

ARBITRATOR'S OPINION AND AWARD

In the matter between:

INTERNATIONAL ASSOCIATION OF
FIREFIGHTERS, LOCAL 789

and

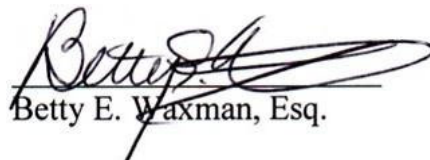
CITY OF NASHUA

Grievance: [REDACTED]

AWARD

The Undersigned, having been designated in accordance with the parties' Collective Bargaining Agreement and having duly presided at the parties' arbitration hearing, AWARDS as follows:

The grievance is granted on the basis that the City violated Article 22 of the Collective Bargaining Agreement by denying the Grievant payment for his accrued sick time when he left his firefighter position with the City of Nashua on a vested deferred retirement basis. As a remedy, the Grievant shall be paid for his unused, accrued sick time up to a maximum of 720 hours.


Betty E. Waxman, Esq.

Dated: February 3, 2022

ARBITRATOR'S OPINION

INTERNATIONAL ASSOCIATION OF
FIREFIGHTERS, LOCAL 789

and

CITY OF NASHUA

Grievance: [REDACTED]
sick leave payout

Appearances: For the Union: Leah M. Barrault, Esq.
For the Employer: Dorothy Clarke, Esq.

I. STATEMENT OF THE CASE

On January 9, 2021, Grievant [REDACTED] (the "Grievant") filed a grievance stating that he separated from his firefighter position with the City of Nashua on a "Retired-Deferred" status but that his status was changed to a resignation by the City's Human Resources Department and he was not paid accumulated sick time. City Exhibit 2. The claim was rejected at steps 2 and 3 of the grievance process, after which the Union filed for arbitration. Id.

An arbitration hearing was held over the Zoom platform on October 12, 2021. The City presented five (5) exhibits. The Union presented eight (8) exhibits.

The following witnesses testified: the Grievant, [REDACTED] [REDACTED]

[REDACTED], [REDACTED] [REDACTED] and [REDACTED]

II. ISSUE (formulated by the Arbitrator)

Did the City violate Article 22 of the Collective Bargaining Agreement by denying the Grievant payment for his accrued sick time when he left his firefighter position with the City of Nashua? If so, what shall be the remedy?

III. RELEVANT PROVISIONS

COLLECTIVE BARGAINING AGREEMENT – Joint Exhibit 1

Article 1 – Purposes

It is the purpose of this agreement to achieve and maintain harmonious relations between the City and the Union; to provide for equitable and peaceful adjustment of differences which may arise and to establish fair and equitable standards of wages, hours, and other conditions of employment, and to continue the existing harmonious relationship between the Fire Department and its permanent employees, and to promote the morale, equal rights, well-being and security of the Fire Department’s permanent employees.

Article 22 – Sick Leave:

Section 1. Sick leave will be accrued at the rate of ten (10) hours per month up to a maximum accrual of seven hundred twenty (720) hours allowed. Sick leave does not accrue during disciplinary suspension. Sick leave taken shall be charged against hours accumulated on the basis of the actual number of hours the employee is absent during scheduled duty hours. Effective upon signing of this Agreement, sick leave will no longer have a maximum accrual of seven hundred twenty (720) hours. However, payment of sick leave upon retirement or death as described in Article 22 I and J will never exceed seven hundred twenty (720) hours; any remaining sick leave hours over that amount upon retirement or death will go into the sick leave bank described in Article 22 K.

Section H. No accumulated sick leave shall be paid to any employee who resigns or is discharged from the Department.

Section J. Whenever an employee retires, he/she shall receive his/her accrued sick leave pay up to a maximum of seven hundred twenty (720) hours in a lump sum at the rate of pay in effect at the date of retirement.

Article 30 – PENSION AND RETIREMENT

Employees shall be covered by the New Hampshire Retirement System and any amendments thereto, and the City shall make such contributory payments as may be required to provide such coverage for each employee.

NEW HAMPSHIRE RETIREMENT LAW – City Exhibit 3

TITLE VI – PUBLIC OFFICERS AND EMPLOYEES

CHAPTER 100-A – NEW HAMPSHIRE RETIREMENT SYSTEM

1. Definitions

(XXIII). "Retirement" shall mean withdrawal from active service with a retirement allowance granted under the provisions hereof.

Section 100-A:10

Vested Deferred Retirement Benefit.

II. Group II Members

- (a) A group II member who has completed 10 years of creditable service and who, for reasons other than retirement or death, ceases to be a permanent policeman or permanent fireman shall be deemed in vested status and upon meeting the eligibility requirements of subparagraph (b) may collect a vested deferred retirement allowance.

