COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of the Arbitration Between:	
LEICESTER PUBLIC SCHOOLS -and- INTERNATIONAL UNION OF PUBLIC EMPLOYEES, LOCAL 4	ARB-21-8582

Arbitrator:

Timothy Hatfield, Esq.

Appearances:

Kimberly Rozak, Esq. - Representing Leicester Public Schools

Thomas Horgan, Esq. - Representing International Union of Public Employees, Local 4

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 Leicester Public Schools did not violate the collective bargaining agreement by not providing light duty work to Lisa Johnson. The grievance is denied.

Timothy Hatfield, Esq.
Arbitrator
August 8,2023

INTRODUCTION

On April 14, 2021, the International Union of Public Employees, Local 4 (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 March 24, 2022.

The parties filed briefs on June 6, 2022.

THE ISSUES

The parties were unable to agree on a stipulated issue. The proposed issue before the arbitrator is:

The Union proposed:

Did the Leicester Public Schools violate the parties' collective bargaining agreement by not providing light duty work to Lisa Johnson from December 18, 2020, until she returned to work on March 17, 2021? If so, what shall the remedy be?

The School Committee proposed:

Did the Leicester Public Schools violate the parties' collective bargaining agreement by not providing light duty work to Lisa Johnson on Wednesdays after February 24, 2021, until she returned to work on March 17, 2021? If so, what shall be the remedy?

Issue:

As the parties were unable to agree on a stipulated issue, I find the appropriate issue to be:

Did the Leicester Public Schools violate the parties' collective bargaining agreement by not providing light duty work to Lisa Johnson? If so, what shall be the remedy?

RELEVANT CONTRACT LANGUAGE

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

> Article IV - Food Service Employees
>
> Food Service Employees will perform their duties as outlined in the job description or directed by the Food Service Director and the Superintendent/designee.
>
> Article VIII - No Strike**/**Lockout
>
> During the term of this agreement there shall be no strikes, work stoppages or slowdowns of school operations by the Union or its members. The employer agrees not to lock out any employee covered by this agreement.
>
> Article XIII - Hours of Work
>
> The regular hours of work each day will be consecutive except interruption of lunch periods. The workday for managers will be no less than six (6) hours fifteen (15) minutes (15 minutes for bank deposit). The workday for food service staff and their school assignment will be established by the food services director by the last day of the previous school year. Each employee will be scheduled to work a shift with regular starting and ending times.
>
> When work hours need to be altered due to the needs of the food services department, the food services director will meet with the union president to determine if a posting is required.
>
> The work year for the food service employees shall be the full days that school is in session for the school year. In addition, the food service director will schedule hours necessary for the opening or closing of the school, for cleaning, or for training required for professional standards. Such extra days shall not be less than 2 days per year, shall not be optional, and shall be scheduled prior to the start of the school year. Workers will be paid their regular rate of pay.

> The work schedule shall provide a ten (10) minute rest period during each four (4) hours of work. Whenever possible, the rest period shall be in the middle of the shift.
>
> Overtime work is hereby defined for the purpose of this contract as work performed by an employee in excess of eight (8) hours per day or forty (40) hours per week. The School Department agrees to pay any bargaining unit member time and one-half (1 1⁄2) the regular hourly rate for all overtime hours worked.
>
> Article X (In Part)
> Grievance Procedure
>
> A grievance shall be defined as a dispute concerning the interpretation, implementation, or application of this collective bargaining agreement….
>
> 3. Level Three
> …The Arbitrator or arbitration panel shall be without power to add to, subtract from, or modify in any way the provisions of this Agreement…
>
> Article XXXII (In Part)
>
> This contract represents the entire agreement of the parties. There are no inducements, promises, terms, conditions, or obligations made or entered into by either party other than those contained herein…
>
> This Agreement may not be modified in whole or in part by the parties except by instrument in writing duly executed by both parties.

FACTS

The Leicester Public Schools (Employer / District) and the Union are parties to a collective bargaining agreement that was in effect at all relevant times to this arbitration. Lisa Johnson (Johnson / grievant) is a food service worker at the high school and had been employed by the District at the time of the hearing for eleven years.

