AMERICAN ARBITRATION ASSOCIATION
NO. 11 390 00408 13
ARBITRATOR TIMOTHY J. BUCKALEW

NEW ENGLAND POLICE BENEVOLENT ASSOCIATION
LOCAL 550

AND

WORCESTER COUNTY SHERIFF'S DEPARTMENT

POST-HEARING BRIEF OF THE UNION

Now comes the Union, NEPBA Local 550, and submits the following Post-Hearing Brief for consideration.

RELEVANT RECORD FACTS

1. The Worcester County Jail is a correctional facility that cares for some 1,100 inmates. The Jail is staffed by some 550 employees, a number of whom are Military personnel employed as corrections officers. NEPBA Local 550 ("the Union") represents the line Corrections Officers. [Tr. 38, 88].

2. Warren Lohnes ("Lohnes") is the immediate past president of NEPBA Local 550, serving in that capacity from approximately 2008-2012. Prior to serving as President, Lohnes served in a number of Union leadership roles, including Treasurer and Secretary. [Tr. 36].

3. On or about December 14, 2012, Lohnes became aware of a complaint from Military serving union members relative to denials of Military benefit time. Specifically, Lohnes was informed that the Sheriff was no longer allowing officers to use their contractual 17 days of Military time for weekend training. [Union Ex. 2].

4. As a result of receiving the complaint on December 14th, Lohnes, that same day, forwarded an email to Union counsel, which email: (1) specified the nature of the concern over the lack of Military days for weekend training; (2) forwarded the Massachusetts General Law cited by the Sheriff to support denying pay for weekend training; (3) forwarded a Human Resources' email to a member, Bruce Palmer ("Palmer"), explaining that the Sheriff, although it had in the past, would no longer allow military time for weekend drills; and (4) Lohnes sought an opinion on the issue to determine if a substantive grievance could follow. [Union Ex. 2].

5. Following his email to Union counsel on December 14th, Lohnes filed a formal written grievance on December 19, 2012. The grievance was described as a "class action," and the remedy requested was "that all 550 members serving in the military be allowed the use of 17 days off for military training purposes in conjunction with the CBA, past practice, and the law." [Joint Ex. 2].

6. The Union filed formal written grievances with the Sheriff on four (4) occasions: December 19 and 31, 2012, January 22, 2013, and February 13, 2013. The Sheriff neither responded in writing, nor met or offered to meet with the Union at any stage of the grievance process. [Tr. 39].

7. On March 20, 2013, Sheriff's counsel emailed Attorney Kevin Buck, then representing the Union, asking "is this about Bruce Palmer?", and stating that his understanding was that Palmer had been paid. [Joint Ex. 3].

8. Attorney Buck inquired of the Union as to the status of the grievance, and on March 25, 2013, President Lohnes responded that the matter had not been resolved, stating "Palmer has not been reimbursed for time he had to take to attend weekend drills throughout the year. This is our beef: our military guys have always been allowed to use their 17 days throughout the year and not limited to just their 2 weeks of annual training." [Tr. 44; Union Ex. 1].

9. Lohnes' email to Buck on March 25, 2013, is consistent with his initial pre-grievance email to counsel on December 14, 2012, in which Lohnes complained about the lack of Military time for weekend training. [Union Ex. 2].

10. The Employer has always allowed officers to apply their 17 Military leave days to their monthly, weekend drills. This much was undisputed by the Sheriff, and was confirmed by several evidentiary sources, including but not limited to:

    a. The email from Payroll Administrator Melissa Anderson ("Anderson"), which acknowledges that the scheduling officer, Captain Dickhaut, had allowed this practice in the past [Union Ex. 2; Joint Ex. 2];

    b. Lohnes' testimony that officers had always been allowed to use their Military benefit time for weekend drills [Tr. 38]; and

    c. Rebecca Pellegrino's ("Pellegrino"), Director of Administration and Finance, testimony confirmed that for a number of years Captain Dickhaut (who had been in charge of scheduling for at least 6-8 years) and Anderson had been allowing members to use their Military time for weekend drills. [Tr. 46, 108-109].

11. There is also no dispute that the Sheriff unilaterally changed this practice. Pellegrino testified that since she "clarified" the contract to Captain Dickhaut and Ms. Anderson, officers are no longer allowed to use their Military benefit time for required weekend training. [Tr. 109-110].

12. Pellegrino testified that she became concerned that Captain Dickhaut and Ms. Anderson had been erroneously allowing military time for "a number of years." As a result, she researched laws and contacted other human resources personnel of unionized agencies to determine their practices relative to payment for weekend drills. She did not, however, review any CBAs

applicable to those agencies, contact or speak to any employee representatives, nor did seek information as to the agencies' past practices. [Tr. 105-106].

13. As a result of her research, Pellegrino testified that she "came up with what she believed was a uniform approach to military leave at the Worcester County Sheriff's office." [Tr. 96].

14. Relative to weekend drills, the approach Pellegrino developed and implemented was that (1) officers could use their own benefit time (i.e. compensation time, vacation, etc.); (2) they could go "off-payroll;" or (3) they could try to do a shift swap through the scheduling Captain. [Tr. 97].

15. Pellegrino testified unequivocally that officers are no longer able to use their Military benefit time for weekend Military training. [Tr. 110].

16. Pellegrino testified that she consulted G.L. c. 33, § 59. That statute is not referenced in Article 24, and Pellegrino agreed that § 59 and Article 24 were not identical. [Tr. 110].

17. Pellegrino testified that she consulted G.L. c. 33, § 59A. She agreed that § 59A is not referenced anywhere in the CBA. [Tr. 111].

18. Jonathan Kenney ("Kenney") testified for the Union. Kenney, a member of the Union, is also a member of the United States Navy, Reserves. In the Navy, Kenney works, among other things, on destroyers and weapons systems. [Tr. 75].

19. While he was still a probationary employee, Kenney was informed by Anderson that he could no longer use Military benefit time for his required, monthly Military weekend drills as he had done in the past. [Tr. 76].

