

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of the Arbitration Between:

TOWN OF NORFOLK

-and-

NORFOLK MUNICIPAL EMPLOYEES
ASSOCIATION, IFPTE, LOCAL 310

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ARB-19-7506

Arbitrator:

Timothy Hatfield, Esq.

Appearances:

Michael Maccaro, Esq. - Representing Town of Norfolk

David LaFemina, Esq. - Representing Norfolk Municipal Employees
Association, IFPTE, Local 310

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 procedurally arbitrable, and the grievance is denied.



Timothy Hatfield
Arbitrator
August 28, 2020

INTRODUCTION

Norfolk Employees Association, IFPTE, Local 310 (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 November 6, 2019.

The parties filed briefs on December 20, 2019.

THE ISSUE

Is the grievance procedurally arbitrable?

RELEVANT CONTRACT LANGUAGE

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

ARTICLE 16 GRIEVANCE PROCEDURE (In Part)

Section 1

For the purpose of this Agreement, a grievance is defined as any dispute between an employee or employees and the Town, the Town and the Union or the Union and the Town concerning the interpretation, application or violation of any provision(s) of this Agreement. No matter shall be subject to the grievance procedure unless taken up within fifteen (15) working days of its occurrence, or within fifteen (15) working days of the awareness of the occurrence. The parties agree that grievances should be resolved at the lowest level possible of the grievance procedure.

The Town and the Union agree that in some instances it would be better served to allow Union Representatives to speak directly to the Human Resources Director to settle disputes or clarify issues or situations. The Town and the Union will waive the Grievance Procedure in those instances in an effort to expedite a resolution. ...

Section 8

Within fifteen (15) working days from the date of their next meeting after receipt of the written decision by the Board of Selectmen, the Union shall have the right to submit the grievance to the Massachusetts State Department of Labor Relations. The Town and the Union must agree on a single arbitrator from a list provided by the American Arbitration Association containing five (5) names. The arbitrator shall not have the right to modify or alter this agreement. The cost of the arbitration shall be paid by the Union. ...

Section 13

Time limits for the grievance procedure may be waived, or modified by mutual consent of the parties, in writing.

FACTS

The Town of Norfolk (Town) and the Union are parties to a collective bargaining agreement that was in effect at all relevant times to this arbitration. In 2011, during negotiations for a successor collective bargaining agreement, the parties changed the manner in which vacation accrual occurred. Prior to the change, vacation accrual was determined based on the employee's prior year's hours of work. After the agreed upon amendment, vacation accrual became based on the current year's hours worked, not the prior year's.

In November 2017, in response to an inquiry over the vacation accrual for Kathy Astley (Astley), Theresa Knowles (Knowles), Assistant Town Accountant, responded by email to Astley's supervisor, Sarina Bluhm (Bluhm). In this email that Bluhm forwarded to Astley, Knowles outlined the Town's policy on vacation accrual and specifically outlined Astley's current accrual. During the arbitration hearing, Astley acknowledged that she received this email response from the Town.

On January 25, 2018, Union President Betsy Fijol (Fijol) filed a grievance on behalf of Astley, contesting the Town's calculation of Astley's vacation accrual.

On this grievance letter, the Union stated that “[t]he Union waives the time line (sic) on the grievance process.” At no time did the Town waive the timeline for filing the initial grievance either verbally, or in writing as is required in the collective bargaining agreement.

During the grievance process, the parties placed the grievance process on hold in an attempt to settle the matter. Ultimately settlement attempts were unsuccessful, and the matter was presented to the Board of Selectmen, the last step of the internal grievance procedure, on March 5, 2018. The Union again announced its intent to waive the grievance timeline. The Board of Selectmen issued its denial response on April 4, 2019, and the next Board meeting was on April 16, 2019.

During July 2019, Fijol and Human Resources Director Scott Bragdon (Bragdon) had a conversation where Fijol indicated that the Union was considering filing for arbitration on the Astley matter. Bragdon informed Fijol that it was too late to file for arbitration. The Union filed for Arbitration on July 30, 2019.

POSITIONS OF THE PARTIES

THE EMPLOYER

It is a bedrock principal of arbitration that when parties have established clear and unambiguous time limits for the initial filing and subsequent steps of a grievance procedure, those time limits should be strictly enforced. Time limits allow both parties the certainty of knowing that, after a given time period, if a grievance has not been filed over a particular practice, the other party cannot object months, or even years later. Additionally, the most important characteristic

of the contractual time limits is the fact that they were collectively bargained by the parties. Given the importance of timelines within a grievance procedure, the failure to abide by such timelines is fatal.

