STATE OF CONNECTICUT
DEPARTMENT OF LABOR
STATE BOARD OF MEDIATION AND ARBITRATION

ARBITRATION AWARD

In the Matter Of:

CITY OF NEW HAVEN

And

AFSCME COUNCIL 4, LOCAL 3144

Grievant: Petrina Yoxall

Case No. 2021-A-0088

DATE OF AWARD: December 13, 2022

Hearings via ZOOM: May 6, 2022
June 28, 2022
August 5, 2022
August 25, 2022

APPEARANCES: Lisa Lazarek, Attorney at Law (For the City)
Patrick Sampson, Staff Representative (For the Union)

I. ISSUE:

Did the City of New Haven violate the Collective Bargaining Agreement when it terminated the Grievant, Ms. Yoxall?

If so, what shall the remedy be?

II. BACKGROUND:

The American Federation of State, County and Municipal Employees, Council 4, Local 3144 (hereinafter referred to as the "Union") filed a grievance on behalf of its member Petrina Yoxall (hereinafter referred to as "Ms. Yoxall or the "Grievant"). The Union claimed that the City of New Haven (hereinafter referred to as the "City") terminated Ms. Yoxall without just cause in violation of the Collective Bargaining

Agreement (hereinafter referred to as the "CBA"). The City claimed that Ms. Yoxall had not been terminated. The City claimed that the Grievant's termination was a non-disciplinary separation as she had voluntarily quit as defined by Article 7A of the CBA.

The grievance was denied during the prior steps of the grievance procedure. The City raised the issue of arbitrability. The issue of arbitrability was heard and decided before this Panel in a separate arbitration. The Panel found that although nondisciplinary separations from employment are not arbitrable under the CBA, the Panel did not have enough evidence to determine if the Grievant's termination was a nondisciplinary separation during that arbitration. Therefore, the Panel found the matter to be arbitrable.

Several prior arbitration hearings on the merits were scheduled, postponed and rescheduled. The Exhibits were provided to the Panel in advance of the hearing which were admitted into evidence over the course of the arbitration. On August 25, 2022, an arbitration hearing was held via ZOOM and both parties were provided an opportunity to present evidence and testimony. A transcript of the August 25 hearing was provided to the Panel.

The Union filed its brief by the original due date of October 17 and the City asked for a short extension to file its brief until October 24 which was granted. The parties reserved the right to file Reply briefs. The Panel received the City's Reply brief on October 31 as agreed. The Panel Chair followed up with the Union and was informed on November 13 that the Union waived its right to file a Reply Brief. The Panel held an Executive Session on November 23, 2022 via ZOOM.

The parties have complied with the grievance and arbitration provisions of the CBA. This grievance is properly before the Connecticut State Board of Mediation and Arbitration.

III. STATEMENT OF FACTS:

Ms. Yoxall had been employed by the City for twenty-five (25) years at the time of her separation from employment. She had been employed as a working Supervisor in the Public Safety Answering Point (hereinafter referred to as the "PSAP") for ten (10) years and, prior to that time, she had been a Dispatcher in the PSAP. The COVID-19 pandemic was severe beginning in late February 2020. Many employers closed their buildings and required employees to either work remotely and if that was not possible, they were instructed to stay home. The City's position is that the duties of a working Supervisor in the PSAP are "required to be performed on-site and cannot be done remotely." The Grievant agreed that the duties of a working Supervisor in the PSAP could not be performed remotely and were required to be performed on-site. (Tr. pp. 66-67).

Ms. Yoxall did not work and utilized accrued paid sick leave from March 28, 2020. It is unknown how many days of paid sick leave to which she was entitled at that time. Apparently, the payments were made without medical certification. (Jt. Ex. 6). On April 27, 2020, the City sent Ms. Yoxall (BY EMAIL - with a copy to the Union President) an Application for Leave of Absence & Family and Medical Leave Form, together with a COVID-19 ADA Accommodation Request Form. (Jt. Ex. 6). This was apparently received by both parties.

