Prepared for: ERIK BROWN

LABOR & EMPLOYMENT

Arbitration Decisions ☆ Favorite

Labor Arbitration Decision, 4659512-AAA, [Redacted}, 139 BNA LA 1462

Pagination
* BNA LA

Decision of Arbitrator

In re EMPLOYER and UNION

No. [Redacted}

February 19, 2019

Hide Headnotes

BNA Headnotes

LABOR ARBITRATION

SUMMARY

[1] Leave - Paid time off - Ambiguity ►100.5201 ►24.15 [Show Topic Path]
Employer violated the labor contract when it failed to pay two grievants for paid time off taken on same day, as parties agree that an employee whose need for sick leave does not become known until before the start of the shift, is entitled to use a day's PTO sick leave, the contract does not address how an employee may communicate this request, both grievants relied on a method each had formerly successfully used to inform the city that they were using PTO-one via e-mail and the second by telephone call to dispatch and leaving a voice mail at employer's offices-and the employer did not timely respond to these notifications.

For the employer-___, city attorney.

For the union-__, attorney.

AMERICAN ARBITRATION ASSOCIATION

LEE HORNBERGER, Arbitrator.

LABOR ARBITRATION AMERICAN ARBITRATION ASSOCIATION
DECISION AND AWARD
2. INTRODUCTION

This arbitration arises pursuant to a Collective Bargaining Agreement (CBA) between the ___ (Union) and the City of ___, Michigan (Employer). The Union contends that the Employer violated the Collective Bargaining Agreement (CBA) when it did not pay Paid Time Off (PTO) to the Grievants for their January 15, 2018, absences. The Employer maintains that it did not violate the CBA when it did not pay PTO to the Grievants for their January 15, 2018, absences.

Pursuant to the procedures of the American Arbitration Association, I was selected by the parties to conduct a hearing and render a final and binding arbitration award. The hearing was held on November 29, 2018, in the City of ___, Michigan. At the hearing, the parties were afforded the opportunity for examination and cross-examination of witnesses and for

introduction of relevant exhibits. The dispute was deemed submitted on January 31, 2019, the date the last post-hearing submission was received.

The parties stipulated that the grievance and arbitration were timely and properly before me, and that I could determine the issues to be resolved in the instant arbitration after receiving the evidence and arguments presented.

The advocates did an excellent job of presenting their respective cases.

3. ISSUE

The parties stipulated that the issue to be resolved in the instant arbitration is: Did the Employer violate the CBA when it did not pay PTO to the Grievants for their January 15, 2018, absences, and, if so, what is the remedy?

4. RELEVANT CONTRACTUAL LANGUAGE

ARTICLE 9 HOURS OF EMPLOYMENT

Section 9.1 Normal Workweek and Workday.

> Effective January 1, 2017, the normal workweek for employees shall consist of five (5) days Monday through Friday. The regular working day for employees, within the ___ Department of Public Works, unless otherwise scheduled by the Department, shall be from 7:00 am to 4:00 pm. The regular working days for employees working within the ___ City Hall and the one employee assigned specifically to Water/Sewer operations of Public Works, unless otherwise scheduled by their Department, shall be 8:00 am to 5:00 pm. Employees shall be entitled to take up to one (1) hour for lunch at times approved by the Department Head or his designee. Notwithstanding past **[*1463]** employee practice, there are no scheduled mid morning or mid afternoon breaks-the lunch break being the only scheduled down time during working hours.

Section 9.2 Deduction for Absences.

> Deduction from an employee's pay shall be made for all absences from work on the days and times stated in Section 1, except as stated herein or authorized absences as set forth in Article 12, or unless excused by the City Manager.

Section 9.3 No Concurrent Employment.

> During working hours, the employee is to concern himself strictly with the business of the City and the duties of his position. At no time during working hours shall the employees perform any services or make or receive any telephone calls for other Employers, except with the express written permission of the City.

ARTICLE 12 AUTHORIZED ABSENCES

Section 12.1 Holidays

> A. Notwithstanding past practice, the following are designated as holidays on which absence from work is authorized:
>
> Memorial Day
>
> Fourth of July
>
> Labor Day
>
> Veterans Day

Thanksgiving Day

Friday after Thanksgiving

December 24th Christmas Day

December 31st New Year's Day

B. Should a designated holiday fall on a Sunday, Monday shall be considered as the holiday. Should a designated holiday fall on a Saturday, Friday shall be considered as the holiday.

