



STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Pittsfield Town Employees, AFT Local #6214, AFT-NH, AFL-CIO

v.

Town of Pittsfield, Board of Selectmen

Case No. G-0060-9
Decision No. 2013-055

Appearances:

Teresa D. Donovan, Esq., for the Complainant

Paul T. Fitzgerald, Esq., for the Respondent

Background:

On August 20, 2012, the Union filed an unfair labor practice complaint claiming that the Town violated RSA 273-A:5, I (e), (g), (h), and (i) when it demanded a doctor's note¹ from certain bargaining unit employees who had been on sick leave for fewer than five days. The Union alleges that the Town's actions are contrary to the parties' collective bargaining agreement (CBA), constitute a failure to bargain in good faith over a mandatory subject of bargaining and to comply with RSA 273-A, and represent a policy that invalidates a portion of the CBA. The Union requests that the PELRB order the Town's Board of Selectmen and its agents to cease and desist from making unilateral changes to working conditions and from requesting bargaining unit employees to provide a doctor's note before their fifth day of absence.

The Town denies the charges and asserts that under the relevant contract language the Town is entitled to demand a doctor's note from an absent employee at any time. The Town requests that the PELRB dismiss the complaint.

¹ A doctor's note is also referred to in the record as "physician's note," "physician's certificate," and "doctor's certificate."

The undersigned hearing officer conducted an adjudicatory hearing on October 4, 2012 at the Public Employee Labor Relations Board (PELRB) offices in Concord. The parties had a full opportunity to be heard, to offer documentary evidence, and to examine and cross-examine witnesses. The parties filed post-hearing briefs; and the decision is as follows.

Finding of Fact

1. The Town is a public employer within the meaning of RSA 273-A:1, X.
2. The Union is the exclusive bargaining representative for all full time and part time employees in the following positions as certified by the PELRB on October 10, 2002:

Administrative Assistant, Office Assistant, Building Inspector, Welfare Director, Ambulance Director, Assistant Ambulance Director, Paramedic, Emergency Medical Technician Intermediate, Emergency Medical Technician, Superintendent of Public Works, Assistant Superintendent of Public Works, Public Works Equipment Operator, Public Works Department Laborer, Public Works Light Equipment Operator, Waste Water Facility Superintendent, Waste Water Facility Chief Operator, Waste Water Operator, Chief of Police, Police Lieutenant, and Police Sergeant.

See PELRB Decision No. 2003-042.

3. The Union and the Town are parties to a CBA effective from January 1, 2011 through December 31, 2012. See Joint Exhibit 1.
4. Article 3 of the parties' CBA, titled Management Rights, provides in part as follows:

The Town hereby retains and reserves to itself all powers, right, authority, duties and responsibilities conferred upon and vested in it by the Constitution, laws and regulations of the State of New Hampshire and the United States. Further, all rights which ordinarily vest in and are exercised by public employers remain vested in the Town unless otherwise modified by this Agreement. The Town retains the right to justly exercise managerial policy within its exclusive prerogative to manage its affairs efficiently and economically including, but not limited to, the use of technology, organization structure, selection, assignment, number, direction and discipline of its personnel. Further, the Town retains the right to adopt, change, enforce or discontinue any rules, regulations, procedures, policies, ordinances and law not in direct conflict with any provision of this Agreement, or existing applicable statutory laws as delineated under the New Hampshire Revised Statutes Annotated or the United States Code, so as to

continue public control of Departments, Boards, Commissions, Committees, Agencies and Employees of the Town of Pittsfield.

See Joint Exhibit 1 (emphasis added).

5. Article 20, Section 1 of the CBA, titled Sick Leave, provides as follows:

All full-time permanent Employees covered by this Agreement shall in the event of a bonafide personal and non-service connected sickness or injury, for which no compensation is received under Workers' Compensation or other insurance coverage's [sic], shall be eligible for time off with pay in an amount appropriate to the circumstances of each individual case in order that their income may be maintained during such period of bonafide non-service incapacitation. Sick leave may also be utilized for any FMLA eligible leave and it shall be the employee's discretion whether to utilize sick leave or vacation leave and in what order the leave shall be utilized.

See Joint Exhibit 1.

