COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of the Arbitration Between: CITY OF ATTLEBORO -and- MASSACHUSETTS PUBLIC EMPLOYEES, COUNCIL, LOCAL 1144	ARB-23-10131

Arbitrator:

Timothy Hatfield, Esq.

Appearances:

Timothy Zessin, Esq.	- Representing City of Attleboro
Sal Romano	- Representing Massachusetts Public Employees Council, Local 1144

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 City violated Article 17 of the collective bargaining agreement when it implemented its dress code policy in June 2023. The City and the Union are hereby ordered to bargain over the issues in a manner consistent with this decision.

Timothy Hatfield, Esq.
Arbitrator
January 31, 2025

INTRODUCTION

On July 17, 2023, Massachusetts Public Employees Council, Local 1144 (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 October 13, 2023.

The parties filed briefs on January 17, 2024.

THE ISSUE

Did the City violate Article 17 of the collective bargaining agreement when it implemented its dress code policy in June 2023? If so, what shall be the remedy?

RELEVANT CONTRACT LANGUAGE

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

Article XVII – Clothing

> Section 1. Employees shall adhere to the clothing policy established below:
> Employees must wear work boots or work shoes and socks of the type generally worn in the construction trades. They shall be heavy duty and in good repair. Sneakers, tennis shoes, sandals, dress shoes and similar casual and/or formal shoes are not allowed except with the express prior approval of the department head.
>
> Employees must wear long trousers as generally worn in the construction trades. Trousers shall be full length, a solid color, clean, neat and in good repair. Employees may wear shorts if appropriate and safe for the particular day's assignment. Short pants shall be clean, neat, in good repair and hemmed. Shorts may not be worn in the Water and Wastewater plants without the express permission of the Superintendent. Shorts may not be worn when cutting brush.

> Employees must wear T-shirts with the department emblem. They may wear polo shirts, or sweat shirts which display their department's logo in lieu of departmental T-shirts. Other clothing may be worn over the T-shirt as climate and safety conditions may necessitate. They must have their ID visible at all times.
>
> Section 2. Work gloves and foul weather gear, consisting of rain boots, rain hat, rain coat and rain pants, shall be provided by the City for the use of said employees in the performance of their duties. The City shall provide safety equipment, including hard hats, chaps, eye protection and ear protection. Employees shall wear such provided equipment when performing job duties.
>
> Section 3. Any employee who provides a medical exception to this policy, from a licensed physician, shall have such exception respected subject to the operating needs of the department.

FACTS

The City of Attleboro (City) and the Union are parties to a collective bargaining agreement that was in effect at all relevant times to this arbitration. The Union represents a bargaining unit comprised of approximately fifty non-managerial positions employed by the City within the following departments:

Water
Wastewater
Recreation
Parks and Forestry
Health
Public Works
Mayor

Bargaining unit members perform a variety of duties throughout the City. Many of these positions are required to perform physical tasks that may expose the employees to the risk of injury. There is no evidence that, prior to May 2023, the City had ever prohibited employees from wearing shorts on the grounds that doing so was not appropriate or safe for a particular day's assignment. Bargaining

unit members regularly wore shorts while performing duties such as grass cutting and other outdoor tasks involving the use of light and heavy equipment. In May of 2023, a bargaining unit member working at the zoo while wearing shorts was bitten on the leg by an animal and sustained an injury.

On May 26, 2023, the City issued a new dress code policy. This policy applied to all employees including members of this bargaining unit. In relevant part the policy stated:

> City of Attleboro employees are required to dress in a professional and appropriate manner consistent with their work environment and job duties.
>
> "Business Casual" attire is typically defined as no jeans, no shorts … Please be advised that employees should refrain from wearing clothing items that fall into the following categories: …
> - Shorts …
>
> (This list is not exhaustive; other items may be considered inappropriate.)
>
> Complaints or concerns about employee attire will be reviewed on a case-by-case basis.
>
> It is understood that there are some employees who work in the field or in other locations where jeans or more casual clothing is necessary and appropriate based on the work environment and job duties. … Even in those circumstances, most of the items on the above list remain unacceptable. Accordingly, employees working in the field should use discretion when varying from the above standards. …
>
> Any questions regarding this policy shall be directed to the department head or the Personnel Director.

