

AMERICAN ARBITRATION ASSOCIATION

BEFORE ARBITRATOR MARY ELLEN SHEA

In the matter of the arbitration between:

CITY OF CHELSEA

-and-

CHELSEA FIREFIGHTERS, LOCAL 1937

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01-18-0002-1344

INTRODUCTION

A demand for arbitration was filed by Chelsea Firefighters, Local 1937, pursuant to the parties' collective bargaining agreement and in accordance with the rules of the American Arbitration Association. The parties jointly selected Mary Ellen Shea to act as single neutral arbitrator in the matter. A hearing was conducted on October 30, 2018, at Chelsea City Hall.

Chelsea Firefighters, Local 1937 (Union) was represented by Attorney Leah Barrault. Also in attendance were Union officials [REDACTED];

[REDACTED] and the Grievant, [REDACTED]

The City of Chicopee (City) was represented by Attorney Kate Clark. [REDACTED] [REDACTED] appeared for the City.

The parties submitted post hearing briefs at which time the record was closed.

THE ISSUES

The parties agreed on the following statement of the issues to be decided:

Did the City of Chelsea have just cause to suspend Firefighter [REDACTED] on April 24, 2018?
If not, what shall be the remedy?

RELEVANT CONTRACT PROVISIONS

Until October 2017, the relevant sick leave language at Article XVII stated:

Section 1. Employees shall be granted fifteen (15) days of sick leave annually without loss of pay for absences caused by legitimate personal illness or injury. Unused days will accumulate. Employees will be granted fifteen (15) days of sick leave at the beginning of the fiscal year (prorated for those who commence employment after July) ... Employees may use any or all of said fifteen (15) days whether or not yet earned.

On October 24, 2017, the parties' signed a memorandum of agreement, which included changes to the sick leave language and, in particular, added the following requirement:

Effective upon execution...any member who utilizes sick leave for four (4) consecutive tours must produce a sick note...

The Department's Standard Operating Guidelines, Policy Number DP-24, is dated April 8, 2018, and details administrative procedures related to the use of sick leave. The pertinent provisions are:

1. Sick Leave shall be granted in accordance with Article XVII of the CBA; and may be utilized as specified in Section 1 for absences caused by legitimate personal injury or illness only.
 - a) Members reporting sick leave shall report directly via phone to the Shift Commander no later than 19:00 HRS for the next day tour; and, no later than 12:00 HRS for a night tour....

BACKGROUND

██████████ had been a Chelsea firefighter for eighteen years when he was suspended for four days on April 24, 2018. ██████████ suspended ██████████ for "utilizing an unacceptable and unreasonable amount of sick leave."

A review of your 2018 sick leave use shows that you have utilized 17 sick days between January 1 and April 8. From January 16 through January 26 you utilized seven consecutive days. The Collective Bargaining Agreement mandates that a sick note is required for absences of four days or more; yet, you only provided a note that excused you for January 16 and 18th. A summary of your 2017 sick leave use shows that you used 27 sick days, nearly twice the annual allotment for that year, with no medical documentation.

For utilizing an unacceptable and unreasonable amount of sick leave you are hereby suspended for four working days effective the May 8 day tour through the May 10 night tour, and returning to regular duty May 11 at 08:00 hrs....

Joint Exhibit #2

██████████ had been disciplined for alleged misuse of sick leave once before. On September 16, 2016, the Chief issued a Notice Reprimand:

Per the Collective Bargaining Agreement, Article XVII, Section 1, sick leave is for use for absence caused by legitimate personal illness or injury. However, on September 9, 2016 at approximately 10:09 hrs, you called out sick via cell phone for your 18:00 hour tour. Immediately following, you attended funeral services with the department. Hence, your report of illness that precluded you from working our 18:00 our tour was misleading and not entirely accurate.

Employer Exhibit #5, page 4

██████████ also had been disciplined for failing to comply with procedures for cancelling scheduled detail assignments:

January 23, 2013	Verbal Warning for missed detail
September 15, 2015	Verbal Reprimand for missed detail
August 25, 2016	Cautionary Email ¹ for “late cancels”
September 21, 2017	Written reprimand for missed details

Soon after Chief ██████████ was hired in April 2016, he reviewed attendance records and found that the “department had an above-average use of sick leave.” Determined to reduce the overall sick leave use, the Chief issued the first of two department-wide memos on September 26, 2016, reminding employees about the proper use of sick leave:

All members are to be reminded that under Article XVII of the Collective Bargaining Agreement, sick leave is for use for legitimate personal illness or injury. Sick leave may also be used under approved Family Medical Leave for up to 12 weeks annually when meeting the federal criteria and approved by the city. Sick leave is not permissible for any other use such as for personal leave, or for a vacation when vacation time is not available.