On December 4, 2020, Johnson had surgery on her left thumb. After the surgery, Johnson wore a cast, which was removed a week later due to swelling. Her left thumb was then put into a splint.

On December 18, 2020, a medical professional evaluated Johnson's left thumb. After the visit, she stopped at the school and gave Laurie Cascione (Cascione), then Food Service Director, a medical note from her Nurse Practitioner, Jonathan Ponte (Ponte), which stated, “This is to certify that Lisa M Johnson was evaluated in my office 12/18/2020. Lisa, due to medical reasons, can return to work immediately, but is restricted to light duty. All work-related activities 2 pounds or less in a cast/splint until further notice.” After submitting the note, Johnson requested to work light duty. Cascione said she would pass the note along to Cady Maynard and get back to Johnson. Johnson did not hear back from Cascione at this time. Johnson worked on and was paid for December 18, 21, and 22, 2020. December 23, 2020 was an early release day when food service workers did not work. From December 24, 2020, through December 31, 2020, the School District was on winter break, so food service workers did not work.

On or about January 19, 2021, Ponte re-evaluated Johnson and Johnson submitted another medical note to Cascione. On January 20, 2021, Johnson began working light duty each Wednesday thereafter through Wednesday, February 24, 2021. The School District advised Johnson she could no longer work light duty because she was not adhering to her medical provider’s lifting restrictions. Johnson did not work again until she was able to return to work full

capacity on March 17, 2021. The Union filed a grievance on March 4, 2021 that was denied at all steps resulting in the instant arbitration.

POSITIONS OF THE PARTIES

THE UNION

The Employer did not dispute the existence of a past practice between the parties of allowing members in the food service unit to perform light duty work when authorized to do so by a qualified medical physician.

It is generally accepted that certain, but not all, clear and longstanding practices can establish conditions of employment as binding as any written provision of the agreement.[1] In cases where the contract is silent with respect to a given activity, the presence of a well-established practice, accepted or condoned by both parties, may constitute an unwritten term on how a certain type of situation should be treated.[2]

A union management contract is all the oral understandings, interpretations, and mutually acceptable habits of action which have grown up around it over the course of time. It is well recognized that the contractual relationship between the parties normally consists of more than the written word. Day-to-day practices, mutually accepted by the parties, maintain the status of contractual rights and duties, particularly where they are not at variance with any written provision negotiated into the contract by the parties and where they are of longstanding and

[1] Arbitrator Dallas L. Jones, in Alpena General Hospital., 50 LA 48, 51 (1967)
[2] Arbitrator Thomas McDermott, in Texas Utility Generating Division., 92 LA 1308, 1312 (1989).

were not changed during contract negotiations.[3]

When it is asserted that a past practice constitutes an implied term of a contract, strong proof of its existence ordinarily will be required. Many arbitrators have recognized that, “in the absence of a written agreement, past practice, to be binding on both parties, must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as the fixed, and established practice accepted by both parties.” [4]

The Employer has not disputed the existence of a past practice of allowing members to work light duty if cleared by their medical professional. Johnson was previously allowed to work light duty in 2014 and testified she has observed other unit members work light duty in the past. The Employer has failed to offer any reasonable objection to allowing Johnson to have worked light duty on the dates in question, including but not limited to, a legitimate safety concern.

The Employer has a past practice of allowing members to work light duty when cleared by a medical provider to do so. This practice has been ongoing since at least 2014, unequivocally without objection, and has thus been accepted by both parties. The Employer’s decision to deny Johnson light duty resulted in a loss of accrued time and additional out-of-pocket expenses related to health insurance. The Employer has failed to establish just cause for forcing Johnson to utilize her accrued time, which was clearly triggered based upon its decision to deny light duty opportunities despite her medical clearance and the availability of work. Johnson’s request for light duty was supported by a medical opinion and the Employer, a non-medical professional, had no reasonable grounds to deny her

[3] Arbitrator Marlin Volz, in Metal Specialty Company, 39 LA 12 (1962).
[4] Celanese Corp. of Am., 24 LA168, 172 (1954).

request based upon a belief that it would be unsafe.