After the issuance of this policy, the Union filed a grievance. In response to the grievance, the City issued a revised policy on June 28, 2023. This policy, in relevant part, stated:

> City of Attleboro employees are required to dress in a professional and appropriate manner consistent with their work environment and job duties. Please note that employee safety is paramount and the provisions of this policy are not intended to supersede either contractual requirements or the Occupational Safety and Health Administration (OSHA) guidelines. (454 CMR 25.00) Please use good judgment and reasonableness when applying this policy.
>
> For Office staff: "Business Casual" attire is typically defined as no jeans, no shorts …
> Please be advised that employees should refrain from wearing clothing items that fall into the following categories: …
> - Shorts …
>
> (This list is not exhaustive; other items may be considered inappropriate.)
>
> Complaints or concerns about employee attire will be reviewed on a case-by-case basis.
>
> It is understood that there are some employees who work in the field or in other locations where jeans (not ripped or torn), other pants or more casual clothing is necessary and appropriate based on the work environment and job duties. … Even in those circumstances, most of the items on the above list remain unacceptable. Accordingly, employees working in the field should use discretion when varying from the above standards. …
>
> Any questions regarding this policy shall be directed to the department head or the Personnel Director.

On June 29, 2023, the Union, unhappy with the revised policy, filed a Step 2 grievance that was denied by the City. The Union subsequently filed the instant arbitration.

POSITIONS OF THE PARTIES

THE UNION

This is a very simple dispute which arose when the City unilaterally changed the provisions of Article 17 of the collective bargaining agreement without any impact bargaining. The Commonwealth's Public Service employees are

protected by the Department of Public Safety not OSHA. Further, pursuant to 454 CMR 25.00, public service employers are not required to comply with OSHA standards. The City has relied heavily on the adoption of OSHA rules by Public Service employees. This is an erroneous claim and must be disregarded.

In Article 17, workers are allowed to wear shorts if appropriate and safe for a particular day's service. Neither "appropriate" nor "safe for a particular day's service" is defined in the collective bargaining agreement. Shorts are permitted as long as they do not create a safety issue. Other than cutting brush, there are no specific examples of when a worker can or cannot wear shorts to work.

Prior to May 2023, there were no claims employees were violating the dress code by wearing shorts. As a result of an incident at the zoo, the City decided to unilaterally change the dress code. As a result, on May 26, 2023, the City concluded that Article 17 did not comply with the 29 USC Section 651 which ensures that employees are equipped with "appropriate personal protective equipment in all operations where there is exposure to hazardous working conditions." The Commonwealth has not adopted these OSHA standards because the legislature has created its own OSHA-style safeguards administered by the Department of Public Safety for all public employees.

Shortly thereafter, the City released a "revised" dress code. The language mirrored the original dress code except it contained an additional sentence allowing for complaints or concerns to be reviewed on a case-by-case basis. This sentence is far too vague to apply any proper procedure.

The Union is by no means suggesting that an employee's health and safety are not important. The City will probably argue that the OSHA provisions are specifically concerned with wearing shorts. In other words, wearing shorts violates OSHA protections. This argument is without merit. Article 17 and the new Code abolish that argument because they are essentially stating the same thing. The City has created an opportunity to utilize undefined, as well as ambiguous terms to state its argument. The clothing requirement of the OSHA provision is based on common sense, and they provide examples of protective clothing.

The just, reasonable and objective way to address a resolution of this dispute is not the unilateral creation of a new dress code, but, rather, to realign the terms of Article 17 by properly bargaining for changes and/or amendments to it. Therefore, the application of the June 28th dress code must be rejected and replaced by a bargained for resolution.

THE EMPLOYER

Article 17 Conflict with OSHA

State plans are workplace safety and health programs that are covered by OSHA and are required to be at least as effective as the federal regulations in protecting employees and in preventing work-related injuries, illness, and deaths. There are seven OSHA approved state plans and Massachusetts is one of them. The Massachusetts state plan is codified as M.G.L. c. 149, §6$^{1/2}$ and is regulated by 454 CMR 25.00. In sum, the Massachusetts state plan requires all public sector employers to comply with the standards set by OSHA. It became effective on August 18, 2022, prior to the execution of the collective bargaining agreement.

City Not in Compliance When Employees Could Wear Shorts

Under OSHA, an employer is solely responsible for ensuring that its employees are "wearing [the] appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates the need for using such equipment to reduce the hazards to the employees."[1] OSHA does not give a precise definition of what constitutes personal protective equipment. Instead, OSHA leaves it up to the employer's best judgment regarding the risks that its employees are subject to when completing their daily work-related tasks.