Therefore, it is the department expectation that members maintain the regular work schedule within the parameters of the Collective Bargaining Agreement;

¹ The email details late cancellations but there is no reference to the email as “discipline” although the Chief cautioned, that “going forward, there will be sanctions for any details missed or cancelled within the 24 hours period as per policy.”

and, accurately relay information about illness or injury for purposes of sick leave use.

Employer Exhibit # 1

The same day he issued the first department-wide memorandum, the Chief issued the first discipline [REDACTED] would receive about his sick leave use:

Per the Collective Bargaining Agreement, Article XVII, Section 1, sick leave is for use for absence caused by legitimate personal illness or injury. However, on September 9, 2016 at approximately 10:09 hrs, you called out sick via cell phone for your 18:00 hour tour. Immediately following, you attended funeral services with the department. Hence, your report of illness that precluded you from working our 18:00 our tour was misleading and not entirely accurate.

Employer Exhibit #5, page 4

The Chief issued the second department-wide memorandum about sick leave use on January 13, 2017:

A study of sick leave use for calendar year 2016 for the city manager has resulted in the following:

- The average sick leave used per member was 14.1 days
- Deducting all authorized FMLA days expended as sick the average is 13 days
- 20 members used five days or less, with eight of the 20 using zero days
- 31 members use more than the allotted 15 days, only a few of these were for documented long-term medical issues off the job

The bottom line is that the average use of sick leave is 3+ weeks per member. This is double last year's average, and double the amount of many comparable departments. This appears to be an excessive amount of sick leave use. In September, I issued the following reminder:

Just as the Local insists on the enforcement of all the contractual obligations of the City, the City in turn insists that contractual obligations on the members including those that restrict the use of sick leave for the specific purpose of "legitimate personal injury or illness. "

Maintaining the work schedule is the most basic and critical employee obligation. Proper attendance is required for the efficient and effective operation of the department.

Therefore, be advised that the department expectation is that sick leave is only utilized for legitimate personal illness or injury as specified in the collective bargaining agreement. Further, any misuse of sick leave, or disregard for this restriction will be considered a major conduct violation going forward.

Employer Exhibit #2

At the time, there was no requirement that firefighters provide doctor's notes when using sick leave but this changed on October 24, 2017, when the parties agreed that, any employee "who utilizes sick leave for four (4) consecutive tours must produce a sick note."

From the time the new requirement went into effect until the April 24, 2018 suspension, [REDACTED] was out on sick leave for a total of 20 scheduled tours²; including the 7 consecutive tours the Chief referenced in the suspension letter. [REDACTED] provided a doctor's note on February 1 when he returned to duty from these consecutive absences:

A medical provider saw the above patient in the office on January 18, 2018. Please excuse him from work January 16, 2018 through January 18, 2018. If you have any questions or concerns, please give the office a call...

Employer Exhibit #3

The Chief testified that the doctor's note was not sufficient because it addressed only the first four consecutive absences and did not address the absences from all seven tours. The Chief did not mention this to [REDACTED] but added a handwritten note, "Absence was from 1/16/18 @ 08:00 through 1/26/18 @ 18:00. Medical documentation insufficient." The Chief then placed the doctor's note with his hand-written annotation in [REDACTED] file on or about February 1, 2018. He did not discuss the matter with [REDACTED] before suspending him on April 24, 2018. On April 26, 2018, the Union grieved the suspension:

Local 937 is grieving the 4-day suspension of [REDACTED] dated May 8, 2018. Also, grieving Chief [REDACTED] definition of what "above average" is referring to.

Union Exhibit #1

The City denied the Union's grievance and subsequently the matter was submitted to arbitration.

² According to Joint Exhibit #3, [REDACTED] had been on IOD when the sick leave policy was changed and through November 29, 2017. Thereafter, was on sick leave on 12/31/17 (2nd tour), 1/16/18 (both tours), 1/18/18 (both tours), 1/24/18 (both tours), 1/26/18 (1st tour), 2/11/18 (both tours), 3/15/18 (both tours), 3/23/18 (both tours), 4/8/18 (both tours), and 4/22/18 (both tours).

POSITIONS OF THE PARTIES

THE CITY

The City argues it had just cause to suspend Firefighter [REDACTED] because he had multiple unscheduled absences in a short period of time after receiving a prior warning about sick leave use in addition to multiple warnings for cancelling or failing to work scheduled details. Mr. [REDACTED] record reflected a persistent, ongoing problem of calling out for scheduled work despite repeated warnings about doing so.