20. In the past, Kenney and other officers were allowed to use their Military benefit time to be paid for Military weekend training if they simply provided Captain Dickhaut with a copy of their drill scheduled a week in advance. [Tr. 76, 79].

21. Kenney later discussed the change in practice with Palmer, a permanent (non-probationary) officer, and member of the National Guard. Palmer confirmed that Military officers had always been allowed to use Military benefit time for weekend training. [Tr. 77].

22. Because Kenney believed that he was "not under union protection at the time," Palmer told Kenney he would go to the Union to pursue the issue. [Tr. 77].

23. Since the change in practice, Kenney has not been allowed the use of Military benefit time for his weekend drills; instead, he has had to exhaust personal time and vacation time. Kenney stated: "I actually have drill coming up this weekend . . . I'm probably going to have to go off the books for it because I am out of benefit time." At that time, Kenney stated he had possibly 10 Military days still available to him. [Tr. 78].

24. In his cross-examination of Kenney, Counsel asked whether his "monthly weekend drill was the same thing as his annual tour of training?" Kenney replied, "Correct." Kenney said that they were not two different things. The Sheriff offered no evidence to dispute this testimony. [Tr. 85].

25. Given Kenney's testimony, and the new uniform approach described by Pellegrino, the effect and impact on Military Union members is ongoing and continuous in nature.

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 24 – MILITARY LEAVE [Joint Ex. 1]

SECTION 1. An officer is entitled to leave with pay for his/her annual tour of training duty in the Armed Forces of the Commonwealth (the National Guard), or as a member of the reserve unit of the Armed Forces of the United States, not exceeding 17 days. An officer shall submit to the Sheriff documentation of such military training duty.

SECTION 2. Subject to this Article, for further provisions governing Military Leave, see Addendum A, page C9.

ADDENDUM A, C9

MILITARY LEAVE

An employee is entitled to leave with pay for service in the Armed Forces of the Commonwealth (the National Guard), or during his/her annual tour of duty, not exceeding 17 days, as a member of a reserve unit of the Armed Forces of the United States. (Upon vote of acceptance of M.G.L. 33, Section 59 by County Commissioners)

ARGUMENT

I. THE SHERIFF HAS FAILED TO ESTABLISH THAT THIS GRIEVANCE IS NOT ARBITRABLE.

It is the Sheriff's burden to prove that the grievance at issue is not arbitrable. In order to meet this burden, the Sheriff must overcome the strong presumption in favor of arbitration. See Elkouri & Elkouri, How Arbitration Works at 2-9, 6-4 (7th ed. 2012) ("Doubts should be resolved in favor of arbitrability, and arbitration should be compelled unless it may be said with 'positive assurance' that the arbitration clause is not susceptible to an interpretation that covers the dispute.") (citations omitted). The Sheriff is unable to meet this heavy burden.

A. THE GRIEVANCE IS SUBSTANTIVELY ARBITRABLE.

The Sheriff cites to both the Management Rights clause and the Arbitration clause to argue that this grievance is not substantively arbitrable. Neither clause offers the support the Sheriff seeks. The Management Rights clause has no force or effect, pursuant to the unequivocal and unambiguous language of the CBA, where such rights are "expressly abridged by a specific provision of" the CBA. [Joint Ex. 1, Art. 4, §1]. Here, the Sheriff's "rights" regarding the "allocation, scheduling, and granting of all leaves," is abridged by the CBA's Military Leave provisions. [Joint Ex. 1, Art. 4, §1(24), Art. 24 & Add. A at C9]. The interests and rights imparted by the CBA would otherwise be rendered unenforceable and essentially meaningless. Cf. Elkouri, at 13-30 ("[Management-rights clauses] serve to deflect unions' attacks on unilateral management changes in *subjects that are not expressly covered in the contract.*") (emphasis added). As a result, the Management Rights clause does not protect the Sheriff from defending his unilateral termination of his Military members' right to be paid for Military weekend training. Further, because this grievance does not require the arbitrator to add to or modify the contract—instead, as further described below, the Union seeks only to enforce the CBA's Military Leave clause in the same manner in which the parties have always done—this grievance is not outside of the CBA's arbitration clause. [Joint Ex. 1, Art. 10, §3(a). See Elkouri, at 12-12 & 12-13 (stating that arbitrators have regularly ruled that management is unable to unilaterally take away a benefit, including leave benefits, established by custom or practice). Accordingly, because it involves the Sheriff's unilateral change of a subject covered by the CBA and supported by a sustained past practice and understanding of the parties, this grievance is substantively arbitrable.

B. THIS GRIEVANCE IS PROCEDURALLY ARBITRABLE.

The grievance at issue in this case was made timely. The parties' CBA provides that "no grievance may be filed in writing more than fourteen (14) calendar days after the officer knew, or should have known, of the occurrence or event upon which the grievance is based." [Joint Ex. 1, Art. 10, § 2]. The grievant, Bruce Palmer, was provided notice of the Sheriff's about-face refusal to pay Military members for their required weekend training on December 5, 2012 and the Union was provided notice of the same on or about December 14, 2012. [Union Ex. 2]. Thereafter, on December 19, 2012, then-Union President Lohnes filed a formal, written class-action grievance. [Joint Ex. 2]. Having received no response at all to the Step 1 grievance, Lohnes proceeded to file a Step 2, 3, and 4 grievance—none of which were responded to—pursuant to the to the CBA. This grievance, thus, was filed within the 14 days required under Article 10, § 2 of the CBA.[1] Furthermore, continuing violations of the CBA give rise to continuing grievances; therefore, such grievances may be filed at any time regardless of time requirements specified by agreement. Elkouri, at 5-28. Here, the Sheriff's unilateral change of his Military leave policies and practices is ongoing and constitutes a continuing violation of the contract. Each and every month that military members are not paid for their weekend drills, the violation renews. Therefore, it is without question that this grievance was timely made. See id.

