COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of the Arbitration Between: TOWN OF HULL -and- HULL FIREFIGHTERS, Local 1657	ARB-20-8374

Arbitrator:

Timothy Hatfield, Esq.

Appearances:

James B. Lampke, Esq. - Representing Town of Hull

Paul T. Hynes, Esq. - Representing Hull Firefighters, Local 1657

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 substantively arbitrable, but the Town did not violate the collective bargaining agreement when it removed the grievant from §111F benefits in September 2020. The grievance is denied.

Timothy Hatfield, Esq.
Arbitrator
April 12, 2022

INTRODUCTION

On December 28, 2020, the Hull Firefighters, Local 1657 (Union) filed a unilateral petition for Arbitration. Under the provisions of M.G.L. Chapter 23, Section 9P, the 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 Web Ex on June 30, 2021.

The parties filed briefs on October 20, 2021.

THE ISSUES[1]

Is the grievance substantively arbitrable?

If so, did the Town violate the collective bargaining agreement when it removed the grievant from §111F benefits in September 2020?

If so, what shall be the remedy?

RELEVANT CONTRACT LANGUAGE

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

> Article XIV Grievance Procedure (In Part)
>
> Section 1: Any grievance of the members of the Fire Department in respect to wages, rate of pay, or other items and conditions of employment arising under the agreement, or in connection with the interpretation thereof, shall be handled as follows: …
>
> Article XXII Limited Duty (In Part)
>
> Section 1: Whenever a firefighter is incapacitated because of an injury or by one of, or multiple of the following infectious diseases (meningitis, childhood communicable diseases,

[1] The parties were unable to agree on a stipulated issue and authorized the arbitrator to craft an appropriate issue.

herpes virus, hepatitis A, hepatitis B, hepatitis non A/B or, hepatitis C, lice or scabies) sustained in the performance of duty, without fault of his/her own, in accordance with MGL Ch. 41, sec. 111F, said firefighter shall be granted leave without loss of pay, in accordance with Article XXII of this Agreement for the period of such incapacity. …

RELEVANT MASSACHUSETTS GENERAL LAW

Acts of 2020
Chapter 53 (In Part)

AN ACT TO ADDRESS CHALLENGES FACED BY MUNICIPALITIES AND STATE AUTHORITIES RESULTING FROM COVID-19.

Whereas, The deferred operation of this act would tend to defeat its purposes, which are to make certain changes in law in response to a public health emergency, each of which is immediately necessary to carry out to accomplish important public purposes, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public health and convenience. …

SECTION 14. (a) Notwithstanding any general or special law to the contrary, subsections (b) and (c) of section 91 of chapter 32 of the General Laws shall not apply in calendar year 2020 to the following 2 categories of persons for hours worked and earnings received during the governor's March 10, 2020 state of emergency:

(i) any person who has been retired and who is receiving a pension or retirement allowance, pursuant to said chapter 32 or any other general or special law, from the commonwealth or a county, city, town, district or authority; or

(ii) any person whose employment in the service of the commonwealth or a county, city, town, district or authority has been terminated, pursuant to said chapter 32 or any other general or special law, by reason of having attained an age specified in said general or special law or by the rules and regulations of any department or agency of the commonwealth or a county, city, town, district or authority without being entitled to any pension or retirement allowance.

These 2 categories of persons may, during the state of emergency and subject to all other laws, rules and regulations governing the employment of persons in the commonwealth or a county, city, town,

> district or authority, be employed in the service of the commonwealth or a county, city, town, district or authority, including as a consultant or independent contractor or as a person whose regular duties require that such person's time be devoted to the service of the commonwealth, county, city, town, district or authority during regular business hours.
>
> (b) This section shall not apply to individuals retired under a general or special law on disability. …

Chapter 41, Section 111F (In Part)

