AMERICAN ARBITRATION ASSOCIATION

In the Matter of Arbitration Between

NEPBA Local 550

-and-

Worcester County Sherriff's Department

AAA Case No. 01-20-0005-1378

Issued: August 24. 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)

PRELIMINARY STATEMENT

On January 22, February 1 and April 1, 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 May 24, 2021.

ISSUES

The Union and Employer agree this grievance presents this issue:

"Did the employer's administration of sick time meetings as referenced in the grievance violate the collective bargaining agreement? If so, what shall be the remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 8 DISCIPLINE

SECTION 1. The Sheriff shall have the right to adopt rules and regulations and Standards of Conduct. All officers shall be subject to, and comply with, the rules and regulations and Standards of Conduct. An officer who has successfully completed his/her probationary period may be disciplined, demoted, suspended or discharged for just cause by the Sheriff.

SECTION 2. The form of discipline may include the following: oral warning; written warning with a copy to the officer and Union Steward; suspension in writing as stated herein; demotion in writing as stated herein; and discharge in writing as stated herein.

ARTICLE 10 GRIEVANCE PROCEDURE

SECTION 1. For purposes of this Article, a grievance will be defined as an actual dispute arising as a result of the application or interpretation of one or more express terms of this Agreement provided, however, that any matter arising under the purported exercise of management right pursuant to Article 4 of this Agreement, or any matter reserved to the discretion of the Sheriff by the terms of this Agreement, will not be subject to the grievance procedure nor construed as being grievable. Any matter which occurred or failed to occur prior to, or after the termination of, the date of this Agreement will not be subject to grievance.

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.

FACTS

Sometime before 2.28.20, Jeffrey Hehir, Chief Steward, filed a grievance alleging that the Employer had violated Article 17, Section 5 set out above. The grievance alleges more specifically, "Article 17, Section 5 reads, "…regarding certification by a physician, if abuse is selected, the Sheriff may require the officer to produce a physician's note…" The WCSO is routinely scheduling Local 550 members to attend sick time meetings. At those meetings Members are not being advised they are suspected of abusing their time instead Members are being asked by AS Trainor why they used sick time. Under the CBA WCSO does not have the right to question 550 members about their sick time usage unless there is a suspicion of abuse." The grievance was denied and advanced to Step 2. On February 28, 2020, Christopher Brothers, AS issued a written denial of the grievance. Prior to the Step 2 decision, Kevin Carlo, President of the Local, provided Brothers with the 2015 Memorandum of Agreement. Brothers argued that the actions complained of did not violate the contract or the 2015 MOA which provides, "The Sheriff further agrees that at the outset of such sick time meetings, the administration will notify the bargaining unit member that sick time abuse is suspected and the administration will explain to the bargaining unit member why sick time abuse is suspected." Brothers' denial letter states" At the start of each of these meetings, each member was explained the reasons for why they were being suspected of sick time abuse which may have included, but not limited to excessive sick time use, absences on weekends or holidays, utilizing sick tiem in conjunction with scheduled vacations and/or calling in sick after being denied a day off. "Brothers asserted the procedure followed by AS Trainor met the requirements of the MOA because the manager started each meeting by providing the officer with notice sick time abuse was suspected, and why abuse was suspected. "within this agreement, the Sheriff's Office is not required to send any documentation prior to the meeting. Of the twenty-one (21) members suspected of sick time abuse, only twelve (12) received verbal warnings which is the lowest level of discipline possible… (t)he Sheriff's Office was transparent and consistent during these meetings by the fact that each member was made aware at the start of each meeting why they were suspected of sick time abuse."

The Union filed a demand for arbitration with the Tribunal challenging the discipline issued the twelve officers and seeking an order requiring the Employer to "rescind practice, expunge disciplinary documents and make officers whole."

CO's Hehir, Breton, and Grabowski testified for the Union regarding their meetings with AS Trainor. AS Rives, AS Trainor (ret.) testified for the Employer.

I summarize the testimony of the Union and Employer witnesses and the documentary evidence.