6. Article 20, Section 3, titled Granting and Use of Sick Leave, provides as follows:

Employees shall notify the Department Head or designee on the first day of absence do [sic] to non-service connected sickness or injury, stating the nature of the sickness or injury, time expected to be incapacitated, and when they expect to return to work. Such notification shall be made not more than two hours before the start of the Employees work period unless for pre-authorized and planned sick leave, and not less than fifteen (15) minutes after the start of the Employees work period unless exigent circumstances prevent an employee from providing said notification.

See Joint Exhibit 1.

7. Article 20, Section 5 of the CBA, titled Physician's Note, Examination, provides as follows:

A doctor's certificate may be required after the 5th day of absence, unless required earlier. If approved by the Board of Selectmen, the Town Administrator may require the Employee to submit to an independent medical examination at the Town's expense. Failure of the Employee to submit to such examination shall be grounds for dismissal.

See Joint Exhibit 1.

8. For the purpose of application of Article 20, Section 5 to bargaining unit employees who work on 48-hours a week schedule, including Ambulance Department employees, a sick leave absence for two consecutive 24-hour shifts or four consecutive 12-hour

shifts would constitute a five-day absence.

9. Section 2 of Article 26, titled Family Medical Leave, provides in part as follows:

[T]he Town will grant job protection paid and/or unpaid family and medical leave to eligible male and female Employees for up to 12 weeks per 12 month period for any one or more of the following reasons:

- A. The birth of a child and in order to care for such child or the placement of a child with the Employee for adoption or foster care ...; or
- B. In order to care for an immediate family member ... of the Employee if such immediate member has a serious health condition; or
- C. The Employee's own serious health condition that makes the Employee unable to perform the functions of his/her position.

See Joint Exhibit 1.

10. Article 26, Section 5, titled Substitution of Paid Vacation Time and Sick Leave, provides as follows:

A. An Employee will be required to substitute all unused paid vacation and all unused paid sick leave first for family/medical leave taken for a reason prior to any unpaid leave being taken. It shall be at the employee's discretion whether to use sick or vacation leave for any FMLA authorized leave and the order in which they choose to apply sick or vacation leave...

See Joint Exhibit 1.

11. Article 26, Section 6, titled Notice Requirement, provides as follows:

A. An Employee is required to give 30 days notice in the event of a foreseeable leave. A "Request for Family/Medical Leave" form should be completed by the Employee and returned to the Town Administrator. In unexpected or unforeseen situations, an Employee should provide as much notice as is practicable, usually verbal notice within one or two business days of when the need for leave becomes known, followed by a completed "request for Family/Medical Leave" form.

See Joint Exhibit 1.

12. Article 26, Section 8, titled Medical Certificate, provides in part as follows:

A. For leave taken because of the Employee's or to cover family member's serious health condition, the Employee must submit a completed "Physician or Practitioners Certificate" form and return the certificate to the Town Administrator. A medical certificate must be provided by the Employee within 15 days after request, or as soon as is reasonably possible...

See Joint Exhibit 1.

13. A Physician or Practitioners Certificate forms, contained in the Appendix to the CBA, must be filled out and signed by a treating physician, practitioner or other provider of health services, and must set out, among other things, the diagnosis, date condition commenced, probable duration of the condition, regiment of treatment to be prescribed, whether an employee is able to perform work of any kind and whether an employee is able to perform the functions of employee's position. See Joint Exhibit 1, Appendix.

14. In FMLA cases, a doctor's note must be produced in advance in order for an employee to utilize sick time for FMLA leave.

15. Article 35 of the CBA, titled Workers' Compensation, provides as follows:

The Town agrees to provide insurance to compensate Employees for occupational injuries or illness pursuant to the provisions of New Hampshire Revised Statutes Annotated Chapter 281-A, New Hampshire's Workers' Compensation Law.

See Joint Exhibit 1. Bargaining unit employees are required to submit a doctor's note to be placed on worker's compensation leave and they are required to submit a doctor's note to return to work from worker's compensation leave.

16. Article 11 of the CBA sets forth the following 4-step grievance procedure: (1) Supervisor, (2) Department Head, (3) the Board of Selectmen (BOS), and (4) filing of an unfair labor practice complaint with the PELRB. See Joint Exhibit 1.