The City argues [REDACTED] had ample notice of the Department's expectations based on the two Department-wide memos issued by Chief [REDACTED] in 2016 and 2017 as well as the multiple prior verbal and written warnings he had received. By the time Chief [REDACTED] issued the four-day suspension in April 2018, it was clear that the prior warnings had little or no effect on [REDACTED] attendance over time. The City points out that [REDACTED] never gave Chief [REDACTED] a reason to believe that his use of significant sick time in 2018 was due to a legitimate need for it, which might have excused the absences.

[REDACTED] sick leave use for January-April 2018 warranted discipline. In January 2018, he was absent from work for seven consecutive tours but provided a doctor's note that covered only two of the days. Then, [REDACTED] called out sick for another 12 tours before he was suspended in April. In sum, [REDACTED] was out "sick" for a total of 19 tours between January 1, 2018, and April 22, 2018. Measured against the annual grant of 13 sick days per year, the use of 19 sick days in the first four months of the year was very high.

Chief [REDACTED] determined the suspension was appropriate because of prior disciplinary actions for attendance problems, including a September 26, 2016, written Notice Reprimand for misuse of sick leave when [REDACTED] attended a funeral while on sick leave and was out on sick

leave for 20 tours during a 10-month period. [REDACTED] had also been disciplined for attendance problems related to scheduled detail assignments.

None of the prior disciplinary actions was grieved. Despite the fact that [REDACTED] received multiple prior warnings, his attendance did not improve and he presented no information that the high use of sick time was based on “legitimate” need as required by the contract. The City pointed out that the Union offered no testimonial evidence that [REDACTED] needed the time off due to an injury or illness, information which is entirely within the control of Grievant, not the Department.

According to the City, the Union’s argument that [REDACTED] was treated differently is without any merit. The Union’s evidence of discipline imposed on other employees establishes that the Department was consistent in disciplining employees who, like [REDACTED] used excessive amounts of sick time.

Based on [REDACTED] use of significant sick time in 2018, which is not supported by medical evidence, as well as the extensive prior disciplinary history for similar attendance problems, the Department had just cause to suspend Firefighter [REDACTED] in April 2018. For these reasons, the City asks that the grievance be denied in its entirety.

THE UNION

The Union argues that the City did not have just cause to suspend Firefighter [REDACTED] because there is no evidence that he did not qualify for the sick leave used or that he violated any established sick leave rule or policy.

The current contract establishes two conditions or requirements for the proper use of sick leave; only one of these applies to [REDACTED] situation:

Effective... [October 27, 2017] ...any member who utilizes sick leave for four (4) consecutive tour must produce a sick note...

Prior to the April 24, 2018 suspension, ██████████ had one sick leave absence of four or more consecutive tours that triggered the requirement to provide “a sick note” (the January 16, 2018 through January 26, 2018 absence). ██████████ met this requirement on February 1, 2018 with a note from his doctor (Joint Exhibit #4). The Chief may have found the medical documentation to be “insufficient” but he admitted he never mentioned this to ██████████. The Union notes that, after the parties’ October 2017 agreement to require medical documentation for absences of four consecutive tours, the Chief never issued any instruction or clarification about how to meet this new requirement. Having failed to provide any instruction or guidance about the new requirement and having failed to inform ██████████ that the note he submitted was insufficient until more than 2 months had elapsed, the Union argues this argument must now be deemed waived.

The Union argues that ██████████ use of sick leave did not violate any established rule. The Chief’s only statements on the matter were the two general memorandums (Employer Exhibit #1 and #2), which simply reminded employees to comply with the contractual requirements when using sick leave. Neither memorandum established a rule restricting sick leave based on the number or frequency of sick days used. The only rule in effect that relates to ██████████ sick leave is the requirement to provide medical documentation for being absent for four consecutive tours. ██████████ complied with this rule and the suspension must be vacated for this reason alone.

The Union argues ██████████ was denied due process when the Chief determined the medical documentation was “insufficient,” failed to tell ██████████ it was not sufficient, and denied him an him an opportunity to explain or provide additional documentation. The Union also argues that the City failed to produce any evidence that, in fact, ██████████ was not sick or injured on any of the days he called out sick.

The Union concludes the City did not have just cause to suspend Firefighter [REDACTED] and asks that the grievance be sustained. The Union asks that the suspension be rescinded, that [REDACTED] be made whole, and that the City be directed to stop disciplining firefighters based on the amount or frequency of sick leave used in a given year.

DISCUSSION

The question before me is whether the City of Chelsea had just cause to suspend Firefighter [REDACTED] on April 24, 2018. I find the City has not met its the burden of proving that [REDACTED] is guilty of the alleged misconduct or that he violated an established rule, regulation, or policy.