The Union's Initial Grievance was Untimely

Article 16, Section 1 of the collective bargaining agreement provides that grievances must be filed "within fifteen (15) working days of [the matter's] occurrence, or within fifteen (15) working days of awareness of the occurrence." The Union failed to bring this grievance within that time period.

First, the Union was aware of the calculation of vacation policies in 2011 when the change in accrual was first implemented. In fact, the change was the direct result of contract negotiations. Additionally, Union President Fijol had multiple conversations with the Town's Human Resources Director about the accrual of vacation time dating back to 2012. The grievance is therefore untimely as Astley's vacation has accrued in the same manner since 2011, and the Union was aware of the Town's accrual process at that time.

Second, the Union and the grievant were specifically aware of the Town's calculation of Astley's vacation time since at least November 29, 2017. Astley, as well as a union representative, received an email describing the Town's calculation of her vacation time and attached to the response was the Town's vacation accrual policy. Furthermore, Astley testified at the hearing that she was aware of the Town's calculation of her vacation time on November 29, 2017. However, the Union did not file a grievance until January 25, 2018, almost two months later. There can be no dispute that Astley was aware of the Town's calculation more

than fifteen working days before the grievance was filed. Therefore, the grievance is untimely and must be dismissed.

The Demand for Arbitration is Untimely

The collective bargaining agreement provides that a demand for arbitration must be submitted to the Massachusetts Department of Labor Relations “[w]ithin fifteen (15) working days from the date of their next meeting after receipt of the written decision by the Board of Selectmen.” The Board of Selectmen’s decision was issued on April 4, 2019, and the Board’s next meeting was on April 16, 2019. The Union did not file its demand for arbitration until more than three months later, on July 30, 2019. This is well in excess of the timeline outlined in the grievance procedure.

The Town Did Not Consent to Waiver of the Grievance Procedure Timelines

The Union has asserted that the timelines of the grievance procedure were waived, pointing to its own letters and statements in which it has waived timelines. However, Article 16, Section 13 of the collective bargaining agreement provides that time limits may be waived or modified “by mutual consent of the parties in writing.” The Union’s evidence demonstrates that the Union consistently waived timelines, the Town however, has never waived the timelines for the initial filing of the grievance or the timeline for the demand of arbitration. The Union failed to put forward any evidence that the Town waived these timelines. There is no dispute that the grievance process was placed on hold during settlement discussions; however, those settlement discussions terminated before the grievance was submitted to the Board of Selectmen.

Conclusion

The Union failed to meet the clear timelines of the collective bargaining agreement. First, it failed to file its initial grievance with fifteen days of the occurrence, which dates back to 2011, or awareness of the occurrence, which undeniably occurred on November 29, 2017. Second, the Union failed to file a demand for arbitration pursuant to the timeline of the grievance procedure, instead waiting more than three months after the Board of Selectmen's decision to file with the Department of Labor Relations. The Town, therefore, requests that the arbitrator dismiss the grievance as it is not procedurally arbitrable.

THE UNION

The collective bargaining agreement is very clear that timelines may be waived by the parties by mutual agreement. A grievance was filed by Union President Fijol on behalf of Astley. In the grievance, the Union stated that it agreed to waive the time limits. The grievance was presented to Human Resource Director Bragdon, who did not disagree with the waiving of the timelines which was a normal course of practice between the Union and the Town in prior grievances and disputes.

Astley met with Bragdon on January 16, 2018 when she reached her 20th year with the Town. Astley questioned how her accumulation of vacation time was being accounted now that she reached the top threshold for accumulation, however this was not being reported to her correctly. The only acknowledgement of any vacation benefit she would be entitled to was provided to her in an email which detailed how her hours would accrue relating to her reduction in hours from

30 hours to 24 hours per week. This email was from the Director of Library Services, and was not an official documentation of her time accumulation, any official documentation would have been provided by the Director of Finance or the Director of Human Resources.

The Union and the Town attempted several times to resolve the grievance, to no avail. At no time during these negotiations did Bragdon claim or charge a timeliness issue. During this time of reviewing the proposed settlement agreement, the Town Administrator vacated his position leaving no individual to complete the process of the grievance. The parties moved the issue to the Board of Selectmen as the final in house step of the grievance procedure. The Board and the Union met on March 5, 2019. At no time during the proceeding did Bragdon raise the issue of timeliness. At the conclusion of the meeting, the Union stated to the chairperson that the timelines, as the regular practice, would be waived to allow for full deliberations and give the Board scheduling flexibility as they are volunteers. The Board accepted the offer and thanked the Union for their cooperation. The Union received the Board's answer on April 4, 2019. If the timelines had not been waived, the Board would have been required to respond no later than March 26, 2019.