17. The Town of Pittsfield Ambulance Department has six employees including Jennifer Tedcastle, the Assistant Ambulance Director. She has been employed by the Town since 1998 and has been an Assistant Ambulance Director since 2000. She performs the duties of a Paramedic and is also responsible for shift scheduling, ordering supplies, and day to day operations of the Ambulance Department. Her responsibilities include filling the shifts if someone is out on sick leave. She has participated in collective bargaining as a member of the Union's negotiating team several times but was not on the negotiating team for the latest CBA. Ms. Tedcastle is also a Physician Assistant. In this capacity, she examines patients, diagnoses

injuries and illnesses, and provides treatment at the emergency room in the Town of Wolfboro, New Hampshire.

18. Alyssa MacGlashing has worked as a Paramedic for the Town's Ambulance Department since July, 2007. When she started her employment with the Town, she worked two 24-hour shifts per week, Mondays and Thursdays. There was a day off between the shifts. The Town changed two 24-hour shifts schedule to four 12-hour non-consecutive shifts schedule in May, 2012, after which some employees started swapping shifts with other employees in order to work 24-hour shifts.

19. Ms. MacGlashing swapped shifts with Paramedic Karen Brown on June 27, 2012 to go on a 24-hour shift. Ms. MacGlashing worked a part of her night on June 27, 2012 when she started to have pregnancy-related contractions and became concerned because she fell at home a day before. She left work to go to a medical center where she was examined by a midwife. Ms. MacGlashing utilized sick leave to cover approximately 16 hours of absence on June 27 and 28, 2012.

20. At the time Ms. MacGlashing went to the medical center, she did not ask for a doctor's note. She did not know she would be asked to produce a doctor's note.

21. Since at least 1998 until July of 2012, the Town required bargaining unit employees to provide a doctor's note for a sick leave absence only if this absence lasted for five or more days. Both the Town and the Union were aware of this practice and accepted it.

22. Paul Skowron has been the Pittsfield Town Administrator for four years, prior to which he was the Interim Town Administrator. He participated in several contract negotiations with the Union, including negotiations on the latest CBA.

23. On July 3, 2012 Mr. Skowron sent the following email message to then-Interim Fire Chief Lenny Deane and Assistant Ambulance Director Jennifer Tedcastle:

Please be advised that both Karen Brown and Alyssa MacGlashing were out on sick leave for multiple shifts last week. Article 20 Section 5 of the contract provides for the request for a physician's note. Please consider this communication fulfilling such request. If there is any objection please advise me to later than July 16, 2012.

See Joint Exhibit 2.

24. Neither employees nor the Union were informed prior to July 3, 2012 that the Town intended to require employees to produce a doctor's note for a sick leave absence lasting for fewer than five days.

25. Ms. Tedcastle was not surprised by the Town Administrator's request concerning Ms. Brown's absence, as Ms. Brown was absent for five or more days, but she was surprised by the request that Ms. MacGlashing provide a doctor's note because, as the Assistant Ambulance Director, she has never before been directed by the Town to ask an employee to produce a doctor's note for an absence lasting for fewer than five days.

26. As directed by the Town Administrator, Ms. Tedcastle asked Ms. MacGlashing to produce a doctor's note.

27. Ms. MacGlashing contacted her doctor's office and explained that on June 27, 2012 she was seen by a midwife. On July 6, 2012 a certified nurse midwife from the Garrison Women's Health Center issued the following note addressed to Ms. MacGlashing's employer: "Please excuse Alyssa MacGlashing from work 6/27/2012. She is fine to return to work as of 6/29/12." Ms. MacGlashing submitted the note to Ms. Tedcastle. See Union Exhibit 4.

28. Obtaining doctor's notes causes hardship on Ms. MacGlashing because in order to obtain a note, Ms. MacGlashing, who also has a three-year old child, must schedule an appointment with her doctor, pay a deductible/co-pay, and expend time driving from her residence in Rye to her doctor's office in Dover.

29. In the five years Ms. MacGlashing has worked for the Town, she has occasionally utilized sick leave but, until July of 2012, has never been asked to produce a doctor's note for an

absence of fewer than five consecutive days. Now, she is asked to produce a doctor's note every time she takes sick leave.

30. Ms. Tedcastle informed the Town Administrator that Ms. MacGlashing objected to the request to produce a doctor's note. Ms. Tedcastle and the Town Administrator discussed the issue but were unable to resolve it.