NHRS (New Hampshire Retirement System) Publication – Union Exhibit 7

Vested Deferred Retirement

Eligibility for Vested Deferred Retirement

Even if a member's active NHRS membership ends prior to eligibility for Service Retirement, the member may be entitled to a Vested Deferred Retirement pension from NHRS in the future under the following conditions:

- The member has a minimum of 10 years of Creditable Service when the member terminated active membership; AND
- The member does not withdraw his/her accumulated contributions from NHRS. (A member's accumulated contributions are equal to the sum of all mandatory NHRS contributions deducted from a member's compensation, any additional contributions and any contributions made by a member for purchases of service credit, plus credited interest.)

IV. EVIDENCE

On November 17, 2020, the Grievant notified Nashua Fire Chief [REDACTED] and the Nashua Fire Commission of his intent to enter "retired-deferred" status with the New Hampshire Retirement System ("NHRS") based on having vested in the retirement system as a result of accumulating more than 10 years of service in the system. City Exhibit 2. The Grievant was employed with the Nashua Fire Department for 5 ½ years and, before that, was employed with the Salem, New Hampshire Fire Department for 5 years. According to the Grievant, at the time he left his firefighter position, he had accrued approximately 235 hours of unused sick time. He testified that he saved this sick

leave for two reasons: 1) in case of an off-duty injury and 2) in order to receive his unused sick time as compensation when he terminated his employment. The Grievant maintains that he is eligible for a pension upon turning 49 ½ years old.

In response to the Grievant's November 17, 2020 letter, he received a communication from the Nashua Human Resources Department stating that the City considered his separation to be a "resignation." City Exhibit 2. According to the rationale of Fire Chief [REDACTED] as communicated in his grievance response, the Grievant's "retirement" will not occur until he satisfies the age and years-of-service requirements prescribed by NHRS, regardless of his date of vesting in the retirement system. Id. Chief [REDACTED] testified that in his opinion, "vesting" -- which occurs after 10 years of service -- makes an employee eligible at some future point for retirement benefits but does not itself constitute a service retirement.

In response to the Grievant's November 17, 2020 letter of intent to enter "retired-deferred" status, Chief [REDACTED] sent the Grievant a "Resignation/Retirement Form" which only lists two options: resignation and retirement. Union Exhibit 8. The form does not include a "vested deferred retirement" option. The Grievant testified that he placed a notation pertaining to his "attempt to retire" on the form. Id. [REDACTED] testimony.

Following the Grievant's departure from the City of Nashua's employ, he was paid his unused, accrued vacation time but not his unused, accrued sick time.

The payment of accrued sick leave, up to a maximum of 720 hours, is governed by the CBA, Article 22. Section J of Article 22 permits the payment of accrued sick leave "whenever an employee retires" whereas section H specifies that "[n]o accumulated sick leave shall be paid to any employee who resigns or is discharged from the

Department.” There is no definition of “retirement” in the CBA. Under New Hampshire retirement law, RSA 100-A XXIII, the term “retirement” is defined as “withdrawal from active service with a retirement allowance granted under the provisions hereof.” The Grievant, as a Group II member of the retirement system, has not yet attained the necessary age to collect a retirement benefit even though he has the requisite years of credible service to vest in the retirement system. To date, the Grievant has not filed any retirement paperwork with the NHRS.

██████████ testified that when he left the employ of the Nashua Fire Department in July 2019, he had 17 years, 2 months of credible service with NHRS. Since he was over 60 years old, he was eligible to retire immediately. ██████████ received a sick leave payout for 214 hours of unused sick time.

Former Fire Captain ██████████ testified that he worked for the Nashua Fire Department for 17 years before leaving on July 8, 2017 to become Fire Chief in Salisbury, MA. At the time of his departure, Captain ██████████ had 19.8 years of credible service with NHRS. Since he was only 44 years old, he filed for “vested deferred retirement.” ██████████ was originally denied a sick leave payout but at a step 2 grievance meeting, he was given accrued sick time for 620 hours. At the time, he was approximately 8 months shy of reaching his minimum age for retirement. ██████████ testified that he accrued sick time as a result of not abusing the system and of conserving his sick time for injuries off the job. He testified that he did so in order to have a payout when he left Nashua’s employ.

Like ██████████, ██████████ was a Nashua firefighter who, upon separating from the Fire Department on or around April 16, 2017, filed for “vested deferred

retirement” because he had not yet reached the minimum age for retirement. According to then-Local President [REDACTED] the City initially denied [REDACTED] a sick leave payout, but after the Union grieved, [REDACTED] step two grievance appeal was sustained at a Fire Commission meeting on June 1, 2020. [REDACTED] ceased to be Local President on June 30, 2020. He testified that he was not notified that [REDACTED] grievance was going to be reconsidered at a subsequent meeting of the Board of Fire Commissioners. Nonetheless, the decision was “rescinded” at a July 8, 2020 meeting without notification to [REDACTED] or to incoming Local 789 President [REDACTED]. According to [REDACTED], who became Local 789 President on July 1, 2020, the reconsideration of [REDACTED] grievance was not placed on the Fire Commissioners’ agenda, and by the time he learned of the Board’s action, [REDACTED] ten-day arbitration filing deadline had elapsed.