On May 1, 2020, the City received an Application for Emergency Paid Sick Leave Act form dated April 27, 2020 on behalf of the Grievant. (Jt. Ex. 7) The Grievant could not recall where she got this form, however, it was not provided to her by the City.

The Grievant was informed by letter dated May 6, 2020 that the City DEEMED that she was entitled to FMLA effective March 29, 2020. However, the letter indicated that she had to fill out the same forms that were previously sent to her in her April 27 letter. The letter was sent via US MAIL to the Grievant and the Union President with the forms and indicated that the forms had to be completed and returned by May 15, 2020. (Jt. Ex. 8)

Not having heard from the Grievant, the City called the Grievant on May 18 and left a voice mail. The HR department also followed up with an email inquiring whether the Grievant had received the May 6 letter (see Joint Ex. 8). In the email, the HR Department also informed the Grievant that she was not eligible for the Emergency Paid Sick Leave for which she had previously applied. (Jt. Ex. 9)

On May 26, 2020, the Grievant emailed the completed FMLA form to the City. (Jt. Ex. 10) On June 3, 2020, the Grievant and the Union President were sent an email with corrected letter indicating that Grievant's FMLA leave ended on June 21, 2020 with a return to work date of June 22, 2020 (Jt. Ex. 11) On June 15, 2020, the Grievant sent the City an email indicating that she believed the Joint Exhibit 11 was incorrect. (Jt. Ex. 12). Therefore, based upon her response, the Grievant received Joint Exhibit 11.

On June 25, the Grievant was sent FMLA form, by Email and told to apply for Medical Leave (Jt. Ex. 13) to which the City received no response. On July 7, the Grievant

was sent a COVID-19 ADA Accommodation Request Form. No Response was received. (Jt. Ex. 14). On July 16, the Grievant and the Union President were sent a letter by Email for the Grievant to return to work on July 23. No Response was received from either the Grievant or the Union (Jt. Ex. 15).

The City had been experiencing problems with its Email system for many years according to testimony from a Union witness experienced in IT who is now the Union President.

On August 10, 2020, the Grievant was sent letter of termination for job abandonment by US CERTIFIED MAIL with copies to the Union President. (Jt. Ex. 2). The herein grievance was filed.

III. PERTINENT LANGUAGE FROM THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE 7A - Attendance

Any employee who will be absent from work shall notify his/her supervisor as soon as possible before the start of his/her shift (in no event less than 60 minutes prior to the scheduled shift start, absent exigent circumstances). Such notification must be given by phone, personally and directly, to the supervisor or designee. Failure to provide said notice will result in an unexcused absence.

Disciplinary action will begin after two (2) unexcused absences within one fiscal year (July 1 to June 30). Days in which sick or vacation time is used or in which the absence is approved by management shall not be considered an unexcused absence for purposes of this policy. Absences of five (5) consecutive workdays without notification to the supervisor (by the employee or employee's immediate family) shall be considered as a voluntary quit except in cases where it is proven the employee was legitimately unable to provide notice.

ARTICLE 8 – Sick Leave

Section 3

Utilization

(A) Payment for sick leave shall be authorized and approved by the Department Head. Sick leave payment may only be used for employee illness or injury or for medical or dental examinations or treatment for which arrangements cannot be made outside of working hours.

(C) A medical certificate, acceptable to the Department Head, may be required.

(1) For frequent or habitual absence from duty or when, in the judgement of the Department Head, there is reasonable cause for requiring such certificate.

(2) For any period of absence consisting of more than three consecutive working days.

ARTICLE 11 – Leave of Absence

Section 1

Leave Without Pay

(A) Family and Medical Leave

Any employee who is an "eligible employee" as defined under the Federal Family and Medical Leave Act (FMLA), 29 U.S.C. Sec. 2601 et seq. shall be granted up to the statutory allotted weeks of FMLA leave during a twelve (12) month period in accordance with the FMLA. Any accumulated paid sick leave time must be exhausted first in situations where the leave being taken by the employee is covered by the FMLA; however, employees have the option to use or not use accumulated vacation days as part of the FMLA leave. Paid leave time used as part of the FMLA leave shall be included in (and shall not be in addition to) the aforementioned statutory period of allowable FMLA leave. A medical certificate acceptable to the City shall be required for FMLA leave situations.