31. There is no evidence that Ms. MacGlashing was abusing or overusing sick leave.

32. On July 12, 2012 Ms. MacGlashing filed a grievance with Fire Chief/Ambulance Director John DeSilva requesting that he overturn Ms. Tedcastle's request to produce a doctor's note. The grievance provides in part as follows:

On July 6, 2012, Assistant Ambulance Director Jen Tedcastle issued a memo advising me that a request had been made by the Town Administrator Paul Skowron, in regards to obtaining a physician's note for sick leave utilized on June 27 and June 28, 2012. According to the contract between the Pittsfield Town Employees AFT-NH Local #6214 and the Town of Pittsfield, Article 20, Section 5, "a doctor's certificate may be required after the 5th day of absence..."

I used my earned sick time for one 12 hour shift, plus 4 hours and then returned to work the following shift. I feel the request for a physician's note after a period of time that is much less than what is laid out in our contract is creating a hostile work environment. Past practice has shown that a physician's note has not been requested before, unless the absence extended to or beyond the allotted time agreed upon in our contract...

See Union Exhibit 1.

33. On July 12, 2012 Fire Chief John DeSilva denied Ms. MacGlashing's grievance stating as follows:

The grievance you submitted to me on July 12, 2012 ... cannot be resolved at the Department Head level.

The memo that was issued to you on July 6, 2012 by Assistant Ambulance Director Jennifer Tedcastle, was at the request of the Town Administrator. As such I do not have the authority to overturn the request for a physician's note for your sick leave utilized. The remedy you requested is therefore denied.

See Union Exhibit 2.

34. On July 18, 2012 Ms. MacGlashing filed her grievance with the Town

Administrator and the Board of Selectmen. See Union Exhibit 3.

35. On July 25, 2012 the Town Manager issued the following response to Ms. MacGlashing's grievance:

... Article 20, Section 5. Physician's Note, Examination states as follows: "A doctor's certificate may be required after the 5th day of absence, unless required earlier."

The contract clearly permits the town to request a doctor's note after the first day of absence. Based upon the foregoing your grievance is denied...

See Union Exhibit 5.

36. According to Ms. Tedcastle, the Ambulance Department employees do not abuse sick time. In a month, there are on average approximately two or three shifts she has to fill because of sick leave absence.

37. After the Town Administrator's July 3, 2012 request for a doctor's note, Ms. Tedcastle was out on sick leave for one day and obtained a doctor's note because she understood from her discussions with the Town Administrator that employees will now be required to submit a note for an absence of any duration.

38. According to Ms. Tedcastle, requiring employees to produce a doctor's note earlier than after the fifth day of sick leave absence causes hardship because employees have to schedule appointments with a doctor every time they have stomach flu or a cold, ailments that normally do not require a visit to a doctor. Ms. Tedcastle also believes that the requirement to obtain a doctor's note for every day of sick leave absence encourages employees to come to work sick, as a result of which contagions are passed on to the public they are assisting.

39. According to Ms. Tedcastle, the phrase "unless required earlier" in Article 20, Section 5 of the CBA applies to worker's compensation and FMLA leave requests.

40. Richard Walter is a Police Patrol Sergeant. He has worked for the Town since 1998. He became the President of the Union in 2012 and was a member of the Union's

negotiating team during negotiations on the latest CBA.

41. Sgt. Walter understands the parties' CBA, Article 20, Section 5, to mean that a doctor's note can be required only after the fifth day of absence and that the phrase "unless required earlier" refers to worker's compensation and FMLA situations.

42. Sgt. Walter has utilized sick leave during his employment with the Town and, since 1998, he has never been asked for a doctor's note after an absence of fewer than five days.

43. Linda Small is a member of the Board of Selectmen (BOS). She was elected in March, 2012. She also served on the BOS from 2006 to 2009 and was the Chair of the BOS in 2009. As a member of the BOS, Ms. Small was on the Town's negotiating team during several contractual negotiations.

44. Prior to being elected as a member of the BOS in 2012, Ms. Small frequently reviewed payroll documentation on sick leave use by Town employees at the Town Hall and had concerns about possible overuse of sick leave. At that time she was not on the BOS but she wanted to see how payroll was being paid out. Ms. Small's purpose was to track total use of sick leave and to determine whether employees abused sick leave because, in her opinion, efficiency could be gained by reducing the use of sick leave. Based on the total number of sick leave hours used by the Town employees, Ms. Small believed that employees were overusing sick leave. Ms. Small did not determine from the documentation whether or not any individual employee abused or overused sick leave.