There is no doubt that the issue arbitrated in this case—whether the Sheriff violated Article 24 and other relevant provisions of the CBA and established past practice when it

[1] The Sheriff's argument that the grievance was untimely because a Step 2 grievance was not filed within the 14-day time period should be rejected. First, the language of the CBA does not require that the Union file a Step 2 grievance within 14 days of notice. While Article 10, § 3 does state that submission of a Step 2 grievance "will constitute the commencement date of the grievance," it does not state that the commencement date of the grievance must be within 14 days of notice. Instead, the CBA simply requires that within 14 days of notice, a written grievance be filed. Such was done here. Second, Lohnes testified that this grievance was filed in the same manner as always—and as the Sheriff pointed out, Lohnes has been involved in the filing of numerous grievances. [Tr. 39, 48]. Lastly, as a practical matter, accepting the Sheriff's argument would render the filing of a Step 1 grievance, required by the CBA, futile and meaningless.

unilaterally decided to no longer allow officers to use Military leave time to attend Military weekend training—was grieved. The CBA requires only that the grievance "specify the article and paragraph of [the CBA] under which the grievance arises and the specific provisions of the Agreement that allegedly have been violated, and the remedy sought." [Joint Ex. 1, Art. 10, § 3]. The grievances filed in this matter did exactly that. [Joint Ex. 2]. The Sheriff speculated—for the first time at the arbitration hearing—that the Union initially filed a grievance on behalf of Officer Palmer's not being paid for a Military activation and later—sometime after March 20, 2013 when the demand for arbitration was filed—changed the course of the grievance to center on a class-action regarding the Sheriff's failure to pay for Military weekend drills. This argument simply has no support in the evidence, which shows that Lohnes, in filing the grievance on behalf of the Union, from December 14th forward was concerned only with the issue of payment for weekend drills. First, after being forwarded Ms. Anderson's email, Lohnes sought advice of counsel as to whether the Union could grieve the Sheriff's refusal to pay its Veteran officers their 17 days of Military pay for weekend drills. [Union Ex. 2]. Almost immediately thereafter, on December 19, 2012, Lohnes filed the class-action grievance—expressly seeking remedy on behalf of all Union members and not just Officer Palmer. [Union Ex. 2]. Later, after apparent confusion on the part of Sheriff's counsel, Lohnes unequivocally stated that the Union's grievance was that Officer Palmer had not been reimbursed for his weekend drills and that the Local's "military guys ha[d] always been allowed to use their 17 days throughout the year and not limited to their 2 weeks of annual training." [Union Ex. 3]. There is no question that the Union's intention was, and always had been, to grieve that very issue.

The Sheriff's failure to clarify any confusion—or respond to the grievance at all prior to the arbitration—may not now be held against the Union. "A general presumption exists that

favors arbitration over dismissal of grievances on technical grounds." Elkouri, at 5-11, 5-27. This is especially true where such technical grounds are not asserted through the grievance proceedings. Id. Here, for the very first time, the Sheriff asserted at the arbitration hearing that the Union's grievance was untimely and, more incredibly, never actually grieved the issue. [Tr. 41]. Indeed, the Sheriff failed to address the grievance at anytime prior to the hearing; there was no invitation to meet, no discussion, and no response was ever issued to the Union. As a result, the Sheriff waived any such procedural arbitrability argument. See Elkouri, at 5-11.

II. THE UNION HAS SUSTAINED ITS BURDEN OF PROOF ON THE MERITS.

The Union proposed the issue in this case as whether the Sheriff violated Article 24 and other relevant provisions of the CBA, and established past practice, when he unilaterally decided he would no longer allow officers to use Military benefit time to attend Military weekend training. Based on the exhibits and undisputed testimony as to the established past practice, the Union has sustained its burden of proof in this case.

"Unquestionably, the custom and practice of the parties constitute one of the most significant evidentiary considerations in the labor-management arbitration." Elkouri, at 12-1. "Proof of custom and practice may be introduced for any of the following major purposes: (1) to provide the basis of rules governing matters not included in the written contract; (2) to indicate the proper interpretation of contract language; or (3) to support allegations that the "clear language" of the written contract has been amended by mutual agreement to express the intention of the parties to make their written language consistent with what they regularly do in practice in the administration of their labor agreement." Id. at 12-1, 12-2. Because there is a clearly established, and undisputed, custom and practice of allowing Military officers the use of their

Military benefit time for weekend Military training, that practice should continue to be enforced as an implied term of the CBA.

A. THE UNION, THROUGH CUSTOM AND PRACTICE, ESTABLISHED A PERSONAL BENEFIT THAT IS AN IMPLIED TERM OF THE CBA.

"Under certain circumstances, custom and practice may be held enforceable through arbitration as being, in essence, a part of the parties 'whole' agreement."[2] Elkouri, at 12-2. Where it is alleged that past practice constitutes an implied term of a contract, the practice must be (1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties. Id. at 12-4. Further, where such an established custom or practice involves a benefit of personal value to the employees, arbitrators often rule that such practices are binding, and are not subject to change by management. Id. at 12-12. Among such "benefits" or "working conditions" not subject to change, or discontinuance, by management are leaves of absence policies. Id. 12-12, 12-13.[3]

Here, the practice of the parties was unequivocal, undisputed, and consistent for a number of years. There is no question that Captain Dickhaut and Ms. Anderson had been allowing officers to use part of their 17 days of Military time for weekend drills for at least 6 to 8 years. [Tr. 38, 46, 76, 79]. The specific practice was that if the officers provided their drill schedules to

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[2] "A union-management contract is far more than words on paper. It is also all the oral understandings, interpretations, and mutually acceptable habits of action which have grown up around it over the course of time. Peaceful relations depend, further, upon both parties faithfully living up to their mutual commitments as embodied not only in the actual contract itself but also in the modes of action which have become an integral part of it." Id. (citing Coca-Cola Bottling Co., 9 LA 197, 198 (Jacobs, 1947)).

[3] The Arbitrator should reject any argument by the Sheriff suggesting that Article 26 (Stability of Agreement, Joint Ex. 1) somehow precludes the enforceability of established custom and practice. The past practice at issue in this case is not in conflict with the general CBA provisions governing Military leave, and is certainly not prohibited. Moreover, the custom of granting weekend military leave had existed, unabated, under the same CBA language for years. Where such customs are not inconsistent with explicit CBA provisions, they are generally held enforceable. So-called zipper clauses "have no magical dissolving effect upon practices or customs which are continued in fact unabated and which span successive contract periods." Id. at 12-18.

