

James S. Cooper, *Ad hoc* Arbitrator

In the Matter of Arbitration between:)
NEW ENGLAND POLICE BENEVOLENT)
ASSOCIATION, LOCAL 23)
and) **OPINION AND AWARD**
CITY OF ROCHESTER)
_____)

Introduction

The City of Rochester, New Hampshire (“City” or “Employer”) and the New England Police Benevolent Association, Local 23 are parties to a collective bargaining agreement (“Agreement”) dated September 3, 2019 which provides in Article 22, Step 4 for final and binding arbitration of grievances. By agreement the City, represented by attorney [REDACTED] and the Union, represented by attorney Peter Peroni, submitted this matter for arbitration via agreed exhibits and written Briefs. The parties provided these documents on or before August 1, 2022.

Issue

The parties submitted the following issue for resolution:

1. Did the City of Rochester breach the parties Agreement when it refused to provide [REDACTED] the Grievant, with a sick leave pay out under Article 14 (G)¹ of the Agreement when he separated from employment?
2. If so, what shall be the remedy?

¹ Article 14 (G) provides:

Upon retirement from the New Hampshire Retirement System or twenty (20) years of continuous service with the City of Rochester, an employee shall be paid for fifty (50%) of accrued sick leave at his/her regular rate of pay and upon death while employed by the Rochester Police Department, the employee’s heirs shall be paid one hundred (100%) of accrued sick leave at his/her regular rate of pay.

Facts

██████████ worked as a police officer for the City from November 11, 2002 until April 16, 2021, a total of eighteen years and five months and five days. Before serving as a police officer, ██████████ worked for a year and half for the Rockingham County Corrections Department. On April 2, 2021 the Grievant notified the Chief of Police in writing of his decision to retire as follows:

Please allow this letter to serve as my official notification of retirement to you and to the City of Rochester effective April 16, 2021. I began my career on April 16, 2001 and entered the Group II New Hampshire State Retirement Systems at that time. With 20 years of service, 18.5 years as a patrol officer for the City of Rochester, I believe retirement is the best personal decision at this time for myself and my family.

In subsequent conversations with City administrators between April 2nd and April 16th ██████████ informed them that he could not officially retire because he did not meet the minimum age requirement of 45 years, something he would not attain until November 2021. The then-Human Resources Manager, Diane Hoyt informed ██████████ that under Article 14 (G) of the Agreement he failed to meet the twenty-year service requirement and had not met the requirement of "retirement from the New Hampshire Retirement System" in order to qualify for the fifty percent payout of unused sick leave. The City declined to pay ██████████ the fifty 50% percent payout of a accrued sick leave and the Union grieved.

The current Human Resources Manager, Kimberly M. Conley, reaffirmed Hoyt's interpretation of the Article 16 (G) and, in an affidavit stated in relevant part:

It is the interpretation of the City of Rochester Human Resources Department that an employee in the Rochester Police Department, such as ██████████ needs to actually retire through the New Hampshire Retirement System (drawing benefits) to receive pay out of your 50% of accrued sick time if they do not have 20 years of service with the City of Rochester.

This interpretation is consistent with the language of Article 14 G of the Collective Bargaining Agreement (CBA) between the *City of Rochester and the New England Police Benevolent Association, Local 23*. The purpose of this language as I understand it is to provide additional compensation to a retiring employee with less than twenty (20) years of service with the City of Rochester whose future earnings will be limited to New Hampshire Retirement System retirement benefits and such other income as may be limited by the rules of the New Hampshire Retirement System. In this case it appears that ██████████ was not drawing such retirement benefits and thereby subjecting himself

² All dates refer to 2021 unless otherwise stated.

to the additional earning limitations imposed upon retirees by the rules of the New Hampshire Retirement System.

- Further, I have reviewed the records of the City of Rochester and I am not aware of any other situation where an employee of the Police Department, such as [REDACTED] was paid 50% of the accumulated sick leave under Article 14 G of the CBA who did not have either 20 years of service with the Rochester Police Department or did not actually retire with the New Hampshire Retirement System and commence drawing retirement benefits upon separation. Specifically, I could not find any employee of the Rochester Police Department, such as [REDACTED] that was given "retirement status" with the New Hampshire Retirement System under Article 14 G of the CBA upon leaving the City and simply deferring drawing retirement benefits.

Positions of the Parties

The Union

The Union argues that under the retirement law, an employee who has met the minimum number of years of eligible service, may enter into a "deferred vested retirement" when the individual has not met the minimum age requirement for drawing benefits. That is precisely what the Grievant did. The deferred retirement status simply postponed [REDACTED] drawing benefits from the State Retirement Fund until he turned age 45. Once [REDACTED] had a deferred vested retirement, he met the contractual requirement of "Upon retirement from the New Hampshire Retirement System." It was [REDACTED] eligibility for the retirement funds that triggered the City's contractual obligation, not that he had to be "drawing benefits" as specified by the City.

The Union points out that the contract specifies when "drawing benefits" is critical to receiving benefits under the Agreement as set forth in Article 14 (C) in regards to an employee's transition from Workers' Compensation to Disability Retirement which states in pertinent part:

The commencement of payments under the New Hampshire Retirement Law shall end the employer's obligation for payment of vacation time and/or accumulated sick leave under this section.