In 2019, AS Rives, Chief Finance Officer, took over certain human resources functions at the Worcester County House of Correction and initiated a review of sick time use amount CO's. He testified he conducted what was in effect an audit of sick time uses because there were inconsistent management practices under different middle managers causing some COs to complain, including complaints from the past Local President. The contract did not define excessive or abusive use of sick time, but he focused on employees taking sick time around weekends, start and end of vacations, around holidays and sporting events that officers may want to attend. Officers earn fifteen sick days a year: the first forty hours are regulated by the new state law, PMLA; the balance are constrained by the contractual rules. Beginning in November 2019, he prepared individualized sick time use reports for all officers who used more than the forty-hour sick time use covered by the state law in the prior twelve-months. The reports were provided to AS Trainor "for further review to determine if there is a pattern of sick time use/abuse, unexcused or documented absence or excessive sick time use. If you determine that discipline is appropriate, please implement discipline consistent with progressive discipline." Each officer's report provided AS Trainor identified the day sick time was taken and AS Rives' flag for the dates he deemed requiring further explanation from the officer. Although not subject to the contractual rules, AS Rives testified that he also reviewed the first forty hours of sick time use to determine if the officer's use indicated a pattern of use comparable to the indicators used for hours after forty hours (use around weekends, vacations, holidays, etc.). AS Trainor notified each of the CO's identified for an interview by AS Rives and individual interviews were conducted over the next month or so.

CO Hehir testified that he or other Union representatives were contacted by the CO's and/or were solicited by management to participate in the meetings on an ad hoc basis.
CO Hehir and the other Union representatives who attended the meetings testified that the AS Trainor conducted the meetings with a scripted approach. CO Hehir testified that prior to Rives, management held sick time meetings but in his experience the officers called in were uniformly using "an abundance" of sick time and/or were officers working swaps who had not provided notes for their sick time. Officers working swaps are required to provide notes of every sick time call out because they were using sixteen hours of sick time and management uniformly required sick notes for swaps. Officers were not required to produce documentation for the first forty hours before the PMLA. He testified about the 2014 grievance contesting management's decision to conduct sick time meetings and to request medical documentation without notifying an officer that she or he was considered to be a sick time abuser (UX9). The Union offered, through CO Hehir a grievance settlement which the Union believes represented a promise to only hold sick time meetings with officers when abuse is suspected and only after notice. In addition to attending meetings as a representative of the Union for officers Bretton and Bastiene, CO Hehir was also called to a sick time meeting addressing his sick time use.

The meetings all stared with either AS Trainor, or Deputy Brothers or Deputy Daignault opening a brief statement to the effect of, " you know why you are here…if you went over forty-hours of sick time you will be called for a sick time meeting…its Rives' rule" Trainor or the other manager would present the officer with a report of his sick time use, showing the hours used and the dates used. The officer was never accused of sick time abuse, but was questioned about days that fell around holidays, weekends, etc.

One officer, Bastien, when asked about his use of certain days, first said he took time for personal reasons, but when Trainor persisted, he finally said the days were significant for personal reasons related to post-military PTSD. Upon hearing that explanation, he recalls that Trainor thanked the CO for his service and asked no more questions.

AS Trainor submitted a written memorandum to the facility Superintendent, David Tuttle, for

each of the sick time meetings. In each memo, he recounts his conduct of the meeting, the review of sick time use with the officer and action, if any, taken with respect to the officer. In CO Bastien, who had used 104 hours by November 2019, he reported the officer's admission that some of his sick time had been taken on weekends and around comp days in response to PTSD and that he promised to improve his sick time use. Trainor recorded the meeting ending by explaining to Bastien that "this meeting needs to be noted as a verbal warning discussion."

The memoranda for other officers show a similar pattern. In the sick time meeting one officer who had used 99 sick hours reported that much of his sick time use was a result of a medical problem with a changed treatment regimen and he had expected a changed medication to relieve his symptoms and if that failed, he would submit FMLA paperwork. The officer promised to improve his sick time use. Trainor informed the officer that the meeting was a "verbal warning on sick time abuse and grouping sick time usage."

CO Hehir testified that CO Breton who worked swaps was quested about his failure to document sick time use and was told he had to provide documentation for all sick time after forty hours if he wanted to be considered for swaps. CO Breton told AS Trainor that he had submitted notes for some of the days and when that was confirmed, no further action was taken on his sick time use. Officer Bretton testified that he was surprised when he was called for the meeting. CO's knew the meetings were about sick time use, and he believed he had covered all his absences with appropriate documentation. He testified he was not accused of sick time abuse, and was not show the audit report AS Trainor was using at the meeting, but the manager did read the report to him. When asked why he was out on the days questioned, he reported medical conditions that kept him out of work.

Officer Hehir testified that he drafted the grievance challenging the sick time meeting conducted by AS Trainor because officers were being called to the meetings without being notified they were suspected of sick time abuse and because he was asking officers personal questions about why sick time had been used.