Captain Dickhaut, the officer in charge of scheduling, with one week's advance notice, such officers would be allowed paid Military time for their weekend drills. [Tr. 76, 79]. This practice was indisputably recognized and established by both the Union and the Sheriff over the years. [Union Ex. 2; Tr. 108-110]. Accordingly, the Union met its burden to show that the practice was clearly enunciated and acted upon, and was established and accepted by both parties over a sustained period of time. See Elkouri, at 12-4.

Moreover, because this practice assuredly involves a benefit of personal value to Military officers, it is not subject to a unilateral change by management. See Elkouri, at 12-12, 12-13. That is precisely what the Sheriff did in this case. Ms. Pellegrino testified that after researching various Massachusetts General Laws and consulting with other unnamed human resources people, management decided to—and did—alter the long-standing practice by implementing a new "uniform approach to military leave." [Tr. 96]. The Sheriff's new approach terminated a long-standing benefit, which was an implied term of the CBA, and ultimately has caused ongoing and continuous damages to Military officers, such as Officer Kenney, who testified that he has burned through all of his personal benefit time and would be forced to go off the payroll in order to attend required Military weekend training. As such, the Arbitrator should sustain the grievance.

B. THE AMBIGUOUS LANGUAGE OF ARTICLE 24 OF THE CBA, AS DEFINED THROUGH CUSTOM AND PRACTICE, MUST BE READ TO ALLOW THE USE OF MILITARY BENEFIT TIME FOR WEEKEND TRAINING.

Even where the parties do not allege that custom constitutes an implied term of the agreement, it may be considered to define otherwise ambiguous terms and provisions. "The intent of the parties is most often expressed in their actions." Elkouri, at 12-20. As such, the custom or past practice of the parties is the most widely used standard to interpret ambiguous and

unclear contract language. Id. "Indeed, the use of past practice to give meaning to ambiguous contract language is so common that no citation of arbitral authority is necessary." Id. at 12-20.

Article 24 addresses generally that officers shall have up to 17 days of Military benefit leave for training purposes. The article neither cites to, nor mirrors any particular statute, nor does it include any definitions of relevant terms—including "annual," "tour," or "training." Instead, it references further leave provisions, found in Addendum A, as supplementing its provisions. Addendum A, most notably, adds that an employee is entitled to paid leave for Military "service" OR during his/her "annual tour of duty." However, again, the Addendum fails to define any of its terms. Addendum A references G.L. c. 33, § 59, but does not incorporate its terms or definitions. Neither Article 24 nor Addendum A reference or incorporate G.L. c. 33, § 59A, despite the Sheriff's reliance upon it in justifying its change in practice.[4] Indeed, both Article 24 and Addendum A are silent as to the particular issue of weekend training; silent as to the process for approval of leave; silent as to the documentation required by the employer; and silent as to other options to take leave for Military duties.

Given the silence of the provisions, the Arbitrator should interpret and enforce the relevant language of CBA by reference the parties' the undisputed, sustained, and uniform action. Reference to the parties long-standing established practice makes clear that the parties always intended and believed weekend drills to qualify under paid leave for "annual tour of training," "annual tour of duty," or, more generally, "service" in the Military. In fact, Officer Kenney testified that as a member of United States Navy, there was no difference between weekend training and annual training. It was the same in his mind and always was treated the same by the Sheriff: officers would be paid for all training, as a Military benefit under the CBA,

[4] To be clear, M.G.L. c. 33, § 59A does not in any way prohibit paid leave to Military officers for attendance at their weekend drills. Instead, it merely does not mandate such payment. Thus, here, the benefit always bestowed on Military officers is not contrary to or inconsistent with the law or the express agreement of the parties.

so long as the officers provided a weekend drill schedule to Captain Dickhaut. The Sheriff has no authority to alter, and certainly not terminate, this benefit guaranteed to Military members under the CBA.

Interestingly, the Sheriff has provided absolutely no economic mandate for unilaterally divesting his Military Veterans of this contractual right.[5] Rather, at the arbitration, the Sheriff asserted several reasons he should not have to allow his soldier/officers to use their long-standing Military leave benefit for required Military weekend training, for example: (1) falsely claiming the Union never properly or timely grieved the issue—which reason was never raised to the Union before arbitration (because the Sheriff never once responded to the four written grievances filed on behalf of his Military officers); (2) asserting an unbridled management right to strip Military employees of this personal benefit; and (3) arguing that the "clear" language of the contract—the language the Sheriff claims its own managers had misinterpreted for almost a decade—only allows the officers to use their Military time for 2 weeks of annual training (of course, there is no reference to "2 weeks" anywhere in Article 24). It is clear that none of the reasons set forth served as the original basis for the Sheriff taking this benefit away from his Military personnel. The real reason is set forth in black and white in Ms. Anderson's email—we don't have to pay you, so we won't. Ms. Anderson seems to be put between a rock and a hard place, telling one officer that "the issue is much bigger than me." She states that she was advised that she had not been "following the law," and that "Captain Dickhaut had been allowing you to use them on weekend drill . . . which again is not what the law allows." [Union Ex. 2]. So, while actions generally speak louder than words, the words used here speak with sufficient volume to draw a conclusion. The Sheriff unilaterally determined that it did not have to pay this benefit,

[5] While the Sheriff offered no financial hardship or budgetary reason for denying the benefit, the Military officers, as evidenced by Officer Kenney's testimony, are clearly economically impacted, as Kenney offered that he was about to be forced to go off payroll to attend training.

and he instructed his payroll director to tell his Military employees that the law does not allow them to use their benefit for weekend drills. This, of course, is not true, as there was no evidence that allowing such benefits is illegal, or is in anyway prohibited. To the contrary, the Sheriff is prohibited from unilaterally taking away this established personal benefit guaranteed to Military officers.