Years earlier, in 2010, the City denied Fire Lieutenant [REDACTED] a payment for accrued sick leave upon his resignation. According then-Local 789 President [REDACTED] a grievance was filed by Lt. [REDACTED] but the Union voted not to pursue it because Lt. [REDACTED] was not yet vested in the retirement system and because he immediately took another position within the NHRS system which rendered the matter moot.

Nashua Director of Administrative Services [REDACTED] testified that she reviewed the payroll records for City of Nashua firefighters who left their positions on a “vested-deferred “ status over a nine-year period. According to [REDACTED], [REDACTED] was the only employee who received accrued sick time. She acknowledged, however, that no other departing firefighters appeared to have asked for accrued sick leave and that the files she reviewed were not complete.

V. THE PARTIES' POSITIONS

THE UNION'S POSITION

The Union argues that Article 22, section L, which denies accumulated sick leave upon resignation, has no applicability to this matter because the Grievant did not resign. Rather than resign, the Grievant filed for “vested deferred retirement” which, according to the Union, “grants” the Grievant a deferred retirement which he will receive upon reaching age 52. On this basis, the Union asserts that the Grievant is entitled to a sick leave payout of up to 720 hours. The Union asserts that there is no contract requirement that a former employee immediately receive pension funds upon separation from the City in order for the Grievant’s separation to constitute a retirement.

The Union claims that during the 9 years prior to this arbitration, no other firefighter who filed for a “vested deferred retirement” with NHRS was denied payment for accrued sick leave upon leaving a Nashua firefighting position. The Union asserts that Fire Captain [REDACTED] and Firefighter [REDACTED] who both filed for vested deferred retirement in 2017 prior to reaching minimum retirement age, each received sick leave payouts at step 2 of their grievance appeals. The Union maintains that the subsequent “recission” of the [REDACTED] decision at a July 8, 2020 meeting of the Fire Commission is meaningless because: 1) no notification of the anticipated vote was given to either outgoing Local 789 President ([REDACTED]) or incoming Local 789 President ([REDACTED]); 2) the vote was taken in “secret” without the presence of [REDACTED] or the Union; and 3) the so-called “recission” did not comply with time requirements set forth in the CBA. The Union likewise discounts the 2010 decision denying Fire Lieutenant [REDACTED] payment for accrued sick leave upon his resignation because he took a

new job within the NHRS system. Thus, the Union argues that past practice supports the Union's interpretation of Article 22, section J. To deviate from this unbroken history and deny the Grievant payment for accrued sick leave would be inequitable and, thus, a violation of the Article 1 of the CBA.

The Union notes that paying accrued sick leave to vested employees who leave their jobs encourages them to minimize their use of sick leave in order to receive a payout when they separate from their positions.

THE EMPLOYER'S POSITION

According to the City, the Grievant's vested status in NHRS does not equate to retirement. It means only that the Grievant, in the future, will become eligible to collect a pension (a "vested deferred retirement allowance") upon reaching a specified age. When that future time arrives, the Grievant can apply for a "vested deferred retirement" but prior to that point, he need not even file paperwork with the NHRS. Based upon these circumstances, the Employer asserts that the most reasonable definition of the word "retirement" is the one used in the state's retirement law -- a "withdrawal from active service with a retirement allowance granted under the provisions hereof." The Employer asserts that there was no such "grant" in this case at the time the Grievant left his firefighting position.

The Employer notes that the Union, at the bargaining table, could have proposed the payment of accrued sick leave upon resignation for those who achieve vested status, but it chose not to do so. To reach the same result through arbitration is inequitable because it removes the Board of Fire Commissioners from the decision-making process and avoids an analysis of the costs associated with the payouts.

The Employer argues that past practice is irrelevant because the CBA language is clear. Even if the language were ambiguous, the Employer maintains that the examples cited by the Union are insufficient to establish a past practice of paying vested employees accrued sick time when they leave the Nashua Fire Department. The Employer asserts that [REDACTED] is the sole example of paying a former Nashua firefighter accrued sick time under circumstances that support the Union's position. [REDACTED], however, was a long-term employee who left the City just shy of reaching his eligibility for retirement in order to take advantage of another job opportunity. The Employer contrasts the [REDACTED] situation to that of Firefighter [REDACTED] who was denied a sick leave payout by the Board of Fire Commissioners. The Employer asserts that the situation of Firefighter [REDACTED] is irrelevant because he was eligible to retire given his age.