This demonstrates that the drafters of the Agreement knew full well when "drawing payments" is crucial to an employee's eligibility for benefits. Further the Union points out that it was not surprising that City could not find another situation wherein the City made a payment to police officer under these circumstances; this is indeed a rare situation and the fact that it has not occurred previously does not mean that the 50% payment should be denied.

The City

The City argues that the plain meaning of the language rules this case and that the words "Upon retirement from the New Hampshire Retirement" means that the police officer must be officially receiving his retirement funds. The Union could have negotiated different language, but it did not. A deferment of this payment simply does not meet the clear intent of the language. The whole idea of this, the City argues, is that the 50% payment of accrued sick leave is being used to supplement the employee's retirement income. In this case [REDACTED] never retired under the New Hampshire Retirement System. He was simply eligible to be deferred (under the rules MacKenzie could not even apply for deferred retirement benefits until 90 days prior to his 45 birthday, which in this case was September 2021). [REDACTED] was "vested" as is everyone who contributes under the system after ten years of service but he has not officially or unofficially "retired." The New Hampshire Retirement Board owed [REDACTED] nothing on April 16, 2021, the day he left his employment with the City.

In fact, the City points out that [REDACTED] never retired. He simply changed careers and thus the purpose of the sick leave pay out was to aide employees into their transition to more limited income in retirement. The whole scheme of retirement means that one is leaving work completely and this was simply not in the cards for [REDACTED]. In addition, stretched to its logical conclusion under the Union's interpretation of the language, a police officer who worked ten years and became vested would still be eligible for the Article 14 (G) buy out of sick leave simply because he was vested but not able to collect for another five, ten or fifteen years. This would certainly stretch the meaning of "retirement from" to a completely nonsensical conclusion, something arbitrators abhor in interpreting plain language. For all these reasons, the arbitrator should deny the grievance.

Discussion

A buy back of sick leave for police officers serves two purposes. First, it serves as a monetary incentive for employees to use the minimum amount of sick leave necessary and thereby saves the City from the inconvenience and added cost for finding a substitute to take the officer's place for safety reasons or reduces the police manpower below what the City rightfully expects and needs. In many situations, where officers are replaced on a one for one basis, this frequently means paying another officer on overtime, at a substantially increased cost to the City.

The second purpose is to provide the officer with a small cushion of funds for future expenses, particularly when the officer is no longer receiving a paycheck.

The City's denial of sick leave buy back focused solely on the expectation that [REDACTED] would use the buy back money for a time when he was unemployed and retired. The City's interpretation of Article 14 (G) was that when New Hampshire Retirement started paying [REDACTED] that triggered the City's sick leave pay out. But there was little doubt that [REDACTED] was entitled to retirement funds; it was simply a matter of arriving at his forty-fifth birthday, some seven and a half months in the future. There was no uncertainty that the New Hampshire Retirement System was going to start paying his earned retirement funds; it was a matter of a delay or, in the words of the Retirement System "deferred." It would be completely unfair to a [REDACTED] who had complied with conserving his sick leave during his eighteen and a half years of employment to be denied a benefit based on the delay, but nevertheless the certainty, that he would be entitled to his retirement funds.

The words "upon retirement" should be read in this context. The certainty of receiving the funds should trigger the promised entitlement of the sick leave buy back. If the City was unsure that [REDACTED] would actually go through with receiving funds from New Hampshire Retirement, it could legitimately insist that there would be no pay out of sick leave until those retirement funds were being paid; thereby being assured that [REDACTED] did not withdraw his application for retirement and fulfilled the contractual commitment. The City's position that during this period of deferred payment, [REDACTED] was not bound by any income limitation required by the new Hampshire Retirement System and therefore he was not "retired" does not preclude [REDACTED] from collecting his share of unused sick leave. The provisions of Article 14 (C) are not voided if [REDACTED] continues to work at any job for which he is not making a contribution to the New Hampshire Retirement System. There is no evidence that on April 16th or thereafter that [REDACTED] took such a job for which he would no longer have met the requirement of "upon retirement from the New Hampshire Retirement System."

The City's argument that any police officer could defer his New Hampshire Retirement System after only ten years of service and therefore would be eligible for the buy back when that circumstance could be five, ten or more years in the future. Under those circumstances, the City's argument would hold water, but that is not the case under the current fact pattern. It was only a matter of seven and half months before [REDACTED] reached the required age for a payout

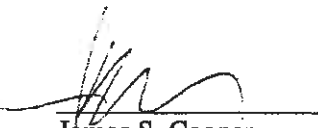
from the New Hampshire Retirement System. Rather than deny the officer the City's obligation to pay the fifty (50%) buyout for his commitment to conserve his use of sick leave, the ruling is that the City was entitled to delay such a payout until [REDACTED] started to collect his funds from the New Hampshire Retirement System.

Award

For these reasons the following is hereby awarded:

1. The City breached the parties Agreement when it refused to provide [REDACTED] the Grievant, with a sick leave pay out under Article 14 (G) of the Agreement when he separated from employment.
2. The remedy is that the City was obligated to pay [REDACTED] the fifty (50%) buy out of his accrued sick leave as of the date he began receiving his retirement annuity from the New Hampshire Retirement System.
3. The City shall make [REDACTED] whole by paying him his fifty (50%) percent of accrued sick leave as of April 16, 2021 plus statutory interest thereon from the date that the New Hampshire Retirement System initiated his annuity until the date such funds are paid.

Date: August 7, 2022


James S. Cooper