45. Currently, Selectman Small is reviewing payroll documentation every week. If she sees what she believes to be an excessive use of sick leave, she questions the Town Administrator about it to find out whether the use was legitimate. According to Ms. Small, it is up to the Town Administrator to check into the sick leave use "however he sees fit."

46. Ms. Small made inquiries of the Town Administrator regarding the use of the sick leave by Ms. MacGlashing. Ms. Small did not ask for a doctor's note herself. She brought the

matter up to the Town Administrator's attention and he asked for a doctor's note.

47. Ms. Small believes that to ask for a doctor's note for every day of sick leave taken would constitute an abuse of employees by management.

48. According to Ms. Small, employees will be asked for a note when the BOS "feels" that sick leave is being abused.

49. At the time Ms. Small asked the Town Administrator to look into Ms. MacGlashing's use of sick leave, she had no evidence that Ms. McGlashing was abusing or overusing sick leave. According to Ms. Small, her concerns are regarding collective overuse of sick leave and not an individual one.

50. Town Administrator Skowron understands Article 20, Section 5 "unless required earlier" language to mean that the Town has the authority to request a doctor's note at any time, even after only one day of sick leave absence. See Findings of Fact at 7. The Town has no written rule/procedure, apart from the CBA, as to when and under what circumstances a bargaining unit employee will be required to produce a doctor's note "earlier."

51. The negotiations on the latest CBA took place in the fall of 2011 and early winter of 2012. These negotiations were extensive and lengthy. A Federal Mediator was utilized. The parties discussed the issue of sick leave use and negotiated over the language of sick leave provisions. During negotiations, the Town did not present evidence of abuse/overuse of sick leave to the Union or inform the Union's negotiating team that it intended to start requiring a doctor's note after fewer than five consecutive days of sick leave absence.

52. During the negotiations on the latest CBA, the Town agreed to remove the phrase "as determined by the Town Administrator and/or Board of Selectmen" from Article 20, Section 1 after the words "...shall be eligible for time off with pay in an amount appropriate to the circumstances of each individual case ..." See Findings of Fact at 5. The Town also agreed to strike the following language from the end of Article 20, Section 3: "The Town Administrator

shall determine and grant what he considers to be the appropriate and reasonable allowance for sick leave for full time employees according to the circumstances of each individual case.” See Findings of Fact at 6. See also Union Exhibit 8.

53. For a number of years, the parties’ CBAs contained the following language at the beginning of Article 20, Section 5: “The Town Administrator shall be responsible to have the sick Employee checked on after the second (2) day of absence.” During the negotiations on the latest CBA, the Town requested the removal of this sentence from the agreement because, according to Mr. Skowron, he did not understand the meaning of this sentence. The Union agreed and the sentence was removed from the CBA.

54. The Article 20, Section 5 language “a doctor’s certificate may be required after the 5th day of absence” has been in the parties’ agreements for a number of years. During the negotiations on the latest CBA, in its December 7, 2011 bargaining counter-proposal, the Town made the following proposal: “Town proposes that fifth day be struck and third day be inserted.” The Union rejected this proposal; and the parties reached an agreement that left the “after the 5th day of absence” language unchanged. The CBA was ratified by the parties and approved by the Town Meeting voters.

55. According to Mr. Skowron, the BOS did not ask him to require a doctor’s note after one day of absence in all cases; instead, it just asked questions about sick leave use. He believes, however, that the BOS gave him broad authority to request a doctor’s note at any time based on circumstances of each case, although, according to Mr. Skowron, the BOS members did not want employees to feel harassed.

56. The Town Administrator acknowledges that in the past, during his tenure as the Interim Town Administrator and the Town Administrator, he did not ask for a doctor’s note after one day of absence.

57. Mr. Skowron did not ask Ms. MacGlashing for a doctor’s note until a week after

she was actually absent because he did not know that she was out on sick leave until he received and reviewed payroll documentation.

58. When Selectman Small asks Mr. Skowron about sick leave use, he requests information about it from department heads. In the majority of cases, he receives an answer from department heads; and the use is legitimate. He meets with department heads every two weeks. According to Mr. Skowron, department heads are supposed to tell him when someone is out.

59. There is no written protocol, rule or procedure requiring department heads to inform the Town Administrator or the BOS when someone is out on sick leave.

60. According to Mr. Skowron, the Town's fiscal problems can be solved by ensuring that Town employees, both bargaining unit and non-bargaining unit, do not abuse sick leave and he personally would not have agreed to the "after 5th day of absence" language in the CBA.