> Whenever a police officer or fire fighter of a city, town, or fire or water district is incapacitated for duty because of injury sustained in the performance of his duty without fault of his own, or a police officer or fire fighter assigned to special duty by his superior officer, whether or not he is paid for such special duty by the city or town, is so incapacitated because of injuries so sustained, he shall be granted leave without loss of pay for the period of such incapacity; provided, that no such leave shall be granted for any period after such police officer or fire fighter has been retired or pensioned in accordance with law or for any period after a physician designated by the board or officer authorized to appoint police officers or fire fighters in such city, town or district determines that such incapacity no longer exists. All amounts payable under this section shall be paid at the same times and in the same manner as, and for all purposes shall be deemed to be, the regular compensation of such police officer or fire fighter. …

FACTS

The Town of Hull (Town or Employer) and the Union are parties to a collective bargaining agreement that was in effect at all relevant times to this arbitration. The grievant, John King (King / grievant) was a former firefighter for the Town who retired in 2016 and commenced receiving his pension.

On April 3, 2020, in response to the COVID-19 pandemic, the Massachusetts Legislature passed c. 53 of the Acts of 2020 (Act). Section 14 (§14) of the Act temporarily removed the cap on hours and earnings for certain retired employees.

On April 7, 2020, at the request of the Town, King returned to work as a firefighter under the provisions of the Act. King was assigned to Group 4, Station One, Engine One, which was a one-man assignment, working a twenty-four-hour shift. Upon his return to work, King continued to receive his retirement pension payments, as well as compensation for his hours worked.

On June 20, 2020, King began to feel pain in his chest and arm during his shift. Medics responded to Station One and transferred King to South Shore Hospital where he was admitted to the Cardiac Care Unit. King did not return to work for the Town after this cardiac incident. King requested to be placed on Injured On Duty (IOD) pay under c. 41, §111F (§111F). The Fire Chief placed King on IOD and he began receiving disability pay under §111F for a period of six weeks.

On September 15, 2020, Town Manager Lemnios (Lemnios) notified King that he was being removed from IOD leave under §111F as he was placed on IOD in error. Lemnios informed King that because he was already retired and receiving a retirement pension, he was ineligible for §111F benefits. On September 28, 2020 a grievance was filed over King's removal from IOD leave. The grievance was denied at all steps of the grievance procedure, resulting in the instant arbitration.

POSITIONS OF THE PARTIES

THE UNION

The arbitrator's role is to give effect to all provisions of the collective bargaining agreement. In this case the parties negotiated a straight forward policy which would be followed for injured leave eligibility in Article XXII, §1. A careful

review of Article XXII, §1 and the COVID Emergency Act demonstrates that both are clear and unambiguous. It is uncontradicted that King was performing work as a firefighter when he became incapacitated due to cardiac problems. It is also uncontradicted that King was still incapacitated when the Town Manager made the arbitrary and erroneous decision to remove him from the injured leave payroll.

There is also no ambiguity in §14 of the COVID Emergency Act. The provision that the employee be "subject to all other laws, rules and regulations governing the employment" is dispositive of the issue. This is precisely why King was eligible to become an active member of the Union, pursuant to M.G.L. c. 150E and he began paying dues. This is also why the Town was required to make all tax withholdings and retirement withholdings. Therefore, because, pursuant to the COVID Emergency Act he was subject to all laws covering his employment, he was required to join the Union and was subject to the collective bargaining agreement's recognition clause and the injury leave provisions in Article XXII, §1.

Since this was the first time a retired Hull firefighter had been allowed to return to duty, the arbitrator is tasked with resolving this grievance having no past practice and relying solely on language. For the Town to ignore clear and unambiguous language is a violation, as the Town does not have the unfettered and absolute right to alter or add to the collective bargaining agreement unilaterally.

Conclusion

This is the first time in the history of the Hull Fire Department that a firefighter was removed from injured leave:

1. Without being cleared to return to duty;
2. Without being examined by the Town physician;
3. Based on the arbitrary decision of the Town Manager; and
4. Without being retired for Accidental Disability retirement.