C. An employee must work his scheduled work shift immediately before and immediately following a designated holiday in order to receive pay for the designated holiday unless any type of authorized absence for the noted work shifts are excused by the Department Head.

Section 12.2 Paid Time Off (PTO)

Permanent full time employees will be entitled to paid time off which shall be used for vacation, sick and personal time. Eligibility for PTO shall be determined as of the employee's anniversary date. Notwithstanding past practice, PTO is acknowledged to be earned and given at the beginning of each July 1, and is based on the seniority attained in the previous fiscal year, and no portion of said PTO is accrued in one year to be payable in the next. The following scheduled will apply:

Seniority as of Previous year	Hired Before July 1, 2016	Hired on or After July 1, 2016
Less than 1 year	None	None
Over 1 Year, less than 4 years	120 hours	120 hours
Over 4 years, less than 9 years	160 hours	120 hours
9 Years and Over	200 Hours	160 hours

Section 12.3 Periods for Taking Paid Time Off.

A. No later than December 1st of each year, employees shall request, in writing, the dates on which they wish to take PTO for the first six (6) months of the following year. No later than June 1st of each year, employee shall request, in writing, the dates on which they wish to take a PTO during the last six (6) months of the year. In cases where there are conflicts between PTO times, time off choice shall be by seniority among the employees involved. Employees with PTO leave credited who do not schedule their PTO according to the above, may select available PTO periods at the time of the request.

B. Except as provided below PTO must be used during the annual period beginning July 1 of each year.

C. PTO will be granted at such times during the year as are suitable considering both the wishes of the employee and the efficient operation of the City.

D. PTO will be taken in a period of consecutive days. PTO may be split into one or two weeks, providing such scheduling does not drastically interfere with the operations of the employee's department.

E. Employee's required to take compulsory military training shall be allowed to utilize **[*1464]** their PTO at the time such training must be taken.

F. If an employee becomes ill and is under the care of a duly licensed physician during their scheduled PTO, the remainder of their PTO will be rescheduled at the employee's request.

G. The Department Head may, when in the Department Head's opinion it is necessary for the efficient operation of the department, cancel any employee's scheduled PTO and request the employee to submit a request for a new PTO period.

H. In the event the employee is prevented from taking any or all of the PTO to which he is entitled in any one year because scheduling time off would interfere with the operation of the department or other good reason, the remaining PTO will be carried over to the following year or the employee may request payment for the unused PTO at his hourly rate. (emphasis supplied)

I. Employees with proper notification to the Department Head may, at the employee's own discretion, carry forward up to forty (40) hours of PTO from one year into the next. (emphasis supplied)

J. In the event any employee fails to submit a request for PTO the Department may schedule the employee's vacation.

K. If an employee wishes to take PTO outside of Section 12.3 (A) they shall submit a written request to the Department head or designee and must receive approval before leaving. Employees failing to receive approval, outside of a family related medical emergency, may be subject to discipline.

L. At any given time no more than 50% of the workforce shall be off on scheduled PTO time. PTO shall be approved on a first come first served basis.

It appears there is no 12.4 in the CBA
Section 12.5 Effect of Layoff on PTO.

If an employee is laid off, voluntarily quits (with two weeks notice), or is terminated by the City, he will be paid for any unused PTO hours in conjunction with the settlement of any other amounts due to the employee from the employer or due to the employer from the employee. A recalled employee who received credit at the time of layoff for the current year will have such credit deducted from his PTO the following year.

Section 12.6 Military Service.

Employees who are in some branch of the Armed Forces Reserve or the National Guard will be paid the difference between their Reserve pay and their regular pay with the City when they are on full time active duty in the Reserve or National Guard, provided proof of service and pay is submitted. Such period shall not in any one (1) year exceed two (2) weeks, except in cases of emergency in the Detroit Metropolitan Area and the City of ___.

Section 12.7 Absence for Sickness.

Notwithstanding past practice, no sick time will be accrued by any employee subject to this bargaining agreement.

