

AMERICAN ARBITRATION ASSOCIATION

In the Matter of Arbitration Between

NEPBA Local 550

-and-

Worcester County Sherriff's Department

AAA Case No. 01-20-0014-3554

Issued: September 3, 2021

Arbitrator: Timothy J. Buckalew

Appearances: Gary Nolan, Esq. for New England Police Benevolent Association, Local 550 (Union); [REDACTED] Esq. for Worcester County Sheriff's Department (Employer)

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PRELIMINARY STATEMENT

On May 17, 2021, the parties appeared for a remotely conducted hearing held under the rules and auspices of the American Arbitration Association. The following Decision and Award is based on the evidence adduced at the hearing, the parties' contract and the arguments made at the hearing and in post-hearing memoranda received on or after July 12, 2021.

ISSUES

The Union and Employer agree this grievance presents this issue:

“Did the Sheriff’s Office violate the parties’ collective bargaining agreement by the manner in which it administered and awarded personal (incentive) days, available to be earned pursuant Article 20, to correction officers? If so, what shall be the remedy?”

RELEVANT CONTRACT PROVISIONS

ARTICLE 17 SICK LEAVE

SECTION 1. Employees shall begin to earn sick leave immediately upon hire but shall not be entitled to use it until the employee has completed 90 days of continuous service. Such sick leave shall be limited to a maximum of fifteen (15) days (120 hours) annually, for each year of service. Notwithstanding the Personnel Rules and this Article, Sick leave shall be earned and administered based on the following two- tier system.

- (i) The first 40 hours of sick leave shall be earned and administered in accordance with the Massachusetts Sick Leave law and not based on this Article or the Personnel Rules.
- (ii) All hours of sick leave earned after the first 40 hours (i.e., the remaining 80 hours) shall be earned and administered in accordance with this contract and the Personnel Rules.

SECTION 2. An officer will not be entitled to paid sick leave if he or she engages in any other work for compensation during the same shift on which the officer was absent from work at the Worcester County Jail and House of Correction.

SECTION 3. The term "sickness" or "injury" will not include disability resulting from: (a) any form of physical disability, sickness or injury which an officer incurs while engaged in the commission of a crime for which he or she is convicted; and (b) sickness or injury caused by injury on duty, except as provided by law.

SECTION 4. An officer will not be entitled to accrue sick leave credits while on worker's compensation except for officers receiving Section 18A supplemental compensation for less than two years.

SECTION 5. In addition to the requirements set forth in Appendix A, page C2, regarding certification by a physician, if abuse is suspected, the Sheriff may require an officer to produce a physician's note or be examined by a physician designated by the Sheriff, for an absence of one or more days or be subject to other verification as the Sheriff deems appropriate, including visitation at an officer's home during the officer's scheduled shift if the officer is not hospitalized.

SECTION 6. Officers currently in the employment of the Sheriff's Office who retire and who have accrued unused sick leave credits shall be paid an amount equal to twenty percent (20%) of the value of such credits computed by multiplying the number of days available times the daily rate of salary compensation received by the officer at the time of the retirement; provided, however, that such payment for unused sick leave shall not affect the amount of retirement allowance available to such officer.

SECTION 7. Subject to this Article, for further provisions governing sick leave see Addendum A.

FORMER SICK LEAVE LANGUAGE, ARTICLE 17 SECTION 1

Officers who have completed not less than six (6) months of continuous full time service shall receive sick leave with pay. Sick leave shall accrue not to exceed one and ¼ days for each month of service. Such sick leave shall be limited to fifteen (15) days annually, for each year of service.

ARTICLE 20 - PERSONAL LEAVE

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Section 7. Any member of the bargaining unit who does not use a sick day during the three-month period from January 1 through March 31, and the three-month period from April 1 through June 30, and the three-month period from July 1 through September 30, and the three-month period from October 1 through December 31 shall be given one (1) personal day off for each specified three-month period in addition to the three personal leave days currently listed in paragraph 1.

STIPULATIONS

The parties stipulated to the following facts:

The following are the Worcester County Sheriff's Office (WCSO) Recruit Academies that were the subject of this arbitration case. The hire date is the date they became employed by the WCSO and began the academies. Each academy is approximately three (3) months duration, after which recruits are sworn-in and commence work as officers.