ARTICLE 16 – Discharge and Discipline

Section 1

Each Department Head, or their designee, shall have authority to exercise discipline as required to carry out the responsibility of the Department and to direct employees of the Department in the performance of their duties, subject to the provisions of this Agreement. If the designee and the individual being disciplined are both members of Local 3144, then such designee shall not be subordinate to, or of the same classification as, the individual being disciplined.

Section 2

Normally, disciplinary action shall be in the form of an oral warning, a written warning, a suspension without pay, or a discharge.

(A) Disciplinary action shall be consistent with the type of infraction or malfeasance which is the subject of the discipline.

(B) Discipline should be progressive in nature, but where circumstances warrant, it need not necessarily have been preceded by lesser disciplinary actions.

Section 3

All disciplinary actions shall be communicated, in writing, to the employee, with a copy placed in the Department's personnel folder and a copy sent to the Union President or his/her designee.

Section 4

Employees shall not be discharged or disciplined except for just cause.

Section 5

All verbal and written warnings shall be removed from an employee's record two (2) years after the incident occurs unless a similar infraction is committed by the employee in the two (2) year period. All other disciplinary actions shall be removed from an employee's work record after 3 years.

Section 6

Employees who are discharged during their initial probationary period shall not have recourse to the grievance procedure including arbitration. This shall not apply to promotions.

ARTICLE 22 - Grievance Procedure

Section 1 – Purpose

The purpose of the grievance procedure shall be to secure equitable solutions to employee's grievances on as low an administrative level as possible and practicable so as to insure efficiency and employee morale.

Section 2 – Definition

A grievance shall be considered to be a dispute between an employee and/or the Union and the City and/or any of its agents, servants, employees, officials, Boards or Commissions concerning the interpretation and application of specific provisions of this Agreement including the discharge, suspension, demotion or other discipline of an employee.

Section 5 – Arbitration

The Arbitrator(s) designated in accordance with this Article shall conduct a hearing at which the facts and arguments relating to the dispute shall be heard. The Arbitrator(s) jurisdiction to make an award shall be limited by the submission and confined to the interpretation or application of the provisions of this Agreement. The Arbitrator shall not have jurisdiction to make an award which has the effect of amending, altering, enlarging or ignoring the provisions of the Agreement in effect at the time of the occurrence of the grievance being arbitrated, nor shall the Arbitrator have jurisdiction to determine that the parties by implication have amended or supplemented the Agreement, unless the parties shall expressly submit to him the issue as to whether such an agreement by implication was made. The Arbitrator(s) shall confine the award to a decision that the City or the

Union has or has not violated a provision of this Agreement, and if such an award is in the affirmative, the award shall specify the remedy. The written award of the Arbitrator made in accordance with the above arbitration procedure shall be final and binding on the parties to this Agreement, subject only to court appeal of the decision.

V. DISCUSSION

There is no dispute that the Grievant was advised by her treating medical professional "not to leave her home for work due to" the COVID-19 pandemic. (Jt. Ex. 7) Although the Grievant went on sick leave effective March 28, 2020, she did not provide any medical documentation to the City until May 1, 2020.

According to her testimony, the Grievant only had one conversation with her supervisor, Mr. George Peet when she left employment on March 27, 2020 until today. Presumably Mr. Peet authorized and approved the payment of the Grievant's sick leave as required by Section 3 (A) of Article 8 of the CBA, although no evidence was provided that this occurred.

There is also no dispute that the Grievant held the position of working Supervisor in the PSAP. It is uncontroverted that the position of working Supervisor in the PSAP can only be performed on-site. The Grievant reluctantly admitted this during cross-examination.

