

**Voluntary Labor Arbitration Tribunal**  
**Tammy Brynie, Esq., Arbitrator**

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In the matter between:

Service Employees International  
Union, Local 509

Arb. No. 8382  
OER No. 15-42806

- and -

Gr: []  
Vacation Denial

Commonwealth of Massachusetts/  
Department of Children and Families

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**Decision and Award**

**For the Employer**

Melissa A. Thomson, Esq.

**For the Union**

Tod A. Cochran, Esq.

**Background**

The hearing in this matter was held on January 7, 2016. At arbitration, the parties submitted the following stipulated issue:

Did the Employer violate the collective bargaining agreement when it denied the

Grievant's vacation request in January 2015 for the period of February 23, 2015 through March 13, 2015?

If not, what shall be the remedy?

The Grievant [] began her employment as a social worker in 1998. From about February 1996 until about December of 2015, the Grievant was a family resource worker within the Department of Children and Family's (DCF) Family Resource Unit. The Unit is responsible for placing children with foster parents, monitoring foster and kinship homes, training foster parents, performing license studies and dealing with licensure and re-licensure assessments. As a result of her longevity, in 2015 the Grievant earned five weeks of vacation annually.

The Grievant suffered both family bereavements and personal health issues in 2014. The Grievant took compensatory leave and, later, bereavement leave in conjunction with her father's ill-health and passing. In addition, the Grievant had facial surgery in August, in conjunction with her Bell's palsy, resulting in five weeks of medical leave, due to the procedure, rehabilitation and physical therapy. The Grievant also

fell ill at the end of December, leading to an absence of ten days. In addition, the Grievant used accrued vacation and personal time in March and April, as well as in October and November of 2014. According to the Employer's calculations, the Grievant used leave for about 30% of her expected work hours.

The Grievant typically schedules a long vacation in late winter to travel to a timeshare in Aruba. The Grievant books her dates well in advance, pursuant to timeshare procedures. After confirming her accommodation dates, the Grievant then arranges her flights, thereby maximizing her early booking savings. Then, the Grievant, about a year in advance, submits her vacation request at work. According to the Grievant's un rebutted testimony, she had never been denied such a vacation request in the past.

In or around April of 2014, the Grievant submitted her vacation request for time off in February-March 2015. Her supervisor indicated that it was too early for her to consider the request and she advised that it should be resubmitted closer to the vacation date. The Grievant resubmitted the request on or about October 2,

2014, but was again advised to wait until closer to the projected vacation period. According to the Grievant, she was not concerned, as her vacation requests had routinely been approved throughout her employment.

In or about January of 2015, the Grievant heard that her vacation request was being denied. Specifically, in an email dated January 7, 2015, [SUPERVISOR] advised the Grievant "I have denied the request due to overdue work that needs to be completed. Hopefully, you and I can work together to get your work caught up so that we can revisit your vacation request." Employer Exhibit #2.<sup>1</sup> The day before, [SUPERVISOR] had met with the Grievant in supervision and had compiled a list of work that need to be done, including a relatively short list of items that the Grievant was directed to complete by January 9, 2015. Union Exhibit #6A. In her next day's email, [SUPERVISOR] tied this "to do" list of caseload work to the status of the Grievant's vacation request.

The Grievant, in response to the new time line, inquired about whether she could get overtime to complete some home studies. In response, [SUPERVISOR]

advised, in effect, that overtime would not be forthcoming and that perhaps a change in schedule, with the Grievant not 'flexing' on Fridays and thereby being in the office for five days in a week, could help with the "catch up" attempts. Employer Exhibit #2.

Despite the January 9th deadline for completion of certain tasks, there is no indication that [SUPERVISOR] met with the Grievant, or otherwise personally intervened, to determine whether the designated work had been accomplished. Nonetheless, at arbitration, [SUPERVISOR] indicated, in effect, that she understood that the Grievant had completed most of the items with the designated January 9th deadline.

On or about January 13, 2015 a grievance challenging the vacation denial was filed. The further status of that vacation request, it appears, was not specifically further discussed between the Grievant & [SUPERVISOR], except for an instance when [SUPERVISOR] indicated that she could approve a one week leave. The Grievant testified that the one week offer, due to travel time,

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<sup>1</sup> On cross-examination [SUPERVISOR] conceded that she had never denied any other vacation requests.

wasn't economical and she indicated that she would, instead, pursue the matter through the filed grievance.