Conclusion

Based upon the above, the Union requests that the Leicester Public Schools be ordered to compensate Johnson for any and all health insurance premiums she was required to pay out of pocket for from March 1, 2021, through March 16, 2021; restore the nine sick days and three personal days that Johnson was required to exhaust from January 1, 2021, through March 17, 2021; that the Grievant be made whole; as well as any and all other remedies deemed appropriate.

THE EMPLOYER

Burden of Proof

In a contract interpretation case, the union has the burden of proof and must prove the contract violation by a preponderance of the evidence. In this case, that means the Union must show that the CBA provides for light duty and that the language allowing for light duty was improperly applied. The Union's grievance alleges that three contract articles were violated as a result of the way the District handled light duty for Ms. Johnson, so it must prove how these contract articles were violated. The District asserts that the Union cannot meet its burden because (1) there is no light duty language anywhere in the parties' CBA and (2) the Union introduced no evidence to show a violation of any of the three contract articles referenced in the Union's grievance or that any of the three articles have anything to do with providing light duty work to unit employees.

The Union also contends that there is a past practice of allowing employees to work light duty, and this past practice was violated. To prove this claim, the Union must show that the parties' contract has a past practice provision to serve as the anchor for its contract violation claim. There being no such language in the contract, the District likewise asserts that this claim fails.

The Grievance Must Stem from Language in the CBA

The grievance procedure is set forth in Article X of the CBA. It states, "[a] grievance shall be defined as a dispute concerning the interpretation, implementation, or application of this collective bargaining agreement." Thus, unless the alleged violation is based on contract language, the matter at issue is not properly the subject of a grievance. Further, the contract states at Section 3 of Article X, "[t]he Arbitrator or arbitration panel shall be without power to add to, subtract from, or modify in any way the provisions of this Agreement." Thus, the Arbitrator must be faithful in his adherence to interpreting and applying only the contract's language in deciding this case.

Finally, Article XXXII reinforces the requirement that a grievance be grounded in the CBA and acts as an anti-past practice provision. It states, "[t]his contract represents the entire agreement of the parties. There are no inducements, promises, terms, conditions, or obligations made or entered into by either party other than those contained herein." This last sentence makes clear that only the terms of the CBA bind the parties. In the absence of light duty language in the CBA, the District is not contractually obligated to provide light duty work.

The District did not Violate the CBA

The grievance describes a series of events and culminates by stating, "[T]his is a violation of the parties' past practice of allowing employees to work light duty, Article IV Food Service Employees, Article VIII No Strike/Lockout, Article XIII Hours of Work and any other relevant article." As stated above, the CBA does not contain a provision that relates to past practices. Because the grievance article in the CBA requires that a grievance be based on contract language, without a past practice clause in the CBA, a past practice cannot be the basis for a contract violation. The Arbitrator should therefore deny the grievance to the extent it claims the District violated past practice.

Article IV of the contract, entitled Food Service Employees, is a simple one sentence provision. It states, "Food Service Employees will perform their duties as outlined in the job description or directed by the Food Service Director and the Superintendent/designee." Ms. Johnson acknowledged that her job included lifting up to 40 pounds on a regular basis. With her two-pound lifting restriction, Ms. Johnson clearly was not able to perform the full scope of her job duties. As a result, the District did not violate this Article of the contract by not permitting Ms. Johnson to work light duty because this Article does not include light duty. Nor should the Arbitrator apply a tortured interpretation of this provision by finding that the Food Service Director instructed Ms. Johnson to do light duty work on Wednesdays (bagging lunch for students on remote school days) but then took that work away from her. She was subsequently instructed not to work because of management's

concern that she was not adhering to her lifting restriction. Thus, Ms. Johnson was not "directed by the Food Service Director" to perform other work.

Article VIII of the contract is the No Strike/No Lockout provision. It states that there shall be "no strikes, work stoppages or slowdowns of school operations by the Union or its members. The employer agrees not to lock out any employee covered by this agreement." This language likewise does not relate to light duty work and cannot be used by the Union in some contrived manner to claim that Ms. Johnson was "locked out" of work when she was advised by email on March 5, 2021 that she could no longer work light duty because she was not following the lifting restriction imposed by her medical provider.

