AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration Between

New England Police Benevolent Association, Local 550

and

Worcester County's Sheriff's Department

Case No. 11390-00408-13

Date issued: December 6, 2013

Arbitrator: Timothy J. Buckalew, Esq

Grievance: Military Leave Benefits

Appearances: Andrew Abdella, Esq., (Jason Rives, Esq., with him) for Worcester County Sheriff's Department (Employer); Gary G. Nolan, Esq., for New England Police Benevolent Association, Local 550 (Union)

Preliminary Statement

The parties appeared before the Arbitrator on September 5, 2013, at a hearing conducted in Worcester, MA, under the rules and auspices of the American Arbitration Association and according to a provision of their labor agreement providing for arbitration of certain disputes arising under that agreement. The following Opinion and Award is based on the evidence adduced at the hearing, the parties' contract, and arguments made at the hearing and in post-hearing memoranda received on or before October 28, 2013.

Issues

> The Employer asks: "Is the grievance arbitrable?" The issue framed in the grievance is whether the Employer violated the contract by not allowing officers to use some of the seventeen days of military leave allowed in Article 24 for military training purposes.

Relevant Evidence

The Union represents a bargaining unit of correctional officers (CO's) and correctional officer sergeants employed at the Worcester County Jail and House of Correction under the management of the Sheriff of Worcester County (Employer). The parties' collective bargaining agreement covers the conventional wages, hours, and other terms and conditions of employment, including at Article 24, paid military leave, which provides in relevant part:

> 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 a reserve unit of the Armed Forces of the United Staes, not exceeding 17 days. An officer shall submit to the Sheriff documentation of such military training duty.
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> Section 2. Subject to this Article, for further provisions governing Military Leave, see Addendum A, Page C9. Section C of the appendix to the contract addresses employee benefits including various paid leaves.

The section captioned "Military Leave" provides, "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 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)"

The evidence regarding the parties practices with respect to paid military leave are not disputed. For at least six or more years (and there was no testimony with respect to older practices), a CO who in the National Guard or a reserve unit would contact the scheduling officer, Captain Dickhaut,at times relevant to this grievance, and provide the officer with a copy of their scheduled training and weekend drills. The Captain would take the officer off the weekend schedule and the officer would be coded for Military Leave pay for any scheduled tours missed on the weekend, or during summer annual training.

This practice was halted sometime in the summer of 2012 when the Director of Administration and Finance, Rebecca Pellegrino, directed Captain Dickhaut, and payroll supervisors, to stop paying military leave pay for weekend drills. Ms. Pellegrino testified that she initiated the change in practice at the direction of counsel based on the conclusion that Article 24 provides military leave pay only for annual training tours and not for weekend drills. She testified that officers who were required to attend military training drills on weekends could ask to be taken off the payroll, i.e.. placed in a non-pay status for weekend drills, use vacation or personal leave to cover the days, or swap shifts with other employees (with Captain Dickhaut's approval).

According to the record before the Arbitrator, CO Jonathan Kenney was the first employee to learn weekend drills would not be covered by military leave pay. Sometime in late September he noted from examining his pay stubs that he had been paid vacation pay for weekend drills. He contacted Melissa Anderson in the payroll office seeking to correct what he thought was a payroll error. On October 9, Anderson informed him by email that, "It has recently been brought to our attention by legal counsel that the 17 days of Military pay is to be used for annual training purposes only. According to M.G. L. ch 33 sec. 59A your weekend drills should be unpaid…(g)oing forward when you have a weekend drill please contact myself of Cpt. Dickhaut to inform us if you would like to use benefit time or if you would like to take the time unpaid. You also have the option of doing shift swaps to make up the days missed due to weekend drills." Kenney testified that some days after he got Anderson's email he contacted Bruce Palmer to complain. Kenney was a probationary employee at that time and Palmer had full status under the contract. CO Palmer it seems told him that he had not heard of the change and Kenney says Palmer indicated he would contact the Union. Kenney recalled that he spoke with Union local President Warren Lohnes some weeks after that. The Union and Lohnes were not given direct notice of the change at that time, however, and did not get the email Kenney received.