III. THIS IS NOT AN ISSUE OF FIRST IMPRESSION.

As one might expect, the issue of Military leave, particularly during the last decade, is one that has been explored within the context of labor arbitration. A remarkably similar case was decided earlier this year. To that end, a copy of Township of Galloway and PBA Local 77, PERC No. AR-2012-589 (Jan. 28, 2013) is attached hereto. In that case, a Police Chief unilaterally terminated paid leave for officers attending weekend drills. There, like here, the management decided to do so after (1) it researched statutes he thought made it unlawful to pay such benefits; (2) it surveyed other local departments and could not find any that paid for weekend drills; and (3) it argued that the benefit was inconsistent with the law and management rights. In that case, the NJ statute at issue was much more restrictive than the one upon which the Sheriff relies in this case. Regardless, the arbitrator concluded that the employer was prohibited from halting the undisputed custom and practice of the parties. The Arbitrator ordered that the practice of paying full pay for attendance at weekend drills be reinstituted, and all officers affected be made whole.

CONCLUSION

Based on the above, the Union requests that the Grievance be sustained, and that the Arbitrator order that all affected members be made whole, with interest. The Union requests that

the Arbitrator retain jurisdiction as to the implementation of this award, including the Remedy in the event the parties are unable to agree.

Respectfully Submitted,
NEPBA Local 550,
By its Lawyer,

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Dated: October 28, 2013

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Arbitration between	*	
Township of Galloway	*	DECISION AND AWARD
-and-	*	
PBA Local 77	*	PERC Docket No. AR-2012-589 (Military Leave Pay)

Before: Frank J. Cocuzza, Arbitrator

Appearances:

For the Township of Galloway

William G. Blaney, Esq.
Blaney & Donohue P.A.

For PBA Local 77

Myron Plotkin
Plotkin Associates, LLP

Procedural Background

The Township of Galloway (hereinafter the Township) and Local #77 of the State PBA (the Union, the PBA) are parties to a collective bargaining agreement (CBA) covering the period January 1, 2011, through December 31, 2014 (Exhibit J-3), the provisions of which are mutually recognized by the parties as controlling in the instant case. Article III (Grievance Procedure) of the Agreement provides for arbitration in disputes arising over its application or interpretation, with the decision of an arbitrator "...binding upon the parties; subject, however, to any applicable laws."

On January 13, 2012, the Township chief of police issued standard operating procedure (SOP) #12-001, a special order which, effective immediately, discontinued the practice of paying Township officers for military reserve weekend drills when such officers are scheduled for work (J-2). On February 14, 2012, the PBA filed a grievance with the chief of police (J-5) on behalf of five of its members alleging a violation of a "...consistent past practice of paying officers their regular pay on drill weekends when they were scheduled to work and attend military drills...". On February 22nd Chief of Police Patrick Moran denied the grievance, and his denial was sustained at Level Three of the grievance procedure by Township Manager Arch Liston on March 28th. The Union then filed a demand for arbitration with the Public Employment Relations Commission (PERC), and on June 15, 2012, the undersigned was appointed by PERC to serve as the parties' arbitrator.

An evidentiary hearing was held on December 5, 2012, at the Township municipal complex. The parties were afforded the opportunity to argue orally, present documentary evidence, and examine and cross-examine witnesses. Both the Township and the Union elected to file post-hearing briefs, which were to reach the Arbitrator by January 7, 2013. Upon the receipt of all material from the parties the record was to be officially closed. However, after receipt a Township objection to the inclusion of testimony and evidence contained within the Union's brief was filed with the Arbitrator. The objection was sustained, and the material in question was excluded from the record and deemed to be outside of the Arbitrator's consideration. The following decision was then rendered.

Issue

Unable to agree on the exact framing of an issue, the parties separately proposed the following, leaving the development of a controlling issue in the hands of the Arbitrator:

The Township

> *Is the Township of Galloway lawfully allowed to pay officers for military drill weekends* and, if so, did the Township and/or its agent(s) violate the Agreement and/or past practice when on January 13, 2012, it unilaterally (through the issuance of SOP #12-001) discontinued the practice of allowing officers who are scheduled to work and attending drill weekends to do so without loss of pay or leave time? If so, what shall be the remedy?

The PBA

> Did the Township of Galloway and/or its agent(s) violate the Agreement or past practice when on January 13, 2012, it unilaterally (through the issuance of SOP #12-001) discontinued the practice of allowing officers who are scheduled to work and attending military drill weekends to do so without loss of pay or leave time? If so, what shall be the remedy?

The two submissions differ solely in the inclusion of the initial question by the Township (set in italics above) which seeks to have the Arbitrator rule on the legality of the parties' practice of payment and failure to charge leave time for police officers attending weekend military reserve drills. Thereafter, the submissions are essentially identical in their framing of the contractual issues to be placed before the Arbitrator.

In refusing to raise the legal question, the Union emphasizes its position that the sole function of the Arbitrator is to interpret the terms of the parties' CBA, not to render his opinion on any statutory preemption that may or may not exist. Thus, the argument before me has three parts. First, should I be entertaining the Township's argument of an alleged legal bar to the discontinued practice? Second, if that answer is affirmative, does such a bar actually exist? And finally, in the event that I make no legal judgment or if I determine that there is no statutory preemption of the practice, did a contractual violation arise through its cessation?

Exhibits

Joint Exhibit 1	Synopsis of pay loss/leave time charged subsequent to January 13, 2012.
J-2	SOP #12-001, 1-13-12 (3 pp.)
J-3	CBA, 1-1-11 through 12-31-14
J-4	CBA, 1-1-05 through 1-31-10
J-5	Grievance package (5 pp.)
Union Exhibit 1	38 USC 4302
U-2	Local Finance Notice, NJ Department of Community Affairs, 1-15-04 (6 pp.)
U-3	Township bargaining counter proposal, prepared 4-11-11 (3 pp.)
U-4	*The Current* (copy of front page), 5-10-12
U-5	Memorandum of Agreement, 3-9-12 (13 pp.)
Township Exhibit 1	N.J.S.A. 38A:4-4 and N.J.A.C. 5A:2-2.1 (2 pp.)
T-2	Memorandum from Chief Moran to Eric Hendrickson, 12-28-09 (4 pp.)