Section 12.8 Funeral Leave.

In cases of a death occurring in the employee's immediate family requiring his absence and during a duty period, the employee shall be granted an automatic leave of three (3) days with pay. At the discretion of the Department Head two (2) additional work days with pay may be granted. "Immediate family" is defined as (1) the employee's wife, husband, child, brother, sister, parent, grandparent, step parent or step child; or (2) any relative of the employee living in the same household and his mother-in law and father-in law.

Section 12.9 Jury Leave.

An employee shall be granted leave while on Jury Duty and will be paid the difference between his pay as a juror, and his regular straight time pay as an employee of the City.

Section 12.10 Temporary Discretionary Leave.

The City Manager, in his sole discretion may grant a temporary written leave of absence to employees for up to thirty (30) calendar days. A written request for such leave of absence must be submitted to the City Manager and approved by him in writing, prior to the start of the leave. Such leave may be extended upon written approval by the City Manager.

Section 12.11 Illness or Disability Leave.

An employee who is unable to perform his assigned duties because of personal illness or disability and who has exhausted all available time off shall, at the written recommendation of a physician certifying the employee's inability to perform his duties, be granted a health leave of absence without pay or fringe benefits for up to six **[*1465]** (6) months. Extensions may be granted by the City Manager. A written request for such leave must be submitted to the City Manager prior to the start of the leave. At least thirty (30) days prior to the expiration of the leave, the employee shall notify the City in writing of his intent to return to work accompanied by a written statement from a physician selected by the employer, certifying the physician and mental fitness of the employee to fulfill his duties. Upon expiration of the leave, the employee will be returned to his former classification, provided his seniority so entitles him and he can perform the available work. Upon return, the employee will be placed on the same position of the current salary schedule that was held at the start of the leave.

Section 12. 12 Compensation and Benefits While on Leave.

All leaves are granted without pay or fringe benefits, provided that, if permitted by the applicable insurance carrier, the employee will be allowed to pay the insurance premium by prepaying the premium in advance by depositing the amount each month with the City Treasurer or Finance Director. Seniority shall accumulate for up to thirty (30) calendar days. On leaves of thirty (30) days or less, the City will pay all insurance premiums. Employees on leave must report for work not later than the first working day following the expiration of their leave. An employee who seeks and/or obtains employment while on leave of absence will be automatically terminated from the City effective the date the leave of absence started.

Section 12.13 Family Medical Leave Act.

Any paid or unpaid leave addressed in this contract which qualifies as a leave under the Family Medical Leave Act (FMLA) shall run concurrently with the leave to which the employee is eligible under the FMLA. Under the FMLA, an eligible employee may use twelve (12) work weeks of FMLA leave in a twelve (12) month period. In administering the FMLA, the City may take any action consistent with that statute and the City's leave rules and policies.

Article 17 GRIEVANCE PROCEDURE

Every reasonable effort shall be made by the parties involved to arrive at a fair and equitable settlement of every grievance without resorting to the Grievance Procedure. If that is found to be impossible, the matter may be submitted to the Grievance Procedure in accordance with the terms of this Agreement.

Section 17.1 Savings Clause.

Nothing in this article shall prevent any individual employee or the Union from exercising the rights granted in Act 336 of the Public Act of 1947, as amended.

Section 17.2 Definition of Grievance.

For the purpose of this contract, a grievance is defined as an alleged violation of this contract. Grievances involving discharge or discipline of an employee shall be processed under Article of this contract.

Section 17.3 Grievance Procedure.

The City and the Union support and subscribe to an orderly method of adjusting grievances. To this end, the City and the Union agree that an employee should first bring his problem to the attention of his immediate supervisor, with or without his Union Steward, and shall attempt to resolve the grievance informally.

Notwithstanding past practice, the following procedure shall be followed to present a grievance to the City.

A. The employee or the Union shall present the grievance in writing to the Department Head within fifteen (15) regularly scheduled working days of the event, or knowledge of the event which gave rise to the grievance.

B. A grievance shall be answered in writing by the appropriate Department Head or his delegate within fifteen (15) regularly scheduled working days after the grievance is presented to the Department Head.