Academy class 50: Hire date 9/17/2018. Graduation date: 12/7/2018
Academy class 51: Hire date 3/14/2019. Graduation date: 5/24/2019
Academy class 52: Hire date 9/16/2019. Graduation date: 12/6/2019
Academy class 53: Hire date 3/09/2020. Graduation date: 5/22/2020
Academy class 54: Hire date 9/14/2020. Graduation date: 12/4/2020
*Academy Class 55 ongoing will graduate 5/28/2021

FACTS

Sometime around May 2, 2020, Kevin Carlo, President of the Local, emailed Diane Jordan, a HR Director and this email exchange transpired:

CO Carlo: It has come to my attention that the last academy class did not receive their earned personal day for not calling in sick In Article 5 1a it states all probationary officers shall enjoy all the benefits of the collective bargaining agreement.

Ms. Jordan: The policy has always been you must complete 6 months of employment and then an entire quarter. This has always been the practice for all employees.

CO Carlo: OK can you tell me what section or article shows that in the CBA. Thank you.

Ms. Jordan: Employees were not allowed to call in sick prior to sick months of service.

CO Carlo: So where in the CBA or Policy does it say probationary officers don't earned (*sic*) personal days when they don't call in sick. So I can inform our members.

CO Carlo testified that he sought out Special Sheriff Andrew Abdella and raised the issue. He testified that there was an offer to settle the grievance. The substance of the settlement offer is not relevant to this award and will not be disclosed in this record. CO Carlo rejected the settlement before filing a grievance on May 20, in order to "keep the time lines per our CBA" as discussions

continued.

The grievance advanced to Step 2 on June 4. AS Brothers issued a written denial on June 12. The reasons for the denial stated by AS Brothers: 1) ...the 2018 CBA bargaining did not impact probationary officer's time towards qualifying for the personal day bonus"; 2) the grievance was untimely because the personal day bonus was given on April 1, but the grievance process began on May 20 and thus the grievance was filed outside the fourteen calendar day filing requirement in the contract.¹

The Union appealed to Step 3. On July 2, David Tuttle, Superintendent of the facility denied the grievance. The written denial states in relevant part: "The grievance is time barred. The grievance was initiated on May 20 however the personal day bonus was given on April 1. Under the CBA, no grievance may be filed in writing more than fourteen calendar days after the officer knew or should have known of the occurrence of the incident or event upon which the grievance is based...Further, the bargaining history establishes that the parties changed the language of the contract solely to conform to the Massachusetts Paid Sick leave Law—not to confer the benefit of a personal day... the longstanding binding past practice of the parties has been, and continues to be, the academy time does not count toward the accrual of a personal bonus day."

The Union submitted a demand for Arbitration on August 13.

President Carlo testified for the Union; the Employer called HR Director Jordan and Labor Counsel, D.M. Moschos, Esq.

President Carlo testified that the changes to Article 17 were proposed by management to bring the contract into alignment with c. 149. Section 148c., the Massachusetts law establishing paid sick time for public employees. The parties agreed in negotiations in 2018 to amend their existing sick time contract provision to accommodate the state law providing up to forty hours earned sick leave which was accrued upon hire at a specified rate and available for use by an employee ninety days after hire.

¹ The arbitrability of the grievance was not contested at the hearing or in post hearing arguments.

In addition to creating the rate of accrual (a minimum of one hour for each thirty hours worked), the law also established procedures and standards for reviewing sick leave use. To paraphrase CO Carlo, the new law allows employees to accrue sick leave immediately upon hire and use after ninety days, but under the predecessor agreement, members of the bargaining unit did begin accruing sick time until after six months of service, plus an additional ninety days of not using sick time before being eligible for the bonus personal day established in Article 20. Officers had to work six months before being able to have paid sick leave, but under the new law and modified contract officers accrue upon hire and may use earned paid sick leave after ninety days. Officer Carlo testified that the personal day bonus has always rewarded officers who do not use sick time in a quarter earned an additional personal day for the quarter. The 2018 negotiations did not change the probationary period for new officers, but under Section 1, probationary officers enjoy contractual benefits, health insurance, retirement, etc. Sick leave is accrued by employees upon hire, or when they start the academy, and accrue sick time immediately upon hire unlike the previous contract where officers had to work six months before earning any sick time.

HR Director Jordan testified about her role in administering the Article 20 personal day bonus provision which has been in effect since she was hired in 2014. She understood the contract to require a newly hired employee work six months, plus one quarter without using sick time in order to earn the bonus leave day. Hire time is understood to start when a CO starts academy training. As an example, she referred to Academy Class 50. That class started September 20, 2018 and graduated December 2018. She testified that members of the class would not be eligible to receive a bonus day until July 1, 2019. Ms. Jordan testified that she has not changed the administration of Article 20 after the effective date of the 2018 contract which changed how sick time is earned for new hires because the new language did not change the terms of Article 20. She testified that she questioned the Employer's counsel, D.M. Moschos, on this issue and was told that the change in the sick leave article did not change the bonus day program. The practice has been to require six continuous months employment, plus a quarter before awarding the bonus day, even after the contract changes that allowed officers to accrue sick time on the first day of employment, or the first day at the corrections officer's academy.