Facts and Stipulations

The parties have stipulated that for at least twenty years Township police officers who are members of the National Guard and Reserves and who are ordered to attend unit training assemblies (i.e., drill weekends) on days when they are scheduled to work have received both their military pay and their regular Township compensation. In addition, these officers were not required by the Township to utilize any accumulated leave time for their shift absences during the drills. The parties agree that this long-standing situation constituted a practice within the meaning of their Agreement.

During negotiations over a successor to their 2005-2010 CBA (J-4), Township Chief of Police Patrick Moran on January 13, 2012, issued Special Order #12-001 (SOP, J-2) in which he unilaterally discontinued this practice of paying police officers for military drill and declared that henceforth officers would have to "...utilize compensatory time, benefit time, trade shifts, or take leave without pay to attend military drill."

Five Township police officers were affected by the Chief's January 13th SOP. In varying degrees they have each lost Township pay for their attendance at drill weekends, and each has been charged with either personal leave or vacation time for such attendance (J-1). The loss of pay and charged time for drill weekends continues to the present for the five affected officers.

Position of the Parties

The PBA

The Union argues that based upon the Township's stipulation that a practice existed for at least twenty years, there is no need to address this issue for the Arbitrator. The Agreement's past practice clause (Article XIX) states that any such practice shall be continued and that the Township must negotiate any changes to existing practice as part of a new CBA. Clearly, they did not do so. The Township, in fact, indicated its intent to negotiate an end to the practice in an e-mail from Chief Moran to Union official Eric Hendrickson on December 28, 2009, wherein Moran in his cover memo acknowledged its obligation to negotiate over the change (T-2). Furthermore, in their proposals for a successor agreement the Township sought to insert a provision eliminating pay for weekend military duty and any other practices not specifically set forth in the expired Agreement (U-3, p. 3). The Union rejected both the Township's overture in Exhibit T-2 and their formal position on the issue contained in their bargaining proposals (U-3). The Memorandum of Agreement (U-5) signed on March 9, 2012, for a four-year Agreement (2011 through 2014) contained neither the Township's proposal regarding cessation of pay for drill weekends nor their attempted exclusion of existing practices from the new Agreement. The Chief's January 13, 2012, SOP (two months prior to the execution of the MOA) was clearly an attempt to gain through fiat what the Township was not going to achieve at the bargaining table.

At the hearing the Union submitted into evidence relevant parts of the accompanying code (38 USC 4302) to the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) (U-1) in which it is stated:

> *Nothing in this chapter shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.*

The PBA also submitted a N.J. Department of Community Affairs Local Finance Notice dated July 15, 2004 (LFN 2004-14, U-2), in which it is stated on page two that while there is no statutory obligation or employee entitlement to receive employer pay for drill sessions, employers "...may have separate personnel policies or labor agreements that may provide compensation for this time." A check by the Union with the state's Division of Local Government Services as to the current validity of this state advisory determined that the Division has not made any changes to LFN 2004-14 (Union brief, p. 8).

N.J.S.A. 38:23-3 limits additional pay for duty status only for commissioned officers:

> ***38:23-3. Compensation of public officers or employees while in military or naval service.***
>
> *Any officer, department, institution, committee, commission or other body of the state or any subdivision or municipality thereof, may pay in his or its discretion the whole or a part of the salaries or compensation of their employees or attaches during the time they are engaged in a branch of the military or naval service of the national government or of this state.*
>
> *No greater portion of the salary or compensation of a commissioned officer as an employee of a department of the state or municipal government shall be paid to him under this section than will, when added to his salary as such commissioned officer, equal the amount paid to him by the state or municipal department before entering the military or naval service.* (Union's emphasis)

The five affected Galloway police officers are enlisted personnel, not commissioned officers, and therefore are subject to no such restrictions to their full Township pay under N.J.S.A.38:23-3.

The Township's reliance upon N.J.A.C. 5A:2-2.1 is misleading. It is true that the code states that pay for active duty (i.e., up to 90 days duration) is statutorily mandated, but is not mandated for weekend drills. However, nowhere is it stated that a public employer is prohibited from negotiating payment for attendance at weekend drills. In the

instant case, "...while the Township is not forced, required or mandated to pay for drill weekends, it has agreed through negotiations and over twenty years of practice to provide this paid leave of absence. It is no different from any other paid leave of absence." (Union brief addendum, p. 2)

Citations by the Township of N.J.A.C. 4:A6-1.11, wherein weekend drills are exempted from the statutory requirement for leaves of absence, are similarly misplaced. This provision is for public employees in civil service municipalities. As Galloway Township is not a civil service municipality, the citation is inapplicable.

The PBA rejects any argument that the Township is not authorized by law to make the salary payments at issue here. For over twenty years the Township's governing body has reviewed and formally approved collective bargaining agreements between itself and the PBA. In Hutton Park Garden v. West Orange Twp. Council, (68 NJ 543, 564-6, 1975), it is stated that legislative bodies "...are presumed to act on the basis of adequate factual support and absent a sufficient showing to the contrary, it will be assumed that their enactments rest upon some rational basis within their knowledge and experience" (cited and paraphrased in Union brief addendum, p. 3).

Police officers in Galloway have historically been paid their full regular pay on days for which they were scheduled to work but were required to attend military drills, and they were not required to utilize any contractual leave time for their drill obligations. There are no legal preemptions precluding the Township from providing this same negotiated benefit that it has provided for over twenty years. The Township was not successful in the last round of bargaining in eliminating this benefit, and now unilaterally through the issuance of SOP 12-001 it seeks to achieve that goal even though the most recent MOA, signed and ratified by both parties, states that all terms and conditions of employment not addressed therein shall remain unchanged and that "Any and all proposals not addressed in this Memorandum of Agreement are deemed to have been withdrawn by the party proposing same" (U-5, p. 9).