After receiving the Board's response, the Union deliberated on whether to move forward to arbitration. Once decided, the Union filed the required paperwork and fees. At no time after receiving the Demand for Arbitration did, the Town Administrator, Bragdon, or the Town Attorney raise the issue of arbitrability.

Conclusion

It is clear that the timelines were waived in this grievance. The collective bargaining agreement allows for timelines to be waived and there is a current past practice to routinely waive the timelines. Therefore, no violation of the negotiated grievance procedure occurred. The Union requests that the arbitrator find in favor of the Union and order this grievance to proceed to arbitration.

OPINION

The issue before me is:

Is the grievance procedurally arbitrable?

For all the reasons stated below, the grievance is not procedurally arbitrable, and the grievance is denied.

There are two distinct issues of procedural arbitrability in dispute. First, and foremost, was the initial grievance filed in a contractually timely manner? Second, was the Demand for Arbitration filed within the stated guidelines of the collective bargaining agreement?

Article 16, Section 1 states in relevant part:

No matter shall be subject to the grievance procedure unless taken up within fifteen (15) working days of its occurrence, or within fifteen (15) working days of the awareness of the occurrence.

The Union filed the grievance in dispute on January 25, 2018. The Town argues that the issue raised in the grievance, the change of vacation accrual, has been occurring since 2011, when the language of the collective bargaining agreement was renegotiated and agreed to by the parties. Accordingly, the Town feels that the Union was on notice of the alleged problem since 2011 and the

grievance is untimely. At a minimum, the Town argues, that the grievant has specifically been on notice since November 29, 2017, of the alleged violation of the collective bargaining agreement over vacation accrual after receiving an email which outlined the Town's vacation accrual policy and specifically described her accrual calculations.

For the sake of this decision, I will focus on the grievant's knowledge of the alleged violation, as even though the Union President filed the grievance, it was filed on behalf of the grievant. On November 29, 2017, the Town, in response to an inquiry sent an email to Astley that outlined the Town's vacation accrual policy and specifically how that effected Astley's vacation accrual for the year. It is clear that on November 29, 2017, that Astley had "awareness of the occurrence" of the event which led to the filing on the grievance. As such, under the terms of the collective bargaining agreement, a grievance over the issue of vacation time accrual should have been filed no later than December 20, 2017, the fifteenth working day. In this case, the grievance was not filed until January 25, 2018, over a full month later.

The Union argues that notwithstanding the tardiness of the filing, the matter should be found to have been timely filed as the timelines had been waived. The Union points to the grievance itself, where it is stated that: "[t]he Union waives the timeline on the grievance procedure." The Union also argues that the parties routinely waived timelines in the grievance and arbitration procedure.

Article 16, Section 13 states that: "[t]ime limits for the grievance procedure may be waived, or modified by mutual consent of the parties, in writing." While the

Union clearly waived the timelines in writing, the Town never waived the timeline for filing the initial grievance. The collective bargaining agreement calls for all waivers of timelines to be by mutual consent in writing. If the Union were allowed to unilaterally waive the timeline to file a grievance simply by so stating on the grievance form, it would make the timeline for the initial filing meaningless and allow for grievance filings at any time regardless of the actual date of the alleged violation, something that was clearly not the intent of Article 16. While the parties acknowledged and agreed that waivers were a possibility, they also mandated that they be mutual and in writing. The Union's unilateral attempt to waive the timelines is insufficient to satisfy the requirements of waiver under the collective bargaining agreement.

As to the Union's argument of a past practice of routinely waving timelines, there seems to be significant evidence that the parties have in the past waived the timelines of the internal grievance procedure. There is no evidence however, that the Town has ever waived the timeline of the initial filing as the Union is claiming here. Additionally, the direct testimony of Bragdon was that he had never waived the timeline on the initial filing of the grievance in this case.

Based on my finding that the grievant was aware of the occurrence of the alleged violation on November 29, 2017; that the grievance was not filed until January 25, 2018; that the Town had not waived the timeline for the initial filing of the grievance; and the lack of a supportable past practice for waiving the initial timeline for filing a grievance, I find the grievance to be untimely in violation of the collective bargaining agreement.

Having found that the grievance is not procedurally arbitrable, based on the tardiness of the initial filing, I need not decide whether the matter was timely filed for arbitration.

AWARD

The grievance is not procedurally arbitrable, and the grievance is denied.



Timothy Hatfield, Esq.
Arbitrator
August 28, 2020