CO Carlo testified from his perspective as prior Union Local president. He testified management's practices on monitoring sick time has changed over the years. Currently there is one set of rules for the first forty hours of sick time taken under the law and other rules for

the next eighty hours earned under the contract. CO's working swaps have always had to produce medical notes or lose the swap. One change instituted since AS Rives took over the review of sick time use is that meetings are conducted by AS Trainor (or other high level managers since he retired), but before the area captain or area supervisor would conduct reviews. AS Trainor conducted the sick time meetings uniformly and did not inform the employee, she or he was suspected of sick time abuse. CO's who offered explanations for dates sick time was taken were issued verbal warnings even if management had prior knowledge of the personal circumstances that may have contributed to an employee's sick time use. He asked officers to substantiate each day or segment of sick time use taken but officers were never asked if they abused sick time nor were any accused of sick time abuse.

AS Rives testified that he started close tracking of sick time use after he took on human resources duties. Officers complained that managers did not follow uniform rules on administering sick time and he instituted centralized monitoring to have uniform practices throughout the facility. He noticed some officers seem to use sick time around holidays, first and last shift, weekends, etc. and since there was no contractual definition of sick time abuse, he decided to look harder sick time use after the forty hours covered by the law. He testified that he always looked for pattern of use even for the first forty hours but hours used after forty-eight triggered a harder look. After a CO exhausted the first forty hours of earned sick time, he examined roll call sheets and attendance calendars, if a CO was on approved FMLA or an EAP program, he did not refer the officer to Trainor for a meeting. Rives testified that officers who use more than forty-hours of sick time may be required to provide medical documentation if sick time abuse is suspected, but that there is not automatic trigger for the request for additional medical information or for a sick time meeting.
Mr. Trainor testified that upon receipt of the memos from AS Rives, he would arrange meetings with the named officers to review the sick time use reported to him. He testified he followed the same procedure in each meeting and approached the dates identified as problematic directly. He did not ask of medical or personal information and stated he saw the meetings as an opportunity to have a conversation on the CO's sick time use and to seek assistance if needed. He denied stating that in any meeting that "if you use over forty hours you will be called in' and denied that AS Rives had informed him that was a rule. Some

officers who offered credible explanations for sick time use tht had not been previously documented (PTSD, medical condition) still received verbal warnings because their sick time use still fit a pattern and he considered the verbal warning the best mechanism to record the sick time use concerns of management and to document the explanations provided by officers and to pas the information along the chain of command. He denied pursuing specific medical information from any officer.

POSITIONS OF THE PARTIES

The Union advances several arguments: 1)In violation of Article 17 the Employer has developed a new, arbitrary criterion, use of more than forty-hours sick time, to compel employees to provide a year-end explanation for past approved sick time use without actually accusing an employee of suspected sick time abuse; 2) the Employer has issued discipline without just cause (verbal warnings) even when the sick time was agreed to be for legitimate and proper purposes in violation of Article 8; the employer has forced employees called to sick time meetings to articulate specific medical explanations for sick time use in violation of Article 11 and the Americans with Disabilities Act; by forcing employees to produce doctor's notes to justify sick time use at the end of the year if the employee used more than forty hours sick time the Employer has created a pretext for violating Article 17.

The Employer created a of new sick time meeting procedures singling out employees using more than forty-hours sick time and the forcing these employees to meet face-to-face with the highest ranking operations officer after the employee had obtained contemporaneous approval of sick time use during the year. Some of the officers brought before AS Trainor had already provided the notes provided and at any rate, AS Trainor testified the CO's had justified every sick day questioned by the audit and yet verbal warnings were issued many employees for reasons AS Trainor himself could not justify. This is clearly intended as punishment for officers who uses 33% of their earned sick time without regard to the contractual standard that permits management to request a doctor's note after three or five consecutive sick days. The net effect of the new procedure is to force employees who use more sick time than protected by the new state law to explain every instance of sick time use

throughout the year and failing the production of a doctor's note, the imposition of discipline. The CBA is clear, and the parties' practice is consistent that employees may be required to produce documentation of sick leave when sick leave is used. The contract does not permit management to adopt new arbitrary criteria and subject certain employees to in-person interrogation on their sick leave use far after the sick time was used.