It is clear that the regulations of OSHA focus on protecting workers who are required to perform manual labor by ensuring that they are equipped with proper safety equipment and protection. The majority of workers in the bargaining unit perform tasks involving manual labor, heavy machinery, and even zoo-kept wild animals, which subject them to the same hazards that OSHA is concerned with. Shorts do not protect the extremities of the majority of bargaining unit employees while they are performing their job duties.

The testimony at the hearing clearly established that the previous restrictions on the wearing of shorts – which gave employees discretion to determine whether shorts were appropriate and safe for a particular day's assignment – were entirely ineffective. Prior to May 2023, employees were allowed to wear shorts while performing tasks that could lead to injury, such as mowing grass, handling animals, and operating equipment. Under this policy, the

[1] 29 C.F.R. § 1926.28

City was unable to place any meaningful limitations on bargaining unit members' ability to wear shorts while performing the dangerous job duties outlined above.

Compliance with State and Federal Law Must Prevail Over Conflicting Terms of the Collective Bargaining Agreement

Arbitrators have the "authority to address external legal issues due to [a] potential conflict between federal law and agreement and parties' stipulations."[2] Generally, unless the parties specifically limit the powers of the arbitrator to any aspect of the issue submitted, it is often presumed that they intend to make the arbitrator the final judge on all questions that may arise in the disposition of the issue, including questions with respect to substantive law.[3] All contracts are subject to statutory and common law, and each contract includes all applicable law. Therefore, it follows that the arbitrator should not enforce a contract provision that is at odds with OSHA regulations and state statutes.

Conclusion

Based on the foregoing, the evidence presented at the hearing established that the City was justified in issuing its new dress code policy to ensure that it was providing a safe working environment for members of the bargaining unit in accordance with OSHA regulations. Because the City is now obligated to comply with these regulations, the Union's claim that the new policy violated Article 17 is without merit and the grievance should be denied.

[2] Alcoa Bldg. Prods., 104 LA 364 (Cerone, 1995).
[3] See Hirras v. National R.R. Passenger Corp., 10 F.3d 1142 (4th Cir. 1994).

OPINION

The issue before me is: Did the City violate Article 17 of the collective bargaining agreement when it implemented its dress code policy in June 2023? If so, what shall be the remedy?

For all the reasons stated below, the City violated Article 17 of the collective bargaining agreement when it implemented its dress code policy in June 2023, and it must be rescinded.

An arbitrator's authority is derived directly from the parties. This authority is expressed through the stipulated issue that the parties select before the hearing begins. In the present case, the parties agreed that the issue before me is:

> Did the City violate Article 17 of the collective bargaining agreement when it implemented its dress code policy in June 2023? If so, what shall be the remedy?

There can be no doubt that both the initial dress code policy and the revised dress code policy implemented by the City violated the plain language of Article 17. In the area relevant to this arbitration, shorts that were allowed in some circumstances in Article 17, are now banned in all circumstances. The City made this unilateral change during the term of a collective bargaining agreement and failed to bargain with the Union over the change.

The City, in this hearing, and in its response to the Union's grievance, opines that the change was mandated by OSHA regulations that the Commonwealth of Massachusetts adopted for public sector workers. While that rationale is debatable, it is ultimately not the issue before me. I have not been granted the authority by the parties to determine if the City's actions were necessary or proper based on federal or state regulations. I was only asked to

determine if the City's new dress code policy violated Article 17 of the collective bargaining agreement. Based on the limited authority I was granted by the parties; the City violated the collective bargaining agreement.

Remedy

Having determined that the City violated Article 17, the parties next granted me the authority to decide the appropriate remedy. Both sides ultimately want the same result, a safe working environment for the employees. The issue is the manner in which the City tried to make what it believed was a necessary change. The parties need to find a way to balance the City's concerns over compliance with OSHA and the dangers of wearing shorts, with the Union's rights under the collective bargaining agreement. The only way to do this is to bargain over the issue. Only then can the parties decide if pants are in fact "protective equipment" that OSHA requires the employer to provide, or if there are certain job duties that would allow the wearing of shorts.

As such, the appropriate remedy in this case is for the parties to bargain over the issue of the dress code policy change in a manner that will allow the parties to move forward in their shared goal of employee safety.

AWARD

The City violated Article 17 of the collective bargaining agreement when it implemented its dress code policy in June 2023. The City and the Union are hereby ordered to bargain over the issues in a manner consistent with this decision.

Timothy Hatfield, Esq.
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January 31, 2025