In early December, Palmer noticed that he had not been paid for some time when he was called up for duty from October 28 to November 3 in response to Hurricane Sandy. Around that time he also contacted Anderson following up on the information Kenney gave him regarding

military pay for weekend drills. Anderson replied that , "our legal department advised us we were not following Mass. General Law...so what the law states is that as an employer we have to pay you 17 days per state fiscal year while you serve your 2 week annual training. Previously Capt. Dickhaut was allowing you to use them on weekend drills...which again is not what the law allows. There is no policy to change we are simply following state law. . ." Subsequently, on December 11, Palmer contacted Anderson about the unpaid days associated with his Hurricane Sandy call-up and she indicated he had been placed in a non-pay status by Captain Dickhaut and instructed him to provide a copy of his orders that would allow him to get military pay.

Lohnes testified that he learned from Palmer that Pellegrino had changed the military pay practice around December 14. He filed a grievance on December 19 alleging that management had informed Palmer he would not receive Article 24 military pay benefit as he had in the past for military training purposes and that the new policy violated the contract, past practice, and the law. The grievance did not receive an answer and was advanced through the contractual grievance procedure on a timely basis. The grievance was not answered at any step and the Union filed a demand for arbitration. Palmer received military pay for his Hurricane Sandy call up on January 23, 2013, and he was credited with vacation time that had been taken to cover two days of his time off work.

Arguments and Discussion

Arbitrability.

The Employer contests the arbitrability of the grievance and there were differences in how the parties understand the history of the grievance as it effects the right of the Union to arbitrate the grievance. The Employer also challenges the substantive arbitrability of the military leave issue.

Based on Article 4, Management Rights the Employer argues that the change in military leave practice is not arbitrable. Article 4 enumerates the "customary powers, authority and prerogatives of management and government, including, but not limited to…(24) the allocation, scheduling and granting of all leaves. . ." and goes on to state, "the Sheriff will have the right to invoke these rights and make such changes in these items as the Sheriff in his sole discretion may

deem appropriate without negotiation with the Union; except as expressly abridged by a specific provision of this Agreement." In addition, the Employer relies on Section 1 of the Grievance Procedure, "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,** will not be subject to the grievance procedure nor construed as being grievable… (emphasis added) Article 4 Section 2 also sets out time standards for processing grievances and expresses the parties understanding 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 of the incident or event upon which the grievance is based."

The burden is on the Employer to prove that the merits of the grievance should not be decided. The burden is substantial. Where the parties have a written contract containing an arbitration clause, there is a nearly an unrebuttable presumption of arbitrability absent a showing that the contract clearly and specifically excludes the subject matter from arbitration. See *United Steelworkers v. Warrior and Gulf Navigation Co.,* 363 U.S. 1347 (1960) This contract clearly covers the subject matter of the grievance-- military leave pay. The Employer's argument that the parties intended to exclude military leave from arbitration because it is committed to the Sheriff's discretion by Article 4 is not persuasive. Article 4 asserts on the one hand the paid leave is a management prerogative but also provides the discretion to change working conditions may be abridged by express provisions of the agreement. Article 24 (and other leave provisions in the contract) is a "express term " of the contract, and therefore questions of the application and interpretation of that provision meet the definition of a "grievance" set out in Article 10, and count an express abridgment of management rights. The existence of a contract clause covering the benefit is an express abridgment of management's rights described in Article 4 and refutes the Employer's assertion that military leave is a matter solely of the Employer's discretion outside the scope of the grievance procedure.

I am also not convinced the Employer has shown that the grievance is procedurally defunct because the subject of the grievance was never grieved. The Employer argues that the

grievance was over the failure to pay CO Palmer when he was called to duty for Hurricane. This argument grows from communications between counsel for the Employer and former counsel for the Union that was outside the normal grievance procedure where prior counsel asked if the question in dispute was Palmer's activation pay. While that communication clouds the picture, the written grievance #36 is clear: a claim that Article 24 had been violated requesting as a remedy, "That all 550 member 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." Lohnes testified credibly that the grievance was intended to challenge Pellegrino's restriction of the use of military pay to annual training. The grievance was never heard at any of the steps of the grievance procedure by decision of management, and thus there is no grievance record to contradict Lohnes and the written grievance document.

