

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of the Arbitration Between:

WORCESTER HOUSING AUTHORITY

-and-

AFSCME, COUNCIL 93

ARB-21-8533

Arbitrator:

Timothy Hatfield, Esq.

Appearances:

Nicholas Anastasopoulos, Esq. - Representing Worcester Housing Authority

Jared Kelly, Esq. - Representing AFSCME, Council 93

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. The grievance is denied.



Timothy Hatfield, Esq.
Arbitrator
September 16, 2022

INTRODUCTION

On March 17, 2021, AFSCME, Council 93 (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 Web Ex on September 13, 2021.

The parties filed briefs on December 8, 2021.

THE ISSUE

Issue:

- 1) Is the grievance procedurally arbitrable? If so,
- 2) Did the Worcester Housing Authority have just cause to issue a one-day suspension to Jessica Santiago? If not, what shall be the remedy?

RELEVANT CONTRACT LANGUAGE

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

ARTICLE 8 - GRIEVANCE PROCEDURE (In Part)

Section 1 - Definition of Grievance

An alleged violation of a specific, express provision of this Agreement.

Section 2 - Grievance Steps

A grievance filed by an employee covered by this Agreement shall be filed in accordance with Section 2 of this Article. The Union may file a

grievance on behalf of two or more employees covered by this Agreement starting at Step- 3 of the grievance process.

(a) Step One (Informal Discussion)

An employee, with the Union's assistance if the employee so chooses, shall first discuss the grievance with their immediate supervisor on an informal basis in an effort to resolve the matter. This must be done within five (5) working days (Monday through Friday, excluding weekends and holidays) after the employee had a reasonable basis to know of the alleged violation. The immediate supervisor shall hand deliver their written decision to the employee within five (5) working days (Monday through Friday, excluding weekends and holidays) after the discussion, a copy shall be sent to the Union.

(b) Step Two (Department Head)

After obtaining the Supervisor's Step One written decision, the employee shall complete the Step Two portion of the Employee Grievance Form certifying that the employee completed Step One of the grievance procedure and requesting a Step Two hearing with the Department Head. The employee must deliver the Step Two grievance form to the Department Head within ten (10) working days (Monday through Friday, excluding weekends and holidays) after the informal discussion with their immediate supervisor or within ten (10) working days (Monday through Friday, excluding weekends and holidays) after receiving notice that the grievance was denied, whichever date last occurs. The Employee Grievance Form shall be delivered by in-hand service, via interoffice mail, email, or by regular first class mail to the Department Head at the WHA.

The Department Head must give the employee a hearing within ten (10) working days (Monday through Friday, excluding weekends and holidays) of receipt of the written grievance request. Within ten (10) working days (Monday through Friday, excluding weekends and holidays) of the hearing, the Department Head's decision shall be hand- delivered, unless the employee is on leave, in which case it shall be mailed to the employee's home address by regular first class mail. A copy shall be sent to the Union if the employee is being represented by the Union.

(c) Step Three (Executive Director)

If, after receipt of the Department Head's written decision, the employee is not satisfied with the decision, the employee must, within ten (10) working days (Monday through Friday, excluding weekends and holidays), complete Step Three (Appendix C) of the Employee Grievance Form requesting a hearing with the Executive Director before proceeding to Step Three.

The Executive Director must then give the employee a hearing at a reasonable time and place, but no later than ten (10) working days (Monday through Friday, excluding weekends and holidays) after the Executive Director receives the grievance. The Executive Director's decision shall be delivered by in-hand service, via interoffice mail, email, or mailed by certified mail to the employee's home address to the employee within ten (10) working days (Monday through Friday, excluding weekends and holidays) of the hearing. A copy shall be sent to the Union if the employee is being represented by the Union. ...

RELEVANT MEMORANDUM

INTEROFFICE MEMORANDUM (May 13, 2020) (In Part)

COVID-19 "Coronavirus" Update

WEARING OF MASKS

As mentioned previously and on several occasions since the start of the pandemic, employees are **REQUIRED** to wear their masks while they are working, particularly when they are around other people. This is not optional.

