AMERICAN ARBITRATION ASSOCIATION
Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration Between

SHERIFF OF MIDDLESEX COUNTY

-and-

AAA Case No:
01-17-0005-8564

NEW ENGLAND POLICE BENEVOLENT
ASSOCIATION, LOCAL 500

Arbitrator: James M. Litton, Esq.

Appearances:

[redacted], Esq. - for the Sheriff of Middlesex County

Peter J. Perroni, Esq. - for the New England Police Benevolent Association, Local 500

OPINION AND AWARD

Stipulated Issue:

Whether the Middlesex Sheriff's Office (MSO) is violating the parties' collective bargaining agreement, Article XIX, Sec. 6 by refusing to allow employees from the 40th Basic Training Academy to convert sick leave for the 2016-2017 time period? If so, what shall the remedy be?

Relevant Contract Provisions:

ARTICLE XIX
SICK LEAVE

> Section One. Every permanent employee covered by this Agreement who has completed six (6) months of continuous service of the Employer shall, subject to Section Two of this Article, be granted sick leave, without loss of pay, for absence caused by illness or by injury or exposure to contagious

disease. Employees will earn and sick leave shall accrue at the rate of 1¼ days for each month of actual service, not to exceed fifteen (15) working days in any calendar year. Employees will be entitled to use any sick leave earned. Sick leave not used in the year in which it accrues, together with any accumulated sick leave standing to the employee's credit on the effective date of this Agreement and not used in the current year, may be accumulated for use in a subsequent year. Sick leave not used prior to the termination of an employee's service shall lapse, and the employee shall not be entitled to any compensation in lieu thereof. ...

...

Section Six. If an employee uses no sick leave including no more than 20 days of Family and Medical Leave (FMLA) during a contractual year (July 1 to June 30), the employee will be entitled to convert seven (7) days of unused sick leave to regular compensation at his or her regular rate of pay, to be added to his/her base salary or at the employee's option, convert the first five days of the seven days earned to additional vacation leave to be scheduled and taken at ta time mutually agreeable to the employer and employee. The sixth and seventh day earned must be taken as compensation and may not be converted to vacation leave. The following schedule will apply:

Leave Used During Fiscal Year	Sick Leave Days Which May Be Converted
...	
0	7
1	4
2	3
3	2
4	1

Eligible Union employees shall be required to notify the Sheriff's Office by May 1 in any contractual year if a conversion of sick leave days to additional vacation or compensation is requested.

ARTICLE XXV
UNIFORMS

...

Section Two. Uniforms, Clothing, and Equipment Payment.

Employees covered by this Agreement who have been employed for a period of at least six months prior to December 1, of each year shall receive an annual uniform, clothing, and equipment payment of seven hundred and fifty ($750.00) dollars.

Those employees who have been employed for less than six months on December 1, of each year shall receive a reduced amount of three hundred and seventy-five ($375.00) dollars.
...

ARTICLE XXVII
PERSONAL DAYS

Section One. Full time employees hired, promoted or in the bargaining unit after January 1, 2001 will be credited annually with paid personal leave credits of twenty-four hours which may be taken during the following twelve months at a time or times requested by the employee and approved by the employer.

Full time employees hired, promoted or in the bargaining unit after January 1st of each year will be credited with personal leave days in accordance with the following schedule:

Date of Service	Paid Personal Leave
Jan. 1 through Mar. 31	3 days
Apr. 1 through June 30	2 days
July 1 through Sep. 30	1 day
Oct. 1 through Dec. 31	0 days

The Employer agrees to add two (2) additional personal days per year, effective March 1, 2012, only for current employees who are bargaining unit members on March 1, 2012. Nothing in this Section shall be construed as giving more than three (3) personal days in a given calendar year to employees hired after March 1, 2012, or more than five (5) personal days in a given calendar year to employees who are bargaining unit members on March 1, 2012.

ARTICLE XXXIII
WAGES

...