The Employer argues that the Union has failed to prove management violated the contract by holding meetings to verify the use of sick leave taken by bargaining unit members. Article 17 has not been violated. Article 17, Section 5 established only one condition: "if abuse is suspected, the Sheriff may require other verification as the Sheriff deems appropriate.'' Holding meetings and questioning COs about their use of sick time actually used is an allowable means to verify the use of sick time.
The written grievance does not challenge management's authority to hold meetings to discuss sick leave, but rather argues that the meetings violate a previous alleged understanding arising from a grievance settlement. The Union argues that the settlement of the 2015 grievance prevents management from asking COs about sick time use unless there is a suspicion of abuse, and officers are advised of those suspicions. The contract does not require management to advise officers of suspected sick time abuse before meeting or questioning. AS Rives suspected the officers he selected for meetings with AS Trainor—each memorandum to AS Trainor expressly directed him to determine if the officer's sick time use amounted to sick time abuse. The contract does not establish a standard for sick time abuse and thus management retained the discretion to determine what is significant sick time abuse.

Nothing in the contract or the law prevents the Employer from examining how CO's use the forty hours of sick leave protected by Massachusetts law. As testified by AS Rives the first forty hours is administered under the law, and he testified he did not review the first forty hours of sick time use in order to question the legitimacy of the sick leave use, and to the extent AS Rives looked at the patterns of use of the first forty hours he was consistent with the law which expressly recognizes that an employer may discipline an

employee for "taking leave on days just before or after a weekend, vacation, or holiday" The Employer argues that if the law allows an employer to scrutinize how an employee is taking leave, the consideration of the same facts when looking at an employee's yearly use of sick leave cannot be prohibited. The facts show that management only looked at an employee's use of the first forty hours of sick time to see if there was a pattern of use that continued through the use of hours beyond forty hours.

The Union objections to the kinds of questions asked by AS Trainor are not founded in the contract. AS Trainor denied asking the officers about their medical conditions or personal family matters. Contrary to the Union's witnesses, he testified he asked open ended questions encouraging officer to explain specific instances of sick time use. The grievance itself is silent on the allegations that the questions violated Article 11—an assertion added in the demand, not in the grievance itself.

The Employer also asks the Arbitrator to reject the Union's contention that the 2015 grievance settlement over sick time meetings required management to inform officers they were suspected of sick leave abuse at the start of any meeting and why sick time abuse was suspected. As found by Arbitrator Garrity and Arbitrator O'Brien the MOA is an extra contractual document that cannot bind the Employer or be cited in grievance where the Union has not shown the side letter was part of the integrated agreement. The MOA cannot support this grievance and cannot bind management because it is not incorporated into the contract.

Finally, the Employer asks the Arbitrator to ignore the Union's complaints over the fact that some correction officers received verbal warning for their use of sick leave. This claim is beyond the scope of the grievance and should not be entertained by the Arbitrator. The Arbitrator should not address the verbal warnings issued where the grievance did not ask for the removal of any verbal warnings issued.

Decision

Assuming for the sake of argument that mere questioning could burden and employee's rights under the ADA, the facts do not support the allegations that AS Trainor improperly questioned the officers called to the sick time meetings. The evidence shows that some officers were reluctant to provide explanations for some sick time because the leave was taken for sensitive personal or medical reasons. The examples cited by the Union show that the officers volunteered medical and confidential information during questioning and Trainor did not question those explanations or ask for medical or other documentation of sick time claimed to be used for confidential reasons. In many instances, it appears the officers had already submitted medical or other documentation supporting the sick time use. In some instances, the meetings stirred an officer to seek FMLA leave to cover sick time used for reasons not clearly covered by contractual sick leave. The net result was no infringement of rights protected by the contract or the law.

Management has latitude to investigate sick leave use or abuse consistent with the contract. The union says that is accomplished by requiring medical notes when an employee returns to work, if the sick time used exceeds thresholds. That is one standard and may be a gateway for sick leave approval in the first instance—employees who don't' take more than x consecutive days in their first forty hours of sick time consumed may assure paid leave by providing that information. Nothing in the contract prevents management from taking a harder look at sick time use pattern and nothing restricts management's discretion on when a meeting with an officer should be held. The external law prescribes certain protections for sick time use for the first forty hours earned but expressly permits employers to scrutinize sick leave use around weekends, holidays and vacations where there is a strong motivation for any employee to extend (or start early) a planned break from work. For example, if an employee takes sick time bracketing two weekends and a holiday (five 8 hour days), but does not reach the consecutive day trigger, management may still suspect sick leave abuse even the employee has provided medical documentation showing the absences were legitimate if a similar pattern is demonstrated

in how sick time is used after forty hours. In such cases, management is not foreclosed from considering those absences as reason to audit for sick leave abuse for the other earned sick time. There is, however no evidence here that management suspected the employees were abusing sick leave taken under the state law rules and I agree with the Union that the existence of patterns of use for the first forty hours cannot be by itself an independent reason to suspect sick time abuse. If an employee provides the documentation properly requested for the first forty hours of sick time, management cannot open an investigation of the employees' sick time use based solely on the forty hour pattern.