Decision Summary:

The Town committed an unfair labor practice, when, contrary to the parties' CBA and longstanding and mutually recognized and accepted past practice, the Town requested that employees provide a doctor's note for a sick leave absence lasting for fewer than five days.

Jurisdiction:

The PELRB has primary jurisdiction of all alleged violations of RSA 273-A:5, *see* RSA 273-A:6.

Discussion:

The Union claims, *inter alia*, that under the parties' CBA and established past practice, the Town violated 273-A:5, I (e), (g), (h), and (i) when it demanded a doctor's note from certain bargaining unit employees who had been on sick leave for fewer than five consecutive days.

RSA 273-A:5, I provides in relevant part:

It shall be a prohibited practice for any public employer ... (e) To refuse to negotiate in good faith with the exclusive representative of a bargaining unit ... (g) To fail to comply with this chapter or any rule adopted under this chapter; (h) To

breach a collective bargaining agreement; (i) To make any law or regulation, or to adopt any rule relative to the terms and conditions of employment that would invalidate any portion of an agreement entered into by the public employer ...

RSA 273-A:3, I provides in part that “[i]t is the obligation of the public employer and ... the exclusive representative of the bargaining unit to negotiate in good faith.” The Supreme Court has recognized that “[a] public employer’s unilateral change in a term or condition of employment ... is tantamount to a refusal to negotiate that term and destroys the level playing field necessary for productive and fair labor negotiations.” *Appeal of Hillsboro-Deering Sch. Dist.*, 144 N.H. 27, 30 (1999). A CBA is “a contract between a public employer and a union over the terms and conditions of employment. When parties enter into a CBA, they are obligated to adhere to its terms, which are the product of their collective bargaining.” *Appeal of the City of Manchester*, 153 N.H. 289, 293 (2006) (citations and quotation marks omitted). In interpreting a CBA, a court begins “by focusing upon the language of the CBA, as it reflects the parties’ intent. This intent is determined from the agreement taken as a whole, and by construing its terms according to the common meaning of their words and phrases.” See *Appeal of Nashua Police Commission*, 149 N.H. 688, 690 (2003) (citations and quotation marks omitted).

Past practice and other extrinsic evidence may be examined to discern the intent of the parties where the language of a CBA is ambiguous or “the contract is entirely silent.” See *AFSCME Local 3657, Hillsborough County Sheriff’s Office v. Hillsborough County*, PELRB Decision No. 2012-117. See also *Appeal of N.H. Dep’t of Safety*, 155 N.H. 201, 208-09 (2007). A contractual clause is ambiguous “when the contracting parties reasonably differ as to its meaning.” *Appeal of Nashua Police Commission*, supra, 149 N.H. at 690. The Supreme Court previously held that:

An employer’s practices, even if not required by a collective-bargaining agreement, which are regular and long standing, rather than random or intermittent, become terms and conditions of [union] employees’ employment, which cannot be altered without offering their collective-bargaining representative notice and an opportunity to bargain over the proposed change. A practice need

not be universal to constitute a term or condition of employment, as long as it is regular and longstanding.

Appeal of New Hampshire Department of Corrections, 164 N.H. 307, 309 (2012) (citation and internal quotation marks omitted). To establish a past practice, a party must show that the alleged practice “occurred with such regularity and frequency that employees could reasonably expect it to continue or reoccur on a regular or consistent basis. In addition, it is implicit in establishing a past practice that the party which is being asked to honor it ... be aware of its existence.” *Id.* (Citation and internal quotation marks omitted.)

This case involves a dispute over the interpretation of a contractual sick leave provision. Sick leave is one of the essential employment benefits and, like vacation and holiday pay, sick leave pay is a component of employees’ wages and, therefore, a term and/or condition of employment. See RSA 273-A:1, XI. See also *Appeal of Berlin Educ. Ass’n, NHEA/NEA*, 125 N.H. 779, 783-84 (1984). The parties here dispute the interpretation of the following language set forth in Article 20, Section 5 of the CBA: “A doctor’s certificate may be required after the 5th day of absence, unless required earlier.” Specifically, they disagree about the meaning of the phrase “unless required earlier.” This phrase appears to contradict the first part of the sentence which clearly sets the number of days an employee can be absent without a doctor’s note at five. This contract provision does not specify why, by whom/what or under what circumstances a note can be “required earlier.”² The Union claims that the phrase “unless required earlier” applies to the situations involving requests for FMLA leave and/or other leave requiring advance notice.³ The Town counters that the phrase “unless required earlier” means that the Town can require an employee to provide a doctor’s note at any time, even after only one day of sick leave absence, at

² In contrast, in the very next sentence, the parties use the active voice and identify that it is the BOS and the Town Administrator who can require an independent medical evaluation. See Findings of Fact at 7.