Section Three. Educational Pay

To promote and foster a well-trained and educated workforce, the employer shall pay on or about October 1, 2000 and each and every year this agreement shall remain in effect the following educational pay incentives to those employees covered by this Agreement who have been employed by the employer for the twelve months prior to October 1st:

...

Those employees who have been employed for less than twelve months prior to October 1st shall be paid their educational pay incentive on a pro rata basis for each full calendar month worked prior to October 1st.

Facts Presented:

The Middlesex Sheriff's Office (MSO or Employer) and the New England Police Benevolent Association (NEPBA or Union) are parties to a collective bargaining agreement (Agreement). The Agreement sets forth the wages, hours, terms and conditions of employment of certain employees of MSO including those whom this case affects.

The language of Article XIX, Sec. 6 as it appears in the Agreement has also appeared in successeve collective bargaining agreements between the MSO and the Union since at least 2001. At no time since at least 2001 has the MSO applied the sick leave conversion language of Article XIX, Sec. 6 to graduates of any BTA which began after July 1 of a given year at the end of the "contract year."

The MSO conducted its 40th Basic Training Academy (BTA) for newly hired employees beginning in September 2016. The 40th BTA consisted of 24 new employees. The BTA ended in approximately early December 2016.

In spring 2017 as the end of the contract year July 1, 2016 through June 30, 2017 approached, the MSO determined -- as it has determined for years -- that the graduates of the 40th BTA which ran from September to December 2016 (during the contract year July 1, 2016 through June 30, 2017) did not contractually qualify for the sick leave conversion benefit set forth in Article XIX, Sec. 6.

On June 23, 2017 Union Steward Matt Bordeleau filed a grievance which protested the MSO's denial of Article XIX, Sec. 6 rights to "bargaining unit members from the 40th basic training academy with a start date of 9/11/16 that have used less than 5

sick leave days during this contractual year (7/1/16-6/30/17)." That grievance results in this arbitration.

Opinion:

Position of the Union

The position of the Union is that the MSO is violating the parties' Agreement, Article 19, Sec. 6 by refusing to allow employees from the 40th Basic Training Academy to convert sick leave for the 2016-2017 time period. The Union argues that "Article XIX, Section 6 compels the MSO to allow the subject employees who began employment in September 2016 to convert accrued vacation time." It argues that "a plain and reasonable reading of Section 6 obligates the MSO to allow the conversion regardless of when an employee begins employment during 'contractual year (July 1 to June 30) ... ." It argues that "nothing about the language in Section 6 requires employment throughout the relevant period in order to obtain the right to convert." It argues that "if no sick time (or relatively little sick time pursuant to the chart) is used during the relevant dates, the employee is entitled to convert.

The Union further argues that "a review of the contract as a whole, reveals that when the parties wished to limit the right of new employees to enjoy the use of a contract benefit they have done it precisely in this agreement." The Union cites three examples of such contract language:

- Article XXV, Sec. 2 (uniforms)

> The Union argues that this Section "provides that employees who have been employed for less than six months on December 1 receive half the benefit of

> those that have been employed for at least six months."
>
> • Article XXVII, Sec. 1 (personal days)
>
> The Union argues that this Section "provides that employees receive 24 hours of personal day benefit time on January 1 of each year." It also argues, however, that "this provision expressly limits the benefit for those that begin their employment after January 1 an provides less time to those who begin the calendar year on April 1 and provides less time to those who begin the calendar year on April 1 and after."
>
> • Article XXXIII, Sec. 3 (educational pay)
>
> The Union argues that "educational pay is paid on a pro rata basis for those employees who 'have been employed for less than 12 months prior to October 1st ..."

Thus, the Union argues that "the absence of a limiting provision in the sick time conversion article strongly suggests that the parties did not intend to limit how the provision applied to new employees." It argues as follows:

> This makes sense because the benefit is essentially self-limiting for new employees. New employees' use of the benefit is obviously limited by the fact that they do not have the opportunity to accrue significant amounts of sick time to convert and conversion will leave the employee vulnerable to not having paid time available should they get sick in the upcoming year.