C. If no further action is taken within fifteen (15) days after service of the written answer upon the employee or Union President, the answer will be considered accepted and no further action may be taken upon the grievance.

D. If the decision is not satisfactory to the Union, a hearing before the City Manager may be requested within fifteen (15) regularly scheduled working days thereafter, by written notice to the City Manager, who shall, within fifteen (15) regularly scheduled working days thereafter, grant a hearing to the employee, review the grievance and answer thereto, hear such other testimony or examine other evidence which is relevant, and with thirty (30) regularly working days after the hearing, shall uphold, reverse, or modify the City's answer **[*1466]** to the grievance in writing. This step is not optional and if the union fails to acknowledge this step in the process it shall void the grievance.

Section 17.4 Arbitration.

If the matter cannot be resolved by the parties as set forth in Section 3 above the matter may be submitted to arbitration within thirty (30) days thereafter. This time limit may be extended by mutual agreement. The Arbitration shall be conducted in accordance with the rules, regulations and procedures of the American Arbitration Association.

The arbitrator may not add to, subtract from, change, or amend any terms of this Agreement and shall only concern himself with the interpretation and application of the terms of this Agreement. The decision of the Arbitrator, within his authority, shall be final. The expense of the arbitrator shall be borne equally by the parties to this Agreement.

Section 17.5 Withdrawal of Grievance.

A grievance may be withdrawn by the employee or the Steward but if withdrawn, it shall not be reinstated. The notice of grievance withdrawal shall be submitted to the Department Head in writing.

17.6 Claims for Back Wages.

No claim for back wages involved in any grievance shall exceed the amount the employee would have otherwise earned.

Section 17.7. Time.

The time limits set forth in this article may be extended by mutual agreement in writing, by the City and the Union.

Section 17.8 Grievance Considered Settled.

Any grievance not moved within the time limits specified in the particular step of the Grievance Procedure shall be considered settled on the basis of the last written answer and not subject to further review.

Section 17.9 Regular Work Days Defined.

The following are to be considered regularly working days for grievance processing: Monday through and including Friday. Saturday, Sunday and Holidays are not to be considered regular working days for grievance processing.

Section 17.10 Sole Remedy.

The sole remedy available to any employee for any alleged breach of this agreement or any alleged violation of his/her rights hereunder will be pursuant to the Grievance Procedure; provided, that is, if an employee elects to pursue any legal or statutory remedy, such election will bar any further or subsequent proceedings for relief under the provisions of this Article.

5. FACTUAL OUTLINE

Introduction

In the 2013 CBA, the Employer moved from sick, vacation, and personal time off to consolidated PTO. Since 2013, there has been a unitary PTO system.

L. A__ has been the City Manager since May 2010.

Assistant City Manager B__ is the Grievant' first line supervisor.

Grievant C__ was hired on September 1, 1989. He was on the Union bargaining team and attended the bargaining sessions for the current CBA.

Grievant D__ was hired on August 1, 1997, as a Laborer.

July 1, 2007, to June 30, 2010, CBA

The July 1, 2007, to June 30, 2010, CBA, extended through 2012, had separate provisions for sick, vacation, and personal time off. In the 2007-2010 CBA there was a call-in procedure for sick time in Art. IX (9). Under Art. IX subsection 8, "Employees shall be entitled to absence without loss of pay for sickness upon notifying the Employer of such absence and provided the employee has accumulated sick leave to cover said absence. Said notification shall be communicated by the employee to the employee's immediate supervisor, the City's Police Department Dispatch or the City Offices no later than 1-1/2 hours after the employee's regular starting time, whenever possible. …"

July 1, 2013, to June 30, 2016, CBA

The July 1, 2013, to June 30, 2016, CBA consolidated PTO for sick, vacation, and personal time off. **[*1467]**

July 1, 2016, to June 30, 2019, CBA

The July 1, 2016, to June 30, 2019, CBA has consolidated PTO for sick, vacation, and personal time off.

Grievant C__ - January 21, 2017

At 6:25 a.m., January 21, 2017, Grievant C__ sent an email to the Assistant City Manager that said, “I won’t be in today.” The Employer paid Grievant C__ for PTO for January 21, 2017.

Grievant C__ - March 6, 2017

At 6:11 a.