Labor Counsel Moschos testified about the bargaining history for the changes in Article 17. The

new language was adopted to bring the Employer's sick time practices into line with the Commonwealth's new earned sick time law covering all public employees. That required creating a bifurcated system: the first forty hours are earned and administered according to the new law; hours over forty are earned and administered according to the contract. These changes were intended to comply with the law and not to change other provisions of the contract. During negotiations discussions focused on explaining the differences between the state law coverage--no changes were proposed to Article 20. The new language eliminated the previous requirement that CO's serve six months before earning paid sick leave. Under the administration of Article 20, all recruits become members of the bargaining unit when sworn as officers, but are not eligible to earn a bonus day until completing six months and one quarter of employment without use of sick time.

POSITIONS OF THE PARTIES

The Union asks the Arbitrator to uphold the grievance. The evidence shows that HR Director continued to administer Article 20, Section 7 without regard to the changes negotiated in Article 17 which deleted the requirement in the predecessor contract that an officer had to work six months full time before accruing sick leave. She testified that although employees in the bargaining unit accrue immediately upon hire, the old standard for awarding bonus personal days still controls.. Despite the adoption of new provisions that permit accrual upon hire and use after ninety days, management applies the personal leave benefit as if the sick leave clause has not been changed. The Union places particular emphasis on the testimony of Labor Counsel that his office proposed the changes in the contract providing for earned leave time upon employment and ability to use earned sick time after ninety days.

The Union urges the Arbitrator to interpret and apply the contract as it written, according to the plain language agreed by the parties. Article 20 applies to any bargaining unit member who does not use a sick day within a quarter, as defined in the contract. The use of "bargaining unit member" sweeps all employees into the bonus provision, including probationary employees who now earn sick leave upon joining the academy and may take sick leave after ninety days of employment. Article 5 states that probationary officers enjoy all the benefits of the contract except a limited by Article 5, which contains no limits on probationary officers earning the Article 20 benefit. The

argument that past practice should mandate how officers are afforded bonus personal leave days does not help management. The past practice followed by HR Director Jordan has been that all officers eligible to use sick time who did not use sick time in the prescribed quarters, earned the bonus day. Expanding the scope of employee earning sick time also expands the pool of officers eligible for the bonus. In both cases the purpose of the bonus is met—officers not using earned sick time for a certain period are awarded with a bonus day. The only question, according to the Union is whether the probationary employees are members of the bargaining unit, and if so, did they not use sick time during the relevant periods. A past practice inconsistent and in clear conflict with the new contract language should be considered as not binding on the parties. *Citations Omitted*

The Union contends that the contract as written requires an award upholding the grievance and directing management to adjust the personal days of officers in the stipulated academy classes to reflect their entitlement to bonus days under Article 20, Section 7.

The Employer denied the Union's grievance because the Article 17 sick leave changes in the new contract were implemented to conform with the state law and did not in any way affect how or when probationary officers earned an incentive personal day under Article 20. The Article 20 benefit has been consistently administered and applied since the clause was added to the contract. Labor Counsel testified without rebuttal that management first proposed the changes embodied in the new Article 17 as early as 2017. More importantly from the Employer's perspective, Labor Counsel testified that there was no intention to change Article 20, Section 7. The Employer's position has always been that the contract changes were intended to change how the first forty hours of sick leave was earned and could be used. The balance of earned sick leave is governed by the contract and Personnel Rules appended to the contract. The Article 20 incentive was not raised or discussed during the negotiations for the new agreement. Article 20 is "aimed at incentivizing the judicious use of sick leave by Union employees...[who] are awarded an extra personal day each quarter of the year when they refrain from using a sick day during the previous quarter." HR Director Jordan has administered Article 20 since 2014 and has basis the incentive day bonus for new hire based on the date of hire (including time spent in the academy) plus six months and one quarter. If the employee has not used a sick day during that period, they are awarded a personal day.

The evidence advanced by the Union does not satisfy its burden of showing that Article 2, Section 7 was breached. The Union's evidence consists solely of CO Carlo's personal judgement that the contract should be read to award all officers the personal day bonus regardless of past practice. In contrast, the Employer argues there is substantial evidence that management is continuing to follow an established practice of awarding incentive days that has been continuously followed without interruption for many years and through many contract negotiations. Ms. Jordan testified, The six month period required (plus a quarter) that triggers eligibility is based on the practice that she had followed since becoming HR Director and she did not know if that was tied to the old contract language fixing when an employee could start earning and using sick leave.