The Union also rejects any argument of the MSO that "some past practice prevents the application of the Union's interpretation" of Article XIX, Sec. 6. First, it argues that

"such a practice would contravene the plain language of Sec. 6 which, as discussed above, allows new employees to convert."

The Union acknowledges that the MSO introduced into evidence print-outs which listed employees whom it believed "were entitled to the conversion under its (mistaken from the Union's point of view) interpretation of Sec. 6." It also acknowledges that the MSO introduced into evidence a form it used to inform those employees that the MSO thought were entitled to convert." It argues, however, that "there is no evidence that the MSO interpretation was mutually agreed upon nor were documents or even the reasoning behind the results evidenced in the documents ever communicated to or known by the Union." Thus, the Union argues that "there is no evidence of mutuality present in this case sufficient to establish some binding past practice."

The Union further argues that "ultimately, the decision to exercise the conversion rests with the individual officers." It argues that "new officers are presumably less likely to use the benefit at least in part because they do not have much sick time." It argues that "the lack of use of the benefit by new employees previously is thus an unremarkable natural consequence of (1) the limited nature of the benefit to new employees, (2) the fact that the right is exercisable by individual members, and, (3) the unilateral process the MSO employed in administering the benefit." It argues that "put another way, the Union has not waived its right to assert the plain language in Sec. 6 compelling the allowance of sick time conversion for new employees."

Position of the MSO

The position of the MSO is that it is not violating the Agreement, Article XIX, Sec. 6 by refusing to allow employees from the 40th Basic Training Academy to convert sick leave for the 2016-2017 time period. The MSO argues that "the plain language of Article XIX, Sec. 6 supports the MSO's position that the employee must work the entire year to be eligible for sick leave conversion." It argues that "by its express terms the 'contractual year (July 1 through June 30)' is the measuring period for the conversion benefit." It argues that "nothing in the language of Article XIX Sec. 6 suggests that the benefit is available to employees who work less than the full contractual year."

The MSO also argues that "the past practice has been to consistently apply Sec. 6 of Article XIX the way it was applied by the MSO in the present case." It argues that "the measuring period has been unchanged since at least 2001." It argues that "on each occasion thereafter that a training academy has commenced after July 1, the MSO has not allowed otherwise eligible employees to convert sick leave for the year beginning on that date."

The MSO argues that "this past practice can be viewed in one of two ways:

> either it (1) confirms that the parties have found no ambiguity in the contract language; or (2) reflects that, even if an ambiguity exists, the parties have understood the language to require that an employee must work the entire year to be eligible for conversion.

It argues that "either interpretation is fatal to the Union's claim."

The MSO rejects any Union argument that "since the right to convert rests with the employee, and not with the employer, then this consistent past practice is of no significance." It argues that "this argument misses the point." Specifically, the MSO argues that "the practice is not that no employee has chosen to convert sick leave; it is that, based on the contract language, the MSO has determined that such employees do not have the option to make that choice." It argues that "thus, the past practice as described above is a reliable gauge as to the parties' understanding as to how the contractual language should be construed."

The MSO also argues that "a final flaw in the Union's grievance is that its grant would either yield an absurd and unfair result, or require the Arbitrator to insert into the parties' agreement language that is not contained in that Agreement." It argues that "it is unclear whether the Union's position is that the members of the 40th training academy should receive the full conversion benefit or whether the benefit should be pro-rated for the percentage of the contractual year during which the employees worked." The MSO argues that "if it is the former, the result would be absurd given the intent of the sick leave conversion benefit" which "obviously is to provide an incentive for employees not to utilize sick leave." It argues that the sick leave conversion benefit "therefore rewards employees who go an entire 12-month period using five or fewer sick leave days." It argues that "if the Union's grievance is sustained, then employees who did not work the full year would be treated exactly the same as employees who worked the full contractual year."