The Chief cited several reasons when he charged [REDACTED] with, “utilizing an unacceptable and unreasonable amount of sick leave.” The Chief reasoned that the doctor’s note for seven consecutive absences from January 16 through January 26 was “insufficient; that [REDACTED] was absent on sick leave 17 times between January 1 and April 8; that he provided no medical documentation for 27 sick leave absences in 2017; and [REDACTED] had multiple prior disciplines related to attendance. The reasons given may be factual but they do not prove the alleged misconduct or that [REDACTED] violated an established rule, regulation or policy.

The City’s argument that [REDACTED] had “ample notice of the Department’s expectations” regarding sick leave use is not supported by the evidence. First, since there was no requirement to produce medical documentation for sick leave in 2017, it was not proper to cite the absence of medical documentation for any 2017 absence when deciding whether to discipline [REDACTED]. Second, assuming the Chief found the February 1, 2018 doctor’s note to be “insufficient,” there is no evidence that [REDACTED] (or the Union) was 1) notified that the note was not acceptable; 2) notified how or why the note was not acceptable; or 3) given an opportunity to provide an

acceptable doctor's note. Moreover, there is no evidence that the "Department's expectations" established a limit on the amount or frequency of sick leave used by employees.

Medical Documentation. While the parties had agreed to require a doctor's note in such situations, there is no evidence that the parties or the Chief issued any instructions or guidance about the implementation of the new requirement. It may be logical to assume that a doctor's note should address an absence of four or more consecutive tours, but the new requirement did not say this and there was no instruction or guidance to clarify the point. The requirement became effective in October 2017 and there was no guidance on how to fulfill the new requirement prior to [REDACTED] absences in January or before he produced the February 1 doctor's note. The doctor's note may have been unacceptable to the Chief but it did provide a medical explanation "for four (4) consecutive tours." After the note was accepted, date stamped, and placed in his file, [REDACTED] was never advised that it had been found to be "insufficient."

Having failed to articulate any clarification or guideline for the new sick leave requirement and, having failed to inform [REDACTED] that his doctor's note was insufficient, and having failed to provide him any opportunity to provide more acceptable documentation, the City denied [REDACTED] notice of the alleged violation and denied him a fair and timely opportunity to respond to or correct the alleged violation.

Turning to the Chief's charge that [REDACTED] was guilty of "utilizing an unacceptable and unreasonable amount of sick leave," I have reviewed the collective bargaining agreement, the Department's Standard Operating Guidelines/Policy, the Chief's two General Distribution Memos, as well as each of the prior disciplinary actions in [REDACTED] file. I find no evidence of an established rule, regulation, policy or directive establishing a limit on the number or frequency of sick days that may be used by department employees in general. Nor is there any

evidence of such a limit on Firefighter ██████ in particular. The Chief cited several statistics in his General Distribution Memos about sick leave use:

- The average sick leave used per member was 14.1 days
- Deducting all authorized FMLA days expended as sick the average is 13 days
- 20 members used five days or less, with eight of the 20 using zero days
- 31 members use more than the allotted 15 days, only a few of these were for documented long-term medical issues off the job
- The average use of sick leave is 3+ weeks per member
- This is double last year's average, and double the amount of many comparable departments.

Even though the Chief concluded, “this appears to be an excessive amount of sick leave use,” it is not clear from either memo that the Chief clearly communicated what constitutes an “excessive amount of sick leave use.” Moreover, even if the Chief meant to establish a rule or policy for determining “excessive sick leave use” (based on the average use in Chelsea or the average use in comparable departments, for example), it is not clear how such a rule or policy could be imposed fairly and reasonably, particularly if an employee suffers a legitimate illness or injury that disqualifies them from work for an extended period of time.

In any event, there is no evidence that the number and frequency of ██████ absences for sick leave violated any established rule, regulation, policy or directive. For these reasons, the Chief did not have grounds to discipline ██████ based on the number and frequency of sick leave absences, including the charges that:

- you have utilized 17 sick days between January 1 and April 8
- January 16 through January 26 you utilized seven consecutive days.
- 2017 sick leave use shows that you used 27 sick days

In summary, I find the City has not met its the burden of proving that ██████ is guilty of the alleged misconduct or that he violated an established rule, regulation, or policy. The City has not proven that ██████ used “an unacceptable and unreasonable amount of sick leave” in

violation of an established rule or policy. The City has not proven that [REDACTED] was on notice that his doctor's note was insufficient and given an opportunity to provide additional documentation prior to being disciplined. For these reasons, I find the City of Chelsea did not have just cause to suspend Firefighter [REDACTED] on April 24, 2018.

AWARD

The City of Chelsea did not have just cause to suspend Firefighter [REDACTED] on April 24, 2018.

The City is ordered to immediately rescind the suspension and any reference to it from Firefighter [REDACTED] record.

The City is ordered to immediately make Firefighter [REDACTED] whole for all wages and benefits lost as a result of the improper four-day suspension.



Mary Ellen Shea, Arbitrator
February 4, 2019