

Boston Police Superior Officers Federation

AAA # 01-21-0003-6076

And

Cancellation of Discretionary Time off
Election week, Nov 2020

City of Boston

Award: June 3, 2022

Arbitrator: Joan M. Martin, Esq

Hearing: February 3, 2022 &

Appearances For the Union
Patrick N. Bryant, Esq.
Pyle, Rome, & Ehrenberg

For the City
Robert J. Boyle, Jr., Esq.
Office of Labor Relations, City of Boston

The Issue: The parties did not agree upon an issue and authorized the arbitrator to frame it.

The Union proposal:

1. Whether the Grievance is substantively arbitrable?
2. Whether the cancellation of discretionary time off and single day vacations from October 31 to November 9 (2020) violated the CBA?
If so, what shall be the remedy?

The City proposal:

“The City maintained that the Federation’s grievance is substantively inarbitrable. The Boston Police Commissioner has a nondelegable right to deploy personnel. Moreover, the Department’s actions did not violate an express provision of the CBA. On the merits, the City maintained that there was no violation of a CBA provision and no harm to any Federation member”.

I find that the following represents the parties proposed issues:

1. Is the grievance substantively arbitrable?
2. If so, did the City violate the collective bargaining agreement when it cancelled all vacation and discretionary leave for BPSOF members in the Police Department from October 31 through November 9, 2020?

If so, what shall be the remedy?

Collective Bargaining Agreement

ARTICLE IV. Management Rights

The Municipal Employer shall not be deemed to be limited in any way by this Agreement in the performance of the regular and customary functions of municipal management, and reserves and retains all powers, authority and prerogatives including without limitation, the exclusive right of the Police Commissioner to issue reasonable rules and regulations governing the conduct of the Police Department, provided that such rules and regulations are not inconsistent with the express provisions of this Agreement.

ARTICLE VIII Hours of Work and Overtime

Sec.2. Scheduling of Overtime. In emergencies or as the needs of the service require, employees may be required to perform overtime work. Employees shall be given as much advance notice as possible of overtime work.

....

Section 9. Compensatory Overtime.

...

Use of Compensatory Overtime

...

B. The following restrictions apply to the use of compensatory time.

i. The City is not required to grant any requests to use compensatory time where the Police Commissioner determines that staffing levels must be temporarily increased to meet public safety needs. This includes but is not limited to the following events circumstances: First Night, Boston Marathon, Caribbean Festival, July 4th, major sporting events, major cultural events, and weather emergencies.

...

iv. A request to use contractual compensatory time shall be subject to the Department's operational needs and shall not be unreasonably withheld.

ARTICLE XI., Vacation Leave

Section 1

.... Subject to the operating needs of the Department, members of the bargaining unit who are entitled to vacation benefits may exercise their option to use vacation time or to be compensated as provided for in Section 3 of this Article.

Subject to the operating needs of the Department, member of the bargaining unit who are entitled to vacation benefits may exercise their option to use their vacation time or to be compensated as provided for in Section 3 of this Article.

ARTICLE XVIII Miscellaneous

...

Section 8. Personal Leave. All employees covered by this Agreement may take up to three (3) of their fifteen annual sick days as personal days, provided that the employee shall schedule any such personal days in advance with the approval of his/her commanding officer. Such approval shall not be unreasonably withheld.

Facts

The Presidential election in November 2020 brought extraordinary disputes and divisions to the American electorate. Based on behavior at demonstrations before the Election, it was not unreasonable to think that confrontations could occur on the day of the vote, November 3. The Boston Police Commissioner decided as a precautionary measure to require all officers to be available for duty in case of disturbances. To implement this, he prohibited the use of all discretionary leave and cancelled approved leave during Election Week, 2020. (October 31 – November 9, 2020)

This controversy over time off started simply enough. An email from the Commissioner's office on October 7, 2020, reminded employees that many had not used their accrued vacation time for the year. (Un. X2)

Relative to employee vacation time, due to the COVID-19 pandemic, many employees have not utilized their accrued vacation time as usual. With the end of the year approaching, it is important to collectively plan and schedule these vacations as a team, in efforts to avoid an influx of overlapping requests.

With the intention to support our employees and their earned paid time off, **all supervisors will immediately connect with their staff and create a plan that works best for everyone and their office.** Vacations should be scheduled accordingly to ensure that each department is adequately staffed each day, especially during the holiday season. (bold in the original)

All current vacation policies remain in effect for vacation carryover into 2021. No additional vacation days, beyond each contractual obligation, will be allowed to carryover into 2021. Employees are encouraged to use their vacation time in order to prevent losing days by the end of the year.

The next day, October 8, an email from the Commissioner began the controversy which resulted in this arbitration. It stated (Un. X2

Subject: UPDATE: VACATION USAGE , week of the Election

Good afternoon- as an update to the below issued message for SWORN personnel, please be advised that vacations will not be allowed from Saturday, October 31 to Saturday, November 7. A separate email regarding discretionary days off will also be issued department wide. Thank you.

Later that same day, the Commissioner, as promised, issued another email about discretionary time off.

To: All Bureau Chiefs
Re: Discretionary Days Off

In order to provide sufficient public safety for the week of the election, all discretionary days off (E-Days, C-Days, single V Days, P Days, W.O.'s as well as a vacation period) for **sworn** personnel shall not be allowed as follows:

- The vacation period from Saturday October 31 to Saturday, November 7 will not be allowed.
- Discretionary Days Off, as noted above, will not be allowed from Monday, November 2 to Monday, November 9.