The Union in its Brief claims that the Grievant was discriminated against since the City provided "accommodations to other similarly situated employees, while denying Ms. Yoxall." There was no evidence provided that the named individuals in the Union's brief, Mr. Scott Nuterangelo and Ms. Teresa Jackson were working Supervisors in the PSAP. Ms. Jackson was identified as a Secretary and a member of another bargaining unit. Mr. Nuterangelo was an administrative Supervisor who retired in early 2020. According to the Grievant, the position of administrative Supervisor is separate and distinct from that of working Supervisor. Administrative Supervisors do not directly supervise the

operation of the PSAP or the employees working therein. According to the Grievant, these two (2) individuals were allowed to work from home on occasion and/or at separate locations within the building not around other individuals.

The Grievant testified that she asked Mr. Peet in her one conversation in March of 2020 that she be allowed to either work at home or allowed to work in a separate room away from other employees. The Grievant knew that working from home was not possible for working Supervisors in the PSAP. Also, based upon her medical certification (which the City did not receive until May 1) her treating medical professional advised her not leave her home to go to work effective March 27. Therefore, her request to work in a separate room was also a nonstarter.

The Grievant did not follow the City's procedures regarding requesting FMLA and providing requisite information in a timely manner. This is outlined in the Statement of Facts section of this Award. The City presented evidence that the Grievant had utilized FMLA in the past, however, it is unknown whether she complied with the procedure at those times.

It is clear that the Grievant received an email which was sent on June 3, 2020 indicating that her FMLA leave ended on June 21, 2020 and that she was to return to work on June 22, 2020. The reason that this is clear is that she responded that she believed the letter was incorrect. Harold Brooks, the Union President (hereinafter referred to as "Mr. Brooks") was copied on the email, but did not recall receiving it.

The City sent the Grievant three (3) more emails (June 25, July 7 and July 23) before the City sent her the letter of termination for job abandonment by US CERTIFIED

MAIL. The Grievant and Mr. Brooks both testified that they did not receive those three (3) emails. The Grievant did admit that she later found them in her Spam folder.

The Grievant has never provided the City with any medical documentation that could return to work as a working Supervisor in the PSAP.

The Union in its brief argues that the City did not have just cause when it terminated the Grievant. The agreed upon issue in this case is not one where the Panel has been charged with determining whether the Grievant was terminated for just cause. By her own testimony, the Grievant was absent for five (5) consecutive workdays without notifying Mr. Peet (her supervisor) and therefore "shall be considered as a voluntary quit", pursuant to Article 7A.

Notwithstanding the clear contract language, the City provided the Grievant payment for accrued sick leave without medical documentation from March 28, 2020 for as many days that she was entitled to be paid. The City did not receive the medical documentation, until May 1. The requisite FMLA paperwork (which the City did not receive until May 26) did not accompany the medical documentation. The City considered the Grievant to have been on FMLA as of March 29, despite the lack of documentation at that time.

It is true that the City had problems with its email system for many years. Intermittently, the City's emails to employee's personal email accounts would go to the employees' Spam Folders. The City reminded employees of this in May and/or June of 2020. However, the Grievant knew that the City had determined that her FMLA ended on June 21 and she was expected back to work on June 22. While she emailed the City

that this was an error, she never contacted the City again. Additionally, she did not contact the Union to attempt to have them assist her in resolve the problem of either extending her FMLA, trying to get an accommodation, or some other resolution to her issue. Instead, she did nothing.

VI. AWARD

For the reasons set forth herein, a majority of the Panel finds that the City of New Haven did not violate the Collective Bargaining Agreement when it terminated the Grievant, Petrina Yoxall.

BY THE ARBITRATION PANEL:

Linda J. Yelmini 11/28/2022
Linda J. Yelmini (Public Arbitrator & Chairperson)

11/29/22
Kenneth Baldyga (Management Arbitrator)

12/9/22
Jeffrey Scanlon (Labor Arbitrator) - DISSENTING