~~Modification~~ of the parties' CBA is not within the realm of the Arbitrator as stated in Article III.B.5.c. The definition of a grievance in Article III.A. encompasses the application or interpretation of the Agreement. The Township is asking the Arbitrator to alter the CBA by eliminating a duly negotiated benefit that exists under the Agreement's

continuation of benefits clause (Article XIX). Their legal justification for this attempted modification rests upon misinterpreted and misplaced applications of New Jersey statutes and administrative code.

For these reasons the PBA asks the Arbitrator to sustain this grievance and direct the Township to reinstate the established practice of allowing police officers to receive full Township salary and be free from having to charge leave time for attendance at their weekend drills. The reinstatement should be retroactive to the issuance of SOP #12-001 (January 13, 2012), and the Arbitrator should make all affected police officers whole for lost wages and lost leave time.

The Township

The Township concurs, both at the hearing and in its brief, that in the twenty plus years prior to the issuance of SOP #12-001 on January 13, 2012, police officers were granted time off with pay whenever their National Guard/Reserve weekend drills coincided with their scheduled work shifts. Likewise, the Union agreed with the Township that no provision in the parties' CBA specifically details any form of military pay.

The issuance of SOP #12-001 came about when the PBA requested to be paid on the basis of twelve-hour shifts rather than eight-hour shifts for their weekend drills. Chief of Police Patrick Moran testified at the hearing that in researching this request, he learned that the State's military leave statutes did not authorize the Township to pay for officers' weekend drill absences from work. The chief also testified that he contacted other municipalities regarding the practice and could not locate one that was paying for the weekend drills. Finding no legal authority for the continuance of the payments, Chief Moran issued the SOP, "...effectively changing the Township's practice to be consistent with his understanding of the law and his authority" (Township brief, p. 3).

The Township sees the dispute in this case to be whether or not it is to be in conformance with appropriate New Jersey law, not whether there is a contractual basis for the practice in question. Pay for drill weekends is not an authorized municipal expenditure under New Jersey law, and the Management Rights clause (Article VI) of the parties' Agreement states:

> *B. The exercise of the foregoing powers, rights, authority, duties or responsibilities of the Township, the adoption of policies, rules, regulations and practices and the furtherance thereof, and the use of judgment and discretion in connection therewith, shall be limited only by the express terms of this Agreement and then only to the extent such specific and express terms hereof are in conformance with the Constitution and Laws of New Jersey and the United States.*
>
> *C. Nothing contained herein shall be construed to deny or restrict the Township of its rights, responsibilities and authority under R.S. 40 and R.S. 11, or any other national or state laws.* (Emphasis supplied)

Therefore, "...this arbitration rises and falls on the issue of whether it is lawful for the Township to pay for National Guard or military reserve weekend drill" (Township brief, p. 3).

Authorization exists under N.J.S.A. 40A to allow the expenditure of public funds by municipalities for their employees. Group health insurance (40A:10-16), retiree health insurance (40A:10-23), paid leave for on-the-job injury (40A:9-7), leaves of absence for participation in the Pan American or Olympic games (40A:9-7.3), paid leave for union activity (40A:9-7.3), employee monetary award programs (40A:9-18), and paid union convention leave (40A:14-177) are examples of such expenditures. Without these specific statutory authorizations, all of these benefits and programs could not be shown to be for a "public purpose," and therefore could not be provided for their employees by New Jersey's public employers. The determination of what actually constitutes a "public purpose" is primarily a function of the state legislature (see Rutgers Chapter of Delta Upsilon Fraternity v. City of Brunswick, 129 N.J.L. 238 [Sup. Ct. 1942]), and the legislature has given the power to interpret military statutes to the Adjutant General of the New Jersey Department of Military and Veterans Affairs (N.J.A.C. 4A: 6-1.11).

N.J.S.A. 38A:4-4 provides that public employees who are members of the organized militia shall be entitled to full pay without loss of time for federal or state active duty up to a period of ninety days. The Adjutant General has provided a definition of "active duty" in N.J.A.C. 5A:2-2.1, which states in pertinent part:

> *(b) Leaves of absence with pay are not authorized for Inactive Duty Training. Inactive Duty Training (IDT) is defined by Army, Air Force, National Guard and State Regulations and includes, but is not limited to:*

1. *Unit Training Assemblies (UTA): This training is commonly known as weekend drill;*
2. Rescheduled (makeup) UTA's
3. Split makeup training for UTA's
4. Additional Flight Training (AFTP)
5. Readiness Management Assemblies (RMA)
6. Additional Training Assemblies (ATA)
7. Additional training time for operation of M-COFT device
8. Proficiency Training (PT)
9. Training Period Preparation Assembly (TPPA)

(c) Employees are entitled to leaves of absence without pay for inactive duty training as identified in (b) above.

(Emphasis supplied)

The PBA relies upon a provision (38 USC 4302) of the Federal Uniformed Services Employment and Reemployment Rights Act (USERRA) in their U-1 Exhibit which has no authoritative or controlling value. The cited provision merely indicates that the federal government did not intend to diminish any rights military personnel might have under state law. Similarly, PBA Exhibit U-2 is an eight-year-old local finance notice issued by the state's Department of Community Affairs, an agency not charged with interpreting New Jersey military statutes. A single sentence in that notice states that municipalities "may" have separate policies or labor agreements that "may" provide compensation for attendance at weekend drills, but there is no legal authority for this interpretation of statute. The Adjutant General, the correct statutory authority, has interpreted the statute in a manner contrary to the position put forward in U-2. Moreover, the AG has been recognized by the Civil Service Commission as the controlling authority in N.J.A.C. 4A: 6-1.11(b), wherein after establishing that civil service employees are entitled to leave with pay for federal or state active duty, it states "Active duty shall not include inactive duty training such as weekend drills. See N.J.S.A. 38A: 4-4. The Adjutant General of the New Jersey Department of Military and Veterans Affairs shall

determine the definition of Federal and State active duty. See N.J.A.C. 5A: 2-2.1." (Emphasis supplied). Galloway Township is not a civil service municipality, but it is clear that such districts could not make the payments sought by the PBA in the instant case because the Civil Service Commission has deferred to the AG's interpretation of the statute which leaves no room for collectively bargained enhancements. The result should be no different here.