The grievance was processed, without resolution, through the contractual grievance procedure to arbitration. At the conclusion of the hearing, both counsel filed comprehensive post-arbitration written submissions.

### **Relevant Contract Provisions**

#### Article 9 -- Vacations

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#### Section 8

The Appointing Authority shall grant vacation leave in the vacation year in which it becomes available, unless in his/her opinion it is impossible or impracticable to do so because of work schedules or emergencies. In cases where the vacation requests by employees in the same title conflict, preference, subject to the operational needs of the Department/Agency, shall be given to employees on the basis of years of employment with the Commonwealth.

Unused vacation leave earned during the previous two (2) vacation years can be carried over on January 1 for use during the following vacation year. Annual earned vacation leave credit not used by December 31 of the second year it was earned will be forfeited.

The department head is charged with the responsibility of seeing that vacation is taken in order that the employee does not lose vacation credits . . .

The parties recognize the need to ensure the granting of personal leave, vacation, holiday and compensatory time when it is requested and as it become available . . .  
Joint Exhibit #1.

### **Contentions of the Parties**

The Union asserts that the Employer has violated the collective bargaining agreement by denying the Grievant's requested vacation, for a number of reasons. First, the contract does not grant the Employer the right to deny vacation because an employee has overdue work. The parties, instead, have recognized the need to ensure the granting of personal leave and vacation, when it is requested and as it becomes available. Two reasons for denying vacation are denoted in the contract -- when there is an emergency or when there is a conflict with an employee with more seniority. Neither reason is applicable here.

There is no basis for the Employer's reliance on the Grievant's sick leave and FMLA absence to deny her

vacation. Under the provisions of Article 9, section 3, the Employer was not entitled to reduce her vacation benefit as a result of her absences.

Any denial of the Grievant's vacation request due to her allegedly being behind in her work is not supportable. Employer witnesses conceded that, in fact, most social workers are behind in their caseloads. It is significant that no other instance of any social worker's vacation being denied due to overdue work was cited at arbitration. Moreover, by the end of January 2015, the Grievant had actually completed most of the identified "overdue work."

Further, the Employer engaged in disparate treatment by denying the Grievant's vacation request, while no other social worker's vacation has been affected by overdue work. It appears that at least one other social worker had a compiled overdue list of a similar length to the Grievant's, but her three week vacation request was granted annually. This disparate treatment is prohibited under basic principles of arbitral jurisprudence.



As remedy, the Union seeks a declaration that the Employer violated Article 9 when it denied the Grievant her vacation benefit in early 2015. In addition, the Grievant should be awarded lost vacation costs, with the arbitrator to retain jurisdiction for 90 days to resolve any remedial disputes.

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The Employer contends that no contract violation has occurred, as it has retained discretion in the granting of vacation requests, subject to the specific limitations imposed by Article 9. Here, the Employer utilized its managerial discretion to deny the Grievant's vacation request for the specific period requested, but allowed her to utilize her available vacation time at other periods in the vacation year of 2015. As a result, the grievance must be denied.

Here, the Grievant was granted vacation leave within the vacation year in which it became available -- namely, during 2015. There is no indication that she lost any vacation credits. Thus, the contract requirements have been met.

Because it has discretion, subject to Article 9's express limitations, whether or not the Employer used its discretion to approve or deny other employees with overdue work vacation leave is of no consequence. Although another employee had overdue work and, like the Grievant, was presented with a "to do" list, there is no indication that the list was presented around the time of the employee's vacation request. Nor was there any comparison to the Grievant's time out of the office with respect to the other employee.

The denial of the Grievant's vacation request was justified as the Grievant's time out of the office and her resulting overdue work rendered it impracticable to grant vacation for the requested time period. Since the Grievant was on leave for almost 1/3 of 2014, it was not surprising that she had a list of overdue work in January 2015. The operational needs were such that the Grievant needed to be in the office to catch up on her overdue work. Accordingly, it was impracticable and inconsistent with the operational needs of the Employer to grant the Grievant's request, due to her overdue work. It was also impracticable for the

Grievant to be out of the office voluntarily, when necessary medical leave was required both prior and subsequent to the requested vacation.

Finally, the requested remedy is not appropriate, for a number of reasons. First, the Grievant assumed the risk by booking her trip prior to securing vacation leave approval. In addition, the Grievant made little or no effort to mitigate her damages and, as a result, she should not be awarded the requested monetary remedy.