The MSO argues that "per the terms of the contract, employees accrue 1.25 sick days per month." Thus, it argues that "employees accrue more than seven sick days if they work a mere six months." It argues that "if the Union is claiming that the full conversion benefit is available to employees hired after July 1, then employees who worked approximately half the year -- and who therefore had a shorter period of time in which they did not use sick leave -- would receive the same conversion benefit as employees who worked the entire year." It argues that this does not make sense in light of the intent in providing the conversion benefit."

The MSO similarly argues that "any claim that the conversion benefit should be pro-rated based on the date of hire is problematic." It argues that "the language of Article XIX, Sec. 6 speaks of the 'contractual year'." It argues that Article XIX, Sec. 6 does not contain language pro-rating the benefit for employees who work less than a full year." It further argues that "there are benefits under the contract which are expressly pro-rated for employees who work less than a full year." It argues that "given the contractual injunction not to add to or modify any of the terms of the Agreement, the Arbitrator should reject the offer to pro-rate the sick leave conversion benefit."

Discussion

I conclude that the MSO is violating the Agreement, Article XIX, Sec. 6 by refusing to allow employees from the 40th Basic Training Academy to convert sick leave for the 2016-2017 time period. I conclude that the language of Article XIX, Sec. 6 is clear and unambiguous on its face. It states that "if an employee uses no sick leave ... during a contractual year (July 1 to June 30), the employee will be entitled to convert" sick

leave to either regular compensation or vacation leave (in accordance with certain restrictions set forth in a contractually express formula not necessary to repeat here). Article XIX, Sec. 6 in no way limits its application to employees who have worked the entire contractual year from July 1, 2016 through June 30, 2017. The parties could have provided for a lesser sick leave conversion benefit or a proration of those benefits for employees -- such as those who attended the 40th BTA and were employed for less than the entire contract year -- but they did not do so. The parties knew how to draft such language as they did in Article XXV, Article XVII, and Article XXXIII with respect to uniform allowance, personal days, and educational pay, respectively.

The MSO argues that past practice shows that the parties have for many years consistently interpreted Article XIX, Sec. 6 as requiring employment for the full contract year (July 1 through June 30) as qualification for the contractual sick leave conversion benefit. To the extent to which past practice may be analyzed to interpret clear and unambiguous contract language, I conclude that there is no controlling past practice in this case. It appears to be true that the MSO has interpreted Article XIX, Sec. 6 for many years in the same manner as it has in this case. But there is no showing that such a practice has at any point been accepted by the Union. To the contrary, there is no evidence that the MSO ever discussed the matter with the Union or that the Union was even aware of the MSO's practice. In fact, the MSO concedes that it alone "determined" that employees such as those in the 40th BTA who have not worked an entire contract year "do not have the option to make the choice" to convert their sick leave.

The MSO also argues that to grant this grievance would result in an "absurd" result. I disagree. It is true that by not working the full contract year, officers in the 40th BTA worked a shorter period of time than others during contract year 2016-2017 and, thus, they worked less time during which to use sick time. It is true that even though they worked less time in the contract year, they still accrued more than seven sick days (at the rate of 1.25 days per month). Because seven days is the maximum that pursuant to Article XIX, Sec. 6 may be converted to pay or vacation leave, it is true that members of the 40th BTA enjoy the right to convert the same amount of sick leave as do employees who have worked the full contract year even though they have, in fact, work less time. To some extent that may seem to be unfair. But it is the result of the clear and unambiguous language which the parties negotiated in Article XIX, Sec. 6.

Award:

The Middlesex Sheriff's Office is violating the parties' collective bargaining agreement, Article XIX, Sec. 6 by refusing to allow employees from the 40th Basic Training Academy to convert sick leave for the 2016-2017 time period.

The Middlesex Sheriff's Office shall immediately allow employees from the 40th Basic Training Academy to convert sick leave for the 2016-2917 time period to the extent allowed by Article XIX, Sec. 6 of the Agreement and in accordance with this Opinion.

James M. Litton
Arbitrator

Dated: May 10, 2018