Section 111F provides income protection in cases where public servants in the most high-risk public safety jobs incur injury or illness as a result of that job and are unable to work. In this case King, due to his service to the Town during the State of Emergency is now left with a serious cardiac condition. Investigations concerning injured leave benefits deserve a high degree of accuracy and care which was not done in this case.

The Union requests that the arbitrator issue a make whole remedy and order that King be reinstated to the injured leave payroll retroactive to September 15, 2020, that retirement contributions be withheld from both the back pay and front pay, and any other remedy which the arbitrator deems fair and just.

THE EMPLOYER

Grievance is Not Arbitrable

It is a well-recognized principle of arbitration law that arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit. There is no evidence to conclude that the Town agreed to submit to arbitration disputes over the statutory benefit of M.G.L. c.41, §111F.

The gravamen of the Union's complaint is that the Town improperly removed King from the §111F benefits he was receiving while he was at the same

time receiving his retirement allowance. The Union cites Article XXII of the collective bargaining agreement as the provision violated by the Town. If the dispute does not come under that provision, then the dispute is not arbitrable under the collective bargaining agreement and the arbitration should be denied.

Article XIV, Grievance Procedure provides: “any grievance of the members of the Fire Department in respect to wages, rate of pay or other terms and conditions of employment arising under the agreement, or in connection with the interpretation thereof, shall be handles as follows …” The collective bargaining agreement is clear that for a dispute to be a grievance subject to arbitration, it must be one that can be said to be arising under the agreement. Thus, as a threshold matter, the arbitrator must determine that the entitlement to §111F benefits or the removal from §111F benefits arises out of the collective bargaining agreement. In this case, the collective bargaining agreement is clear that §111F benefits do not arise out of the contract, but rather from an independent state law.

The collective bargaining agreement is devoid of any provision providing for payment of §111F benefits or the non-payment of §111F benefits and is silent on entitlement to §111F benefits. That silence, especially when the Union could have sought to negotiate a provision, is most telling that §111F is not a benefit provided by the collective bargaining agreement, but rather is provided by the statute itself.

The language of Article XXII, cited by the Union, does not create a contractual right to §111F benefits. Rather, it creates a contractual process for an employee already on §111F benefits to be assigned light duty. A dispute over the entitlement to §111F benefits does not arise under the contract and cannot be the

subject of the grievance procedure or lead to arbitration. Thus, by its plain terms, the collective bargaining agreement does not provide for §111F benefits, and the grievance is not arbitrable.

Merits

Adopting the interpretation argued by the Union is contrary to the plain language of §111F, and §14 of c. 53 of the Acts of 2020 and would lead to the absurd result that a retired employee receiving a pension can at the same time and from the same employer, receive his full compensation under Section §111F, thus having two streams of income from the same community. Since the Legislature never provided in §111F and/or §14 that an employee can receive both benefits, it can be said that its intention was to not allow an employee on a retirement pension to also collect his full pay on §111F.

Article XXII Limited Duty Not Violated

Article XXII does not provide a basis for someone to claim entitlement to §111F. The process for placing someone on §111F benefits remains the statute and not the collective bargaining agreement. For the arbitrator to find otherwise would be adding language to the collective bargaining agreement and such a modification is beyond the scope of the arbitrator's authority. Any failure to place or keep someone on §111F must be addressed under the statute. Adequate remedies are provided under the law apart from the collective bargaining agreement.

§14

Just as the arbitrator has no authority to add language to the collective bargaining agreement, he similarly lacks the authority to add language to a statute. While it would have been helpful if the Legislature had addressed the issue of what happens when a retired employee is brought back to work under §14 and is then injured, for whatever reason it did not address that issue. No presumption can be applied to explain why it wrote the statute the way it did. What is clear is that it did not see fit to provide affirmatively that a called back employee under §14 who is injured is entitled to §111F. There is no basis or authority for the arbitrator to change the statute even if he wanted to or had good reason to do so.