The Union immediately filed a grievance and a demand to bargain over the impact of the cancelled leave. The following week, October 15, the Police Department Office of Labor Relations (OLR) notified the Union that the Commissioner:

“will allow officers to petition, through their commanding officer, to use vacation time if it was scheduled in advance of the October 8, 2020 order. The Commissioner will review such petitions on a case-by-case basis when determining whether to grant previously scheduled use of vacation. Such requests should be made by October 23, 2020. All other cancellations will remain in effect.” (CX 6)

This permitted officers to take already booked vacations if approved by the Commissioner; it did not however allow discretionary days off.

Finally on October 20th, the Commissioner sent another email:

Regarding the previously issued email, in addition, all regular days off for sworn personnel are cancelled from Monday November 2 through Friday November 6, 2020.

In total the Commissioner prohibited all vacation days, all regular days off, all Personal days, all comp time, all single vacation days, and all E days during Election Week. This was modified by the Office of Labor Relations memo, allowing individual petitions for previously scheduled vacation time; however, the prohibition on discretionary days remained.

Position of the Parties

The Federation

The Department issued a blanket denial of all discretionary leave 1) pre-emptively and 2) without credible evidence of physical or cybersecurity threat to the November 3, 2020 election.

The cancellation or denial of discretionary time off has been the subject of arbitrations in the past. The City itself presented awards by arbitrators affirming this; the decision of Arbitrator Golick in 2005 could not be more clear although that decision concerned a different bargaining unit. (CX 16) The management authority of the Commissioner is not unlimited. On vacation leave the CBA states "Subject to the operating needs of the Department", on Personal Leave the language is "such approval shall not be unreasonably withheld" and on Compensatory Leave "A request to use contractual compensatory time shall be subject to the Department's operational needs and shall not be unreasonably withheld".

A blanket prohibition of all leave does not show an exercise of discretion neither does it show reasonability in its determination. It does show a violation of the contract as alleged because of its arbitrary and capricious nature.

The City

The Department instituted temporary restrictions on time off in order to help protect democracy. There were numerous concerns about possible violence at the polls. The Department of Justice, the FBI, the US Attorney's office, and police departments across the country were preparing for possible confrontations and violence on Election Day.

The Department did not implement a total ban; many members of the Federation took time off during the Election Week. Additionally, the Police Commissioner has the right to deploy sworn personnel as he determines best serves the public interest. Even if it is later shown that the decision was based on error or misinformation an arbitrator does not have the right to review the facts or the decision.

The Federation did not show harm to its members and thus presented no actual damages

Opinion

The grievance in this case is very similar to that filed in 2004 (Case #24-200, 8/6/2005) when the Police Commissioner cancelled leave during the Democratic National Convention (DNC) which was being held in Boston. That decision by Arbitrator Roberta Golick involved a different bargaining unit, however, the issue is the essentially same – can the Commissioner deny and/or cancel discretionary leave with no exceptions, pre-emptively without considering individual requests.

The Commissioner has broad statutory authority to run the Department as he sees best:

Considerations of public safety and a disciplined police force require managerial control over matters such as staffing levels, assignments ... and deployment of personnel. ... it is a fundamental and customary prerogative of municipal management...(St.1962 c.322)

However, his authority is not total or unlimited. The Collective Bargaining Agreement (CBA) contains limitations on the Commissioner's decisions such as "shall not be unreasonably withheld", or "subject to the needs of the Department" or in the memo from Department's Office Labor Relations regarding the DNC case "dependent on the discretion of management". These limitations do not prohibit the Commssioner's actions in managing the Department; rather they require the actions to be reasonable and non-arbitrary.

In other words:

" the Department is obligated to support a denial of an individual's request for vacation with a rational explanation as to why there would be interference with the regular work of the Department." (Golick Decision)

It is the dispute on these limitations of the Commissioner's authority which carry the substantive arbitrability for this case.

There can be no pre-emptive blanket prohibition of leave without a rational explanation of how the requested leave will impact the Department. Was there a rational explanation for the Commissioner's prohibition on leave? The anticipation of Election Day violence was not unreasonable; there were instances of confrontations around the country. However, as the date drew closer and the BRIC (Boston Regional Intelligence Center) had no credible information regarding possible physical or cybersecurity threats, (CX 23) it became less reasonable.

Numerous officers petitioned and received permission to use vacation time, but this option did not apply to Discretionary time off. Is discretionary time different from vacation time? In the way it is earned and accumulated, yes; in the limitations placed on the Commissioner before a blanket cancellation; no. Here, as in vacation time, the denial of a request cannot be unreasonably withheld; there must be a rational reason for cancellation.

Officers earn discretionary time off by working overtime, by working an administrative 5/2 schedule and by contract (Personal days). They are entitled to these days earned by their services to the Department and by their collective bargaining agreement. The Commissioner has the authority to cancel time off if he reasonably believes the Department needs all hands. As is often the case in labor issues, this is a weighing of rights and needs: do the rights of the officers outweigh the needs of the Department.

The Commissioner's obligation to the officers is to fulfill the contractual requirements whether it be for vacation time or discretionary time off. The outright ban on discretionary time off nearly a month in advance of the Election with no opportunity to request consideration

and with little evidence of threat of harm to the public was unduly restrictive and violated the contract.

The grievance is sustained.

Boston Police Superior Officers Federation and City of Boston
Gr # 15-0592
AAA # 01-21-0003-6076

Award

1. The blanket prohibition on discretionary time off violated the collective bargaining agreement. The grievance is substantively arbitrable.
2. If the Federation can show proof of any member having lost accrued time off because of time restrictions on using it, the time off shall be restored.
3. The Federation reported no monetary losses on the part of its members and no financial award is given.

Joan M. Martin
Arbitrator

June 5, 2022