Galloway Township is not legally authorized to make the weekend drill payments sought by the PBA in their grievance, and the CBA is clear in its direction to the Arbitrator that he must interpret the Agreement "...in conformance with the Constitution and laws of New Jersey and the United States." The Township respectfully submits, therefore, that as the payments requested in the instant grievance are unlawful, the grievance must be denied in its entirety.

Discussion and Decision

Both at the hearing and in their briefs the parties began their arguments within the Collective Bargaining Agreement, and the two issues as submitted ask the same contractual questions. But before considering the CBA, there is the important question before me of whether the stipulated practice of providing unit members full pay with no loss of contracted leave time for their attendance at weekend National Guard or Reserve drills is in fact legal. The Township raises this question as primary in their submission, and the Agreement states in Article VI (Management Rights) that the specific and express terms of the Agreement are limiting upon the Township only to the extent that they are "...in conformance with the Constitution and Laws of New Jersey and of the United States." The question, however, is not only whether that practice is in conformance with the law, but also whether conformance is to be tested in this forum.

Over the years substantial time and space have been devoted to the question of arbitral application of law to collective bargaining agreements, with arbitrators and justices coming down on both sides of the issue. (See, for instance, chapter entitled "Use of Substantive Rules of Law," in How Arbitration Works, Elkouri and Elkouri, any edition.) Some experts assert that agreements should never be interpreted or applied by an arbitrator in a way that would require a party to commit an illegal act. Others insist

that arbitrators should respect the agreement and ignore the law, their task being an effectuation of the parties' intent rather than the requirements of enacted legislation. In the instant case, given the submission by the Township, the lack of any attempt to enjoin the arbitration, and the explicit contractual mandate that any decision must be in concert with the law, it seems wise to first determine whether the law is clear enough to provide a measure of guidance.

In so doing, however, I find that the relevant laws, regulations, and opinions cited by the parties are conflicting. For instance, the Township relies heavily upon N.J.A.C. 5A:2-2.1 in which it is stated that leaves of absence with pay are "not authorized" for weekend drill, and then it cites examples of where the expenditure of public funds are "authorized" under N.J.S.A. 40A for other purposes. But 5A:2-2.1(c) (Ex. T-1) clearly states that employees are "entitled" to leave without pay for IDT, meaning that municipalities are not free to deny such unpaid leave. "Not authorized" in this context could then mean either "not vested with legal authority" (as the Township argues), or it could simply mean "not sanctioned" by the state. The code could be read, therefore, to mean that public employees are not entitled under the statute to leave with pay for IDT, but public employers would then be free to provide it through their policies or negotiated agreements without any recourse to the state for reimbursement. While it is clear that weekend drill is certainly inactive rather than active duty under the law, it is not so clear that public employers are prohibited from providing full or partial pay and/or uncharged leave for employee attendance.

The legal waters are muddied further by the Township and the PBA's citation of various sections of N.J.S.A. 38. The Township references the statute's provision for full pay without loss of time for up to ninety days of active duty, while the Union cites its limitation only on the pay commissioned officers may receive from their public employers, arguing that nowhere does a similar limitation exist for enlisted men such as the affected Galloway policemen. Also, even though the Township argues that the New Jersey Department of Community Affairs is not charged with interpreting the state's military statutes and that the Department's 1994 Local Finance Notice (Ex. U-2) is almost twenty years old and lacking in legal authority, it is directly on point in its assessment that public employers may provide compensation for IDT, and it stands

uncontroverted by a more recent opinion to the contrary from any public agency or official.

I would not uphold contractual provisions that fly in the face of clear federal and/or state statutes. But where I find the law to be contradictory or ambiguous, I am convinced that I should remain within the four corners of the parties' Agreement in finding an answer to their dispute. Thus, in response to the first two of the three questions posed in my discussion of the submission of the separate issues, I have considered the Township's argument for a legal bar to the disputed practice, and mindful of the Agreement's Article III dictate that the Arbitrator's decision is "subject... to any applicable law," I have concluded that no such clear cut statute, code, or opinion has been presented to preclude an arbitral decision on this grievance's contractual merit.

The Township recognized both the existence of the practice at issue and its enforceability in the Chief of Police's memorandum to the Union in December 2009 (Ex. T-2). Their bargaining proposals in April 2011 (U-3) sought its elimination. The parties' Memorandum of Agreement one year later, however, does not alter the Continuation of Benefits clause (Article XIX), nor does the resultant successor Agreement (J-3). The Chief's triggering order in January 2012 (J-2), which appears to be based upon the Township's honest belief that it is not allowed by the State to provide payment for weekend drills, admittedly called a halt to a well-established practice that had been in existence for over twenty years in Galloway. Article XIX states that "...any present or past benefits which are enjoyed by employees...that have not been included in the Agreement shall be continued." Furthermore, Article XXI declares that the Agreement "...represents and incorporates the complete and final understanding and settlement by the parties of all bargaining issues which were or could have been the subject of negotiations."

Once the possibility of a legal bar is removed, the answers to the subsequent questions contained in both parties' submissions are clear: The parties had a practice of providing full pay for weekend drills without use of charged leave time; the Chief of Police's January 2012 order unilaterally halted this practice; and such action by the Employer is prohibited under Article XIX of the parties' Agreement.

Accordingly, having duly heard the proofs and allegations of the parties, I hereby award the following:

Award

The grievance is sustained. The practice of providing full pay for police attendance at weekend drills will be reinstituted and remain in effect until otherwise bargained. Retroactive to January 13, 2012, all affected Galloway Township police officers will be made whole for any lost wages and/or contractual leave charged for this purpose.

I, Frank J. Cocuzza, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Opinion and Award.

Dated: 1-28-13

Frank J. Cocuzza, Arbitrator

SCOTT JAMES GOWE
Notary Public, State of New Jersey
My Commission Expires
December 9, 2015