Public Policy

§111F specifically provides that one cannot receive benefits if the employee has retired or is on a pension. §14, the law under which King was temporarily brought back to work, does not change §111F and is silent on that issue. The Legislature clearly intended that an employee who is collecting a retirement pension cannot also at the same time collect §111F benefits. An award in favor of the Union would frustrate the purpose of §111F which was designed not to provide a windfall to employees, but to provide compensation 100% tax free to public employees injured in the performance of their job. Being able to collect both §111F benefits and a pension from the same employer would create a windfall for the employee. The law disfavors a windfall or double dipping on §111F and would be against public policy to collect both from the same employer.

Conclusion

Based on the evidence presented at the hearing, as well as the arguments set forth in this brief, the grievance should be denied.

OPINION

The issues before me are: Is the grievance substantively arbitrable? If so, did the Town violate the collective bargaining agreement when it removed the grievant from §111F benefits in September 2020? If so, what shall be the remedy?

For all the reasons stated below, the grievance is substantively arbitrable, but the Town did not violate the collective bargaining agreement when it removed the grievant from §111F benefits in September 2020, and the grievance is denied.

Substantive Arbitrability

As a threshold matter, the first question to be answered is whether the grievance is substantively arbitrable. For a grievance to be substantively arbitrable under the collective bargaining agreement, it must concern "wages, rate of pay, or other items and conditions of employment arising under the agreement, or in connection with the interpretation thereof."

Article XXII of the collective bargaining agreement states that:

> Whenever a firefighter is incapacitated because of an injury … sustained in the performance of duty, without fault of his/her own, in accordance with MGL c. 41, sec. 111F, said firefighter shall be granted leave without loss of pay, in accordance with Article XXII of this Agreement for the period of such incapacity.

§111F is clearly and unequivocally referenced and incorporated into the collective bargaining agreement in Article XXII. As such, a grievance objecting to a firefighter's removal from §111F, falls within the "in connection with the

interpretation" language of Article XIV. For that reason, the grievance is substantively arbitrable.

Merits

As noted above, the parties incorporated §111F into the collective bargaining agreement in Article XXII. As a result of the Governor's declaration of a State of Emergency in Massachusetts in the spring of 2020, the Legislature passed c. 53, §14 of the Acts of 2020. §14 temporarily waived the income earning cap and the hours cap of retired employees to help alleviate the burden cities and towns were having keeping municipal services functioning during the COVID-19 pandemic.

King retired from the Town in 2016 and began collecting his retirement pension. On April 7, 2020, he returned to service as a firefighter for the Town under the provisions of §14. King continued to receive his retirement pension while working for the Town and receiving compensation for his services. While §14 lifted the cap on earnings and the amount of hours a retiree could work, it was silent in regards to eligibility for §111F benefits should a retired employee be hurt on the job as happened to King.

A review of the language of §111F reveals that retirees are specifically excluded from eligibility for §111F benefits. §111F states that: "no such leave shall be granted for any period after such … fire fighter has been retired or pensioned." There is no dispute that King was retired and receiving his pension before and during his return to service with the Town. This restriction in §111F and §14's silence on the issue, combine to make King ineligible for IOD leave under §111F.

Because King was ineligible under the clear and unambiguous language of §111F and the Legislature failed to address the issue in §14, his removal from IOD leave by the Town is not a violation of the collective bargaining agreement. Removing King from that which he is ineligible for in the first place cannot be a violation of the collective bargaining agreement.

For all the reasons stated above, the Town did not violate the collective bargaining agreement when it removed the grievant from §111F benefits in September 2020 and the grievance is denied.

AWARD

The grievance is substantively arbitrable, but the Town did not violate the collective bargaining agreement when it removed the grievant from §111F benefits in September 2020. The grievance is denied.

Timothy Hatfield, Esq.
Arbitrator
April 12, 2022