³ The FMLA-related provisions in Article 26 require employees to provide an advance request/notice of leave supported by a doctor’s note under certain circumstances. Sick leave can be utilized to cover FMLA leave. Likewise, employees on worker’s compensation leave must provide a doctor’s note prior to leave.

the Town's discretion.⁴ I find that the parties reasonably differ as to the meaning of the language in CBA Article 20, Section 5, and that this language is ambiguous.

Examination of the past practice and other extrinsic evidence in this case demonstrates that the Union's interpretation of the disputed contract clause is correct. The evidence shows that there exists a longstanding past practice of requiring employees to provide a doctor's note only after the fifth day of absence and not before. For a number of years and over the duration of several CBAs containing the same language as the current CBA (Article 20, Section 5), bargaining unit employees were taking sick leave and, prior to July, 2012, the Town never required a doctor's note if an employee was absent for fewer than five days. Both parties were aware of this practice and it occurred with such regularity and frequency that employees could, and actually did, reasonably expect it to continue on a regular or consistent basis. Mr. Skowron, who has been the Town Manager for the last four years and the Interim Town Manager prior to that, acknowledges the existence of that practice prior to July, 2012.

Furthermore, the parties' bargaining history is consistent with this past practice and further evidences that, under the subject contractual provision, employees were not expected to provide a doctor's note if they were absent for fewer than five consecutive days. For example, during negotiations on the latest CBA, the Town proposed to change the number of days after which a doctor's note may be required from five to three. The Union rejected this proposal and the parties eventually reached an agreement without changing the "five day" language. Such a proposal would not have been necessary if the Town believed, as it now asserts, that it already had authority under the CBA to request a doctor's note at any time.

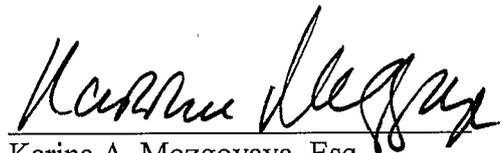
⁴ This interpretation appears to be inconsistent with the testimony of Selectman Small that requiring employees to provide a doctor's note after one day of absence would constitute harassment. In reality, the Town's interpretation of the disputed provision amounts to a requirement that employees obtain a doctor's note when taking sick leave of any duration and for any reason. Because the Town decides whether to ask for a note only after reviewing the payroll, i.e., at least a week after an employee was actually absent, in order to anticipate a possible request for a note, an employee would have to make an appointment with a medical professional or go to a hospital every time he/she has a cold, flu or any other routine ailment that does not ordinarily require a visit to a doctor (assuming that no medical professional would issue a note without actually seeing a patient).

Also, the Town's claim that the Town has unlimited discretion to ask for a doctor's note at any time under the CBA Management Rights clause, Article 3, is unpersuasive. Under this clause, the Town has a right "to adopt, change, enforce or discontinue any rules, regulations ...". This right is, however, expressly limited by the contractual requirement that these rules must not be "in direct conflict" with any provision of the CBA. See Findings of Fact at 4. As discussed above, the Town's actions are in direct conflict with the "after the 5th day of absence" CBA provision and past practice.

For the foregoing reasons, under the CBA and past practice, the Town may require an employee to produce a doctor's note only after the fifth day of sick leave absence. The Town committed an unfair labor practice when it unilaterally required certain employees to produce a doctor's note before the fifth day of absence, thereby breaching the parties' CBA, unilaterally changing a term/condition of employment, and adopting an unwritten rule that invalidated Article 20, Section 5 of the CBA in violation of 273-A:5, I (e), (g), (h), and (i). Accordingly, the Town shall cease and desist from requiring employees to produce a doctor's note for sick leave absences lasting for fewer than five days.

So ordered.

April 12, 2013


Karina A. Mozgovaya, Esq.
Staff Counsel/Hearing Officer

Distribution:

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