The last article the Union cites in its grievance is Article XIII, Hours of Work. Again, there is no reference to light duty in this language. It merely outlines that employees will have regular start and end times for their shift, and sets the work year, rest periods, and when overtime is triggered. In fact, there is no language that has any bearing on this case whatsoever. Given that Ms. Johnson had a two-pound lifting restriction, whether it was for her left thumb, hand, or arm, she clearly could not do all of the required duties of her position, or her medical provider would not have written a note requiring she adhere to lifting restrictions. Thus, the language of this provision which says employees will have regular start and end times, clearly applies to employees who are able to perform the full scope of job duties. Without evidence that this article has ever been applied to mean that all bargaining unit members are guaranteed a work shift regardless of their ability to

perform the full scope of their duties, this article is not relevant to the issue in this case. The District did not violate Article XIII of the CBA.

The District Provided Work to Ms. Johnson

While the District was under no contractual obligation to provide Ms. Johnson light duty following her surgery in December 2000, it nonetheless did so within the scope of her lifting restriction. Based on the District's understanding of what her two-pound lifting restriction meant in terms of using her left hand, the District assigned Ms. Johnson to work on Wednesdays bagging take-away lunches for students who were learning remotely. The grievance does not allege that Ms. Johnson should have been working more days than Wednesdays or that she should have been assigned other light duty work. The dispute between the parties arose from the District's decision to stop the light duty work on Wednesdays because of its concern that Ms. Johnson was not adhering to her lifting restriction.

As a result, in the event the Arbitrator were to find some contractual obligation exists on the part of the District to offer light duty work, the Union's evidence would need to show that Ms. Johnson was safely working on Wednesdays and was entitled to continue that work. However, there was no evidence to prove that she was adhering to the lifting restriction or that the District's decision to suspend the light duty work was arbitrary, capricious, or a contract violation.

The Grievance Seeks a Remedy Beginning March 1, 2021

In the event the Arbitrator finds a contract violation and believes Ms. Johnson is entitled to relief, he should limit the remedy to five hours of pay for the

Wednesdays after March 1, 2021, that Ms. Johnson did not work. According to ER Exhibit 1, that would be Wednesday March 3, 2021, and Wednesday March 10, 2021. By Wednesday March 17, 2021, Ms. Johnson returned to work, and pay records show that Ms. Johnson was paid for working Wednesdays through February 24, 2021.

Conclusion

As stated above, light duty is not a part of the parties' CBA. As a result, there is no contract violation in this case. Further, the District did not violate the CBA by not continuing to provide light duty work to Ms. Johnson after it learned she was not following the lifting restrictions in the medical notes she provided to the District. The District asks the Arbitrator to deny the grievance.

OPINION

The issue before me is: Did the Leicester Public Schools violate the parties' collective bargaining agreement by not providing light duty work to Lisa Johnson? If so, what shall be the remedy?

For all the reasons stated below, the Leicester Public Schools did not violate the collective bargaining agreement by not providing light duty work to Lisa Johnson. The grievance is denied.

As this is a contract interpretation case, I must decide whether the union has met its burden of showing a violation of the collective bargaining agreement. In their grievance, the Union referenced articles of the collective bargaining agreement that do not refer to light duty work for bargaining unit employees, nor is light duty work referenced anywhere in the parties' collective bargaining

agreement. As such, I find that the collective bargaining agreement does not provide for light duty work, and therefore there is no violation of the collective bargaining agreement.

The other argument put forth by the Union is that there is a past practice of light duty work when cleared by a medical professional to do so. It argues that this past practice of light duty work was violated. For a binding past practice to exist, it must be: (1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties. Here, the Union did not meet its burden to show that all three of the elements needed for a past practice were present. The third element of “readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties” was not met. The Union points to Johnson's previously allowed light duty work in 2014, and her testimony that she had observed other unit members work light duty in the past, in an attempt to meet the third element. However, there is not enough evidence of the frequency of light duty work to meet the burden.

Unable to show a violation of the collective bargaining agreement, or the existence of a valid past practice, the Union has failed to meet its burden in this matter and the grievance is denied.

AWARD

The Leicester Public Schools did not violate the collective bargaining agreement by not providing light duty work to Lisa Johnson. The grievance is denied.

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Timothy Hatfield, Esq.
Arbitrator
August 8, 2023