I have personally witnessed incidents where employees are not wearing their masks in close contact with others. As a result of this, we are now issuing discipline for employees not adhering to this directive. It is important that you know that our employees who were diagnosed with Covid-19 caught it from each other – not from our residents. You must wear your mask at all times and conduct yourself as if everyone you encounter is infected. You may remove your

mask on breaks as long as you are maintaining a social distance of at least six feet from others.

FACTS¹

The Worcester Housing Authority (Housing Authority / WHA) and the Union are parties to a collective bargaining agreement that was in effect at all relevant times to this arbitration. The grievant, Jessica Santiago (Grievant/Santiago) works as a Storekeeper for the WHA.

On or about May 13, 2020, WHA Chief Executive Officer Alex Corrales (Corrales) issued an Interoffice Memorandum (Memorandum) updating all employees on the Coronavirus. This Memorandum discussed concerns related to observations of employees not wearing masks while at work. Corrales reminded all employees that wearing a mask was a requirement. Corrales also put employees on notice that, going forward, employees who did not adhere to the mask requirement were subject to discipline.

On January 11, 2021, a complaint was received alleging that the Grievant was frequently observed working, entering/exiting the building and leaving her work area without a mask. On January 12, 2021, based on the complaint, and video confirmation, the Grievant met with Vice President of Procurement, Michelle Ngo (Ngo). Ngo counseled Santiago about the importance of complying with the workplace rule of wearing a mask.

¹ By agreement between the parties and the arbitrator, the issue of procedural arbitrability was argued prior to proceeding to the merits of the case. The parties were directed to address the issue of procedural arbitrability first in their respective post-hearing briefs. Based on my ruling in this matter, I have included only the facts and arguments in this decision related to procedural arbitrability.

On January 13, 2021, Santiago was observed walking into the building without a mask on in violation of the Memorandum. Santiago received a letter of discipline and was suspended one day which she served on January 14, 2021. Santiago did not involve the Union in her meeting with Ngo, nor did she inform them of her discipline.

On January 29, 2021, Union President Michael Kozlowski (Union President Kozlowski / Kozlowski) filed a grievance on behalf of Santiago and her supervisor Paul Mathieson (Mathieson) as a class action grievance. Mathieson had been disciplined with a two-day suspension for failing to enforce a work rule.

The WHA denied the grievance at each step of the grievance procedure, resulting in the instant arbitration.

POSITIONS OF THE PARTIES

THE EMPLOYER

The grievance was not filed in a timely manner. Promptness is a key aspect of grievance adjustment and provides order to the grievance procedure.² Even if the Arbitrator would prefer to rule on the merits, the neutral has no power to ignore procedural requirements set forth in the collective bargaining agreement.

First, this present grievance is not a “class action” as contemplated under Section 2 of Article 8. The Grievant was disciplined based on her individual conduct. The fact that her immediate supervisor was disciplined based on his failure to enforce reasonable workplace rules does not make this matter a class action. Accordingly, this grievance should have been filed within five (5) days of

² Elkouri & Elkouri, How Arbitration Works, at ch.5-41-42.

the issuance of the discipline by the employee or with the assistance of the Union if the employee so chose. It is important to note that the Grievant, who has served on the Union's bargaining committee and is familiar with the collective bargaining agreement, has the option of involving the Union. In this matter she specifically testified that she did not want to create issues for her immediate supervisor, so she did not act on the discipline and did not seek to engage the Union on her behalf.

In the present matter, the clear intention of the Grievant was not to challenge the discipline imposed. The WHA, in accordance with the negotiated language, had every expectation that this matter concluded after five (5) days from issuance. In an effort to circumvent the procedural requirements of the collective bargaining agreement, the Union attempts to couch this matter as a "class action" allowing it to be filed at Step 3. While creative, it is procedurally defective. Two separate members of the bargaining unit were disciplined for two very different reasons – one for failing to follow a reasonable work rule and the other for failing to enforce the rule as a supervisor. Just because some of the underlying facts overlap does not mean it is a "class action". For all the above reasons, this grievance arbitration should be denied based on procedural arbitrability.