Most of the CO's investigated used far more than the forty-hours provided by the state leave program, and the patterns of use shown by AS Rives' audit raised very reasonable concerns that some COs were not using sick time for the purposes prescribed by the contract and accompanying rules. The reservations regarding the state leave component of earned sick time aside, I do not find that management's examination of sick time use after forty hours were taken was arbitrary or capricious.

I disagree with the Employer's assertion that the Arbitrator may not consider facts showing the officers received discipline for sick time use where there was no finding of sick time abuse or fault on the officer's behalf. The failure of the Union to expressly include allegations that management violated the just cause provision by issuing discipline for the purpose of making a record of a meeting or showing an employee has been notified her or his sick time use has been the subject of a meeting, does not shield such actions entirely. The remedy sought by the Union was a broad request to require the Employer to follow the contract. I agree that the Arbitrator is not free to fashion a conventional remedy for a just cause violation where the grievance did not specify just cause violations, but I do not see any objective limit on the Arbitrator's authority to require the Employer to follow the entire contract, including the promise that employee's will be disciplined only for just cause. A verbal warning or reprimand issued as a place keeper or to memorialize a meeting where there is no finding of fault, rule transgression

or other correctable objective is simply not sustainable as a matter of equity and sound practice. The disciplinary actions taken against the officers found not to have been sick time abusers may be beyond the reach of this hearing, but the Employer is ordered to cease issuing discipline in such instances.

The Union argues that the Employer has violated the Sick Time article by failing to abide by the settlement of a 2014 grievance. The Employer roundly objected to the relevancy of that settlement and objected to the admission of the written memorandum memorializing that settlement. In support of the argument, the Employer asks the Arbitrator to follow the reasoning of Arbitrator Garrity, AAA Case Bik 01-17-0002-4335 (2017) and Arbitrator O'Brien, AAA Case No. 11390- 00124-12 (2012), both cases arising between these parties where the arbitrators ruled that settlement agreements were not part of the contract and could not be the subject of grievance arbitration. In his 2012 decision Arbitrator O'Brien ruled that management was not bound by the settlement of an unfair labor practice charge where the parties agreed to enter into a memorandum of agreement, but never executed such a memorandum. Arbitrator Garrity relied on that award in her decision finding that an executed MOA addressing light-duty overtime, a matter covered by the reserved/Management rights clause, was not a "specific term of the Agreement subject to the grievance procedure."

To the extent these awards are relevant, I do not agree with the conclusion that a settlement agreement formalized, reduced to writing and executed by the parties specifically covering sick time administration agreed in Article 17 may not be considered when interpreting and applying that clause. The subject matter of this grievance is specifically addressed by the contract and management does not assert a reserved right to administer the sick time benefit outside Article 17.

Whether the settlement creates a separate amendment or arises to the level of a negotiated contract provision, the agreement to settle a grievance ripe for arbitration, not disavowed here, must be understood as forming at least some part of the context for the administration of the Sick Time clause. Arbitrator Garrity reviewed the MOA on Light

Duty and found that on the merits it was not persuasive. There is no evidence that the 2015 settlement agreement was ever specifically disavowed or that the Employer gave the Union any notice that it intended to conduct sick leave meetings addressing possible sick leave abuse without informing officers they were the targets of such investigations. The cost of time or effort to provide such notice is negligible and providing notice to officers who may be subject to discipline for abusing sick leave as occurred here would be required under normal just cause review. The Union argued throughout the grievance process that the 2015 settlement was binding on management. I agree that the settlement per se is not part of the agreement, but it is an aid to understanding the administration of Article 17 since 2015 and expresses the parties' agreement that notice should be provided alerting officers that a sick time meeting with a manager may result in discipline. Unlike the MOA on Light Duty, the 2015 settlement agreement is directly on point and provides simple guidance on administering sick time meetings.

AWARD

The grievance is denied in part and allowed in part.
The claim that the Employer violated Article 11 is denied.
The Employer shall follow the just cause provision of the contract when disciplining officers for sick time abuse if discipline within the meaning of the contract is imposed.
The Employer violated the contract by not informing officers that the sick leave meetings conducted by AS Trainor following the sick leave audit conducted by AS Rives were sick time abuse investigations conducted pursuant to Article 17, Section 5.
The balance of the grievance is denied.
The remedy is limited to an order to follow the contract.

Respectfully submitted,

/Timothy J. Buckalew, Esq. /