### **Opinion**

The contemporary rationale for the denial of the Grievant's vacation request was clearly delineated. The Grievant's supervisor wrote: "I have denied the request due to overdue work that needs to be completed." Employer Exhibit #2. Thus, the critical question is whether, under the circumstances, overdue work is a valid basis for vacation leave denial pursuant to the parties' collective bargaining agreement. In the present instance, I determine that it is not and such leave denial violated Article 9.

I largely concur with the Union's analysis of the relevant contractual leave provisions. Section 8 of Article 9 requires an appointing authority to grant vacation during the year in which it becomes available "unless ... it is impossible or impracticable to do so because of work schedules or emergencies." Although the cited provision does not require the Employer to grant vacations as requested, further language within Section 8 is instructive. The contract states: "The parties recognize the need to ensure the granting of personal leave, vacation, holiday and compensatory time when it is requested and as it becomes available." Joint Exhibit #1. The parties have expressed their intent that vacations be granted when requested and in the year requested, unless emergencies or work schedules make that impracticable.

Here, neither work schedules nor emergencies restricted the Employer's ability to grant the Grievant's requested vacation. Instead, the leave was denied, due to asserted "seriously overdue" work, according to [] the DCF's Cape and Island's Director. Although [DIRECTOR] supported the decision to deny the

Grievant's vacation request, she acknowledged that, prior to that denial, the Grievant had not received anything, in writing, about being behind in her work. Nor was the Grievant on an improvement plan of any kind. Instead, the Grievant's vacation request was simply denied, with the option to have that denial reconsidered, according to [DIRECTOR], if the Grievant "caught up." It appears that by the end of January the Grievant had made strides in "catching up" with her work, but it is not clear that managers or supervisors monitored the Grievant's progress in order to actually reconsider the entire submitted three week vacation request.<sup>2</sup>

It was not contractually permissible to deny the Grievant's vacation request on the basis of overdue work. As [DIRECTOR] acknowledged, the Employer has other avenues to redress overdue work, including implementing an improvement plan or disciplinary action. Moreover, as [DIRECTOR] conceded, many DCF workers have overdue work. [DIRECTOR], however, testified that she was not aware of any other instance

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<sup>2</sup> The contention that it was incumbent upon the Grievant to renew her request is unpersuasive.

when an employee had been formally denied vacation as a result of overdue work.<sup>3</sup>

Nor am I persuaded that it was impracticable to grant the Grievant's vacation request. The Employer contends that because of the Grievant's earlier leave and FMLA absences, as well as an anticipated future FMLA leave, it was not sensible to grant the Grievant's three week vacation request. The Employer's argument, however, appears to tie the availability of a contractual benefit -- the use of accrued vacation time, upon request -- to the Grievant's recent personal and medical circumstances. Inherent in the argument is the contention that because the Grievant had been out of work and her workload had not been fully covered in her absence, she could not take vacation as requested. I find no contractual basis for denying the Grievant's vacation request due to her use of other, legitimate and approved leave.

I further note that, in this instance, the Grievant provided ample notice of her vacation plans, and sought

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<sup>3</sup> The Grievant's vacation denial, due to overdue work, appears to be unique.

approval for her absence, well in advance.<sup>4</sup> The Grievant, however, was twice advised to hold onto her vacation request, until closer to the date of her anticipated absence. Only then did the Grievant learn that her vacation was being denied, due to a concern about overdue work. The denial of vacation time, under these circumstances, violates Article 9 of the collective bargaining agreement.

As remedy, the Grievant shall be reimbursed for her direct, documented loss of vacation costs. In calculating such loss I am mindful of the Grievant's general responsibility to mitigate, to the extent possible and practicable, her damages. I will retain jurisdiction of this matter for a period of 90 days to resolve any remedial dispute.

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<sup>4</sup> The Grievant's uncontroverted testimony was that her Aruba time share periods were traditionally booked 11-13 months in advance, with flight arrangements booked shortly thereafter. There is no indication that, prior to events at issue here, her vacation had ever been denied.

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**AWARD**

The Employer violated the collective bargaining agreement when it denied the Grievant's vacation request in January 2015 for the period of February 23, 2015 through March 13, 2015.

As remedy, the Grievant shall be made whole for the direct, documented loss of her vacation costs.

I will retain jurisdiction of this matter for a period of 90 days to resolve any remedial dispute.

/s/ Tammy Brynie

Tammy Brynie  
Arbitrator  
May 27, 2016