VI. FINDINGS AND CONCLUSIONS

Under the parties' CBA, accrued sick leave up to a maximum of 720 hours is paid to firefighters who retire but not to those who resign. The CBA does not address a third category of former firefighters at issue in this case – those who take a vested deferred retirement. According to New Hampshire law, RSA 100-A:10.II (a), Group II members such as the Grievant who leave their firefighter positions after vesting in the NHRS may collect a “vested deferred retirement allowance.” Neither the parties' CBA nor New Hampshire law defines a “vested deferred retirement” but a NHRS publication (Union Exhibit 7) states that a member with a minimum of 10 years creditable service may be entitled to a vested deferred retirement provided that the individual does not withdraw his/her accumulated contributions from the NHRS. The only other condition precedent appears to be reaching a designated age. Thus, the publication establishes a

third manner of departing from active employment in which Group II members, upon leaving Nashua's employ, have already fulfilled all of their work requirements to qualify for a future pension.

Because the CBA fails to address which benefits accrue to firefighters who leave their positions on a vested deferred retirement basis as opposed to immediate retirement or resignation, the contract must be deemed ambiguous in regard to the issue in dispute. Under such circumstances, past practice may be used to fill in a contract's gaps. See Elkouri & Elkouri, *How Arbitration Works*, 7th ed. (2012), p. 12-27. Typically, a past practice, in order to be binding, must be consistent, of long duration, and have the acquiescence of both sides. See *id.* at p. 12-4; *Cruz-Martinez v. Dept. of Homeland Security*, 410 F.3d 1366, 1370 (2005) (clear and longstanding practices can clarify terms of an agreement in a manner that is as binding as a contract clause). In this case, however, there are only a few examples of vested firefighters requesting payouts of accrued sick time. The paucity of such examples may be due to departing employees with vested status failing to request accrued sick leave or it may be due to the fact that relatively few firefighters leave their vested positions. Regardless of the reason, the prior examples which do exist are instructive.

Of the vested deferred retirement departures during the past nine years cited by the parties, the situation of former Fire Captain [REDACTED] most clearly supports the Union's position. At the time of Captain [REDACTED] departure on July 8, 2017, he filed for a vested deferred retirement and, pursuant to a grievance appeal, received payment for 620 hours of accrued sick time. The case of Firefighter [REDACTED] also supports the Union position, although not as unequivocally. Like Grievant [REDACTED] and former

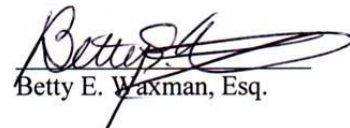
Fire [REDACTED] Firefighter [REDACTED] took a vested deferred retirement in 2017, was initially denied payment for accrued sick time, and thereafter was granted the payment by vote of the Fire Commission pursuant to a grievance appeal. As the Union persuasively argues, a purported “recission” of the decision at a subsequent meeting of the Fire Commission was taken without notification to [REDACTED], without notification to the prior or future Union President, without the matter being listed on the Fire Commission’s agenda, and after the Union’s deadline for taking the [REDACTED] case to arbitration had elapsed. For these reasons, I agree with the Union that the purported “recission” is not entitled to consideration in this matter.

Several other cases cited by the parties are irrelevant because the firefighter in question had not yet achieved vested status upon leaving the City of Nashua (Fire Lieutenant [REDACTED]) or because the firefighter had already reached an age which made him eligible to retire immediately (Firefighter [REDACTED]). If, over the last nine years, there were other departing firefighters who left the City of Nashua after achieving vested deferred retirement status, the Employer failed to identify such individuals or provide any information as to whether they sought accrued sick leave and whether their requests were granted or denied. In the absence of such evidence, the parties’ practice regarding the payment of accrued sick leave to firefighters taking vested deferred retirements must rest on the record presented.

The [REDACTED] and [REDACTED] situations are, to be sure, a slender thread on which to hang the payment of accrued sick time but, given the circumstances, they provide adequate support for upholding the Union’s position. They are not contradicted by any examples of firefighters taking vested deferred retirements who were denied accrued sick

time after receiving proper notice and an opportunity to challenge the denial. If Chief [REDACTED] and the Board of Fire Commissioners seek to change the policy, it behooves them to provide advance notification of the new policy and, if necessary, to bargain over the change. Altering such a policy without notice is inequitable to vested firefighters who may have taken heroic steps to conserve their sick time while employed in anticipation of a payout upon leaving Nashua's employ.

For the reasons set forth above, the grievance is granted. The City violated Article 22 of the Collective Bargaining Agreement by denying the Grievant payment for his unused, accrued sick time when he left his firefighter position with the City of Nashua. As a remedy he shall be paid for his unused, accrued sick time up to a maximum of 720 hours.



Betty E. Waxman, Esq.

Date: February 3, 2022