THE UNION

The WHA alleged that this grievance was not timely filed within the time frame prescribed in Article 8 Section 2 of the collective bargaining agreement. The collective bargaining agreement however states that: "The Union may file a grievance on behalf of two or more employees covered by this agreement starting

at Step 3 of the grievance process.” Step 3 does not specify a time range for a grievance filed on behalf of two employees. Step 1 provides that an employee, with the Union’s assistance if the employee so chooses, must first file a grievance with their immediate supervisor within five working days (Monday through Friday, excluding weekends and holidays) after the employee had a reasonable basis to know of the alleged violation. Kozlowski did not learn of the Grievant’s suspension nor Mathieson’s suspension until after the Martin Luther King Day holiday on January 18, 2021. The grievance was filed on behalf of both the Grievant and Mathieson on January 29, 2021, within 10 working days of when Kozlowski learned of the disciplinary actions.

The grievance was timely filed as required by the collective bargaining agreement as the Step 3 entry for multiple-grievant grievances is to be filed within ten working days of the employee’s reasonable knowledge of the alleged violation. Kozlowski did not learn of the disciplinary action against the Grievant and Mathieson until after January 18, 2021, and thus the grievance was properly filed.

OPINION

The issue before me is:

- 1) Is the grievance procedurally arbitrable? If so,
- 2) Did the Worcester Housing Authority have just cause to issue a one-day suspension to Jessica Santiago? If not, what shall be the remedy?

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

The parties' collective bargaining agreement states in Article 8 that:

Section 2 - Grievance Steps

A grievance filed by an employee covered by this Agreement shall be filed in accordance with Section 2 of this Article. The Union may file a grievance on behalf of two or more employees covered by this Agreement starting at Step 3 of the grievance process. ...

An employee, with the Union's assistance if the employee so chooses, shall first discuss the grievance with their immediate supervisor on an informal basis in an effort to resolve the matter. This must be done within five (5) working days (Monday through Friday, excluding weekends and holidays) after the employee had a reasonable basis to know of the alleged violation. The immediate supervisor shall hand deliver their written decision to the employee within five (5) working days (Monday through Friday, excluding weekends and holidays) after the discussion, a copy shall be sent to the Union. ...

It is clear from the facts of the case and the testimony presented, that the discipline issued to the Grievant and the discipline issued to her supervisor were not for the same offense. As such, the grievance does not satisfy the definition of a class action grievance fileable under the requirements of Step 3 of the grievance procedure. While some of the underlying facts overlap, the two employees were disciplined for completely different reasons. The Grievant's discipline is for failing to follow a work rule, and her supervisor's discipline is for failing to enforce a work rule. These are clearly two different categories of discipline that cannot be intertwined into a class action grievance. The Union's attempt to pigeonhole the two grievances into one class action grievance was an attempt to circumvent the timeline requirements of the collective bargaining agreement.

The Union's secondary argument, that Union President Kozlowski was unaware of the discipline issued to the grievant and filed the class action grievance within ten days of his knowledge, is equally unpersuasive as the "employee's

reasonable knowledge” language in the collective bargaining agreement is for the aggrieved employee and does not run to the Union President. Under this argument, a union president could have an unlimited amount of time to file a grievance simply because he was unaware of an issue that he was not involved with originally. This argument is contrary to the stated timeline for filing a grievance outlined in the collective bargaining agreement that the parties collectively bargained for and are entitled to enforce.

For all the reasons stated above, I find that the grievance is not procedurally arbitrable, and the grievance is denied.

AWARD

The grievance is not procedurally arbitrable. The grievance is denied.



Timothy Hatfield, Esq.
Arbitrator
September 16, 2022