The Employer argues that requiring six months plus one quarter before an officer can be awarded the bonus personal day is consistent with the new language of the contract. The new contract creates a set of rules for earning and using leave in the first forty hours of accrual and continues the prior rules and practices for the remainder of an employee's earned time. The incentive rule does not interfere with an officer's ability to take sick leave after ninety days of employment. It was reasonable and consistent with the contract for the employer to reserve the incentive to employees who do not take earned sick leave for the first six months of employment, plus one quarter.

Decision

Reading the contract and contractual history as a whole, I find the contract favors the Union's interpretation of the contract in large measure. But I disagree to some measure with the Union's conclusions on the method for remedying the grievance.

In the first place, the interpretation and application of Article 20, Section 7, cannot be separated from the contract and must be read together with the recent changes in Article 17 and Article 5. I also find that while the direct evidence is slight, it is persuasive. While neither Employer witness could recall the exact origin of the "six months plus one quarter" trigger for eligibility for the personal leave incentive, logic and common sense requires the conclusion that the six month null period corresponded to the period that new employees could neither earn nor use paid sick leave under expired contracts. "Officers who have completed not less six months of continuous full time service

shall receive sick leave with pay.” [emphasis added] Article 20, Section 7 itself is entirely silent on any qualifying work time and there is no evidence that it had origins in any source other than the parties’ practices and contract. There is no evidence suggesting that the six month null period used by HR management was ever contested under the old agreements. I find that it was understood to be consistent with the prior contract and therefore must have been consistent with all provisions relating to the sick leave article.

A strict reading of the language of the incentive provision would require management to award incentive days to “any member of the bargaining unit who does not use a sick day during ...” in any of the relevant measuring periods. The clause contains no language disqualifying new employee from be eligible to earn the incentive during their first six months of employment. Yet, there is no dispute that the Article 20 had never been read to allow employees with less than six months employment to earn the incentive personal day during the first six months of employment. To earn the incentive a CO had to complete the first six months of employment when sick leave was not earned and could not be used and then work an additional quarter without taking the sick time earned afterwards.

Plainly, Article 20 and Article 17 were read together to prevent officers who were unable to earn sick time from claiming an incentive personal day for not using a sick day, a completely logical, compelling and harmonizing interpretation of the interplay of the sick leave accrual rules and the sick leave incentivizing benefit in Article 20. No employee who was incapable of earning sick leave should be or could be motivated not to use sick leave because the employee has not earned any paid sick leave to use. In contrast, under the modifications wrought in the new contract, regardless of motivation, the contract allows employees to begin accruing earned sick leave immediately, while preventing new employees from taking their earned sick leave for the first ninety days of employment. The origins of the six months discounted by the HR administrator’s practice must be presumed to have a rational basis and foundation in the contract and are not assumed to be merely an arbitrary or capricious exclusion period.

The broad language of Article 20 was not changed by recent negotiations. “Any member of the bargaining unit who does not use a sick day during ...” a qualifying quarter ...shall be given one (1)

personal day off for each specified three month period in addition to the three personal days currently listed in paragraph 1” . With the removal of the six month bar for earning paid sick leave, the parties tacitly agreed or should have understood that benefit would be awarded officers who have earned and may take paid sick leave provided she or he does not use a sick day in the qualifying quarter. If the CO could take sick time, but did not, the CO falls into the category “any member of the bargaining unit who does not use a sick day”. This conclusion is supported by Article 5, Section 1A where the parties agreed that “upon graduation, probationary employees shall enjoy all the benefits of the Collective Bargaining Agreement...except as limited by this Article.” The award of the incentive benefit has always been conditioned on their ability to take sick leave and this condition is preserved in the new contract. Under the modified sick leave clause, an employee cannot take an earned paid sick day for the first ninety days after hire therefor for purposes of the incentive benefit, she or he is in the same situation as new employees under the predecessor contract who could neither earn nor take sick time. If, as the parties agree, Article 20, Section 7 was added some years ago to provide an incentive for employees to avoid using earned sick time, its application is still limited to employees who are eligible to take sick leave and management can reasonably exclude those first ninety days (one quarter) from the incentive program. Thus, an employee would have to work a sick leave-free quarter after their first ninety days of full time employment to be eligible for the incentive.

Management should reexamine the sick leave records for the Academy classes specified in the stipulations and award personal leave incentive days for employees who have had no sick leave use in the relevant quarters after their first ninety days of employment.

AWARD

The grievance is allowed with the remedy prescribed in the decision.

Respectfully submitted,

/Timothy J. Buckalew, Esq. /