Finally, the Employer argues that this grievance is untimely filed. The Employer contends the grievance should have been filed within fourteen days of Anderson informing Palmer of the department's position on Article 14, but that it was not filed until December 31. Lohnes testified that he filed on December 19 and that appears to be confirmed by the written grievance. Again any ambiguity in the processing of the grievance would have been resolved had the employer followed the contract and answered the grievance and/or met with the Union to discuss the grievance as the contract appears to contemplate. The lack of such a record undermines the claim that there was a breach of the time limits in the contract.

Merits

The Union claims that the refusal to permit CO's to use Article 24 pay to cover weekend drills ordered by the armed forces violates the contract. Article 24 provides leave with pay for "annual tour of training...not exceeding 17 days." The Union contends that for at lease six to eight years the Employer has allowed CO's in the bargaining unit to use some part of that military leave allotment to cover weekend drills and that this past practice amounts to a binding commitment and shows the parties understanding that "annual tour of training" was not restricted to the summer training programs but included weekend drills and related training. Nothing in the

contract conflicts with that interpretation of the contract and this practice is not barred by Article 26, Stability of Agreement.

The Employer argues that Article 24 is plain and unambiguous--paid military leave is intended to be used for an employees "annual tour of training duty". This language is directly imported from M.G.L. c. 33 §59 and the contract connects to the statute through the Addendum showing that the benefit exists by virtue of acceptance by the County Commissioners of this local option statute. There is no evidence that the Employer has not provided eligible officers with paid leave for their annual training as required by the contract and the Union has failed entirely to show how such officers would be entitled to use leave for annual training for weekend drills.

The Employer argues that the evidence from Kenney and Lohnes that officers had been at times permitted to use paid military leave under Article 24 for weekend drills, but Kenney admitted that the weekend drills are not the same event as annual training. The contract is clear and contains no reference to weekend drills. The Union should not be permitted to expand the application of the military leave clause to weekend drills because that matter is not covered by the contract. To do so would be an impermissible exercise of authority by the arbitrator and would be adding words not in the agreement.

According to the Employer, the Union cannot rely on the few instances when Capt. Dickhaut allowed the use of paid military leave for weekend drills because Article 26 prevents a party to the contract from relying on non-enforcement of the contract as grounds for asserting the contract has been changed to permit officers to use military leave pay for weekend drills.

I do not agree. The Union has offered persuasive evidence that officers were paid military leave pay for weekend drills for several years. There are no instances when a contrary application of the contract has operated, as far as this record discloses. Moreover, the testimony of Pellegrino and emails from the payroll administrator is clear that management understood the decision to deny military pay for weekend drills constituted a change in the administration of Article 24. That was explained to officers who inquired as being required by the external law, i.e., it was not legal for the Employer to pay for weekend drills under M.G.L. c. 33 §59. I do not understand the external law, which is silent on weekend drills, to bar paid leave for weekend

drills. While the contract clause contains language found in the external law, there is no bargaining history or other evidence showing that Article 24 is conterminous with the statutory benefit. Certainly nothing in the law bars the parties from allowing employers to expand paid military leave for annual training to weekend military training.

The Employer has allowed paid leave for several years for weekend military training. That payment was open and approved by the payroll department and the administration of the jail and was not contested or questioned despite numerous instances of officers claiming the pay for weekend drills. There is a difference in weekend drills and annual training, but as I understand Kenney's testimony, weekend training is not optional. I find that the practice of treating weekend training as functionally the same as the annual tour training is long standing, repetitive and indicates a mutual understanding that Article 24 allowed such payments. The unilateral reinterpretation of the contract adversely affects officers who have relied on the contract as providing payment for their weekend drills. The failure to follow the established application of the contract violated Article 24 and shall be remedied by restoring the status quo and making whole officers who had unexpended earned military leave and were required to take unpaid days or to expend vacation or other leave to cover weekend drills.

Award

The grievance is arbitrable. The grievance is allowed. Officers qualified to take military leave under Article 24 may continue to use that leave for weekend drills as was the practice prior to September 2012. Officers who were required to use vacation or personal leave while in service on weekend drills shall be made whole.

Respectfully submitted,

Timothy J. Buckalew, Arbitrator.