City followed the longstanding policy that requires employees to produce a doctor's note prior to being permitted to use sick time.

Conclusion

Based on the foregoing, it is clear that Kempton applied a longstanding and uniformly applied policy to Collins, and as such, the grievance arising out of the absences on October 25 and 26 should be denied.

OPINION

The issue before me is: whether the Streets' Department policy requiring Collins to provide a doctor's note for sick leave on October 25 & 26, 2018 violates the collective bargaining agreement? If so, what shall the remedy be? For all the reasons stated below, the Streets' Department policy requiring Collins to provide a doctor's note for sick leave on October 25 & 26, 2018 did not violate the collective bargaining agreement, and the grievance is denied.

In this arbitration, the Union is objecting to a rule that has been in place since 1992 in the Streets' Department of the City's DPW&P. The rule promulgated some twenty-eight years ago stated that a doctor's note was required to be submitted by all bargaining unit members prior to sick leave being approved. In 2015, after the retirement of Paldino, Kempton modified this rule to say that bargaining unit members with over two hundred hours of accumulated sick leave were not required to produce a doctor's note prior to sick leave being approved. While neither the original rule, nor the amended rule appear in writing, it is long past the time for the Union to object to the manner in which either version of the rule was issued.

It is undisputed that in October 2018, when Collins was out sick for three days, he did not have two hundred accumulated hours of sick time on the books and was required to produce a doctor's note, which he did upon his return on

Tuesday October 30th. It is also undisputed that the City docked him two days pay for the first two days of his absence before restoring his pay in the following payroll after receipt of his doctor's note.

The parties' collective bargaining agreement contains a general provision in Article 4, that allows for the:

> making, implementation, amendment, and enforcement of such rules, regulations, operating and administrative procedures from time to time as the City deems necessary; … except to the extent abridged by a specific provision of this Agreement or law.

The sick leave provision of the collective bargaining agreement located in Article 15 states, in relevant part, in subsections (e & f) that:

> the administration of sick leave will be subject to such regulations as may be deemed necessary by the City Manager to effectuate the provisions of the allowance.
>
> Prior to the adoption of any proposed amendment of the Sick Leave Rules and Regulations, the City Manager or his representative shall give written notice to Local 495 and, if requested, meet with Local 495 to discuss the proposed amendment.

The plain language of Article 4 allows for the City to promulgate rules and administrative procedures that are not abridged by any specific provision of the collective bargaining agreement. The specific provision of the collective bargaining agreement dealing with Sick Leave is Article 15, and nothing in this article abridges the City's ability to promulgate the specific Streets' Department rule in question here.

I agree with the Union's argument that the rule, as applied in this case, is unnecessarily punitive. Collins had other benefit time available to substitute ensuring that he would not go without pay prior to his submission of a doctor's

note. The City should have followed its admitted City-wide preference to use other benefit time to avoid an employee going on unpaid status. However, as noted above, the rule itself requiring a doctor's note is not a violation of the collective bargaining agreement.[1]

AWARD

The Streets' Department policy requiring Collins to provide a doctor's note for sick leave on October 25 & 26, 2018 did not violate the collective bargaining agreement and the grievance is denied.

Timothy Hatfield, Esq.
Arbitrator
July 19, 2021

[1] As I have found that the Streets' Department rule is authorized by the plain language of the collective bargaining agreement, I decline to rule on what, if any, impact the parties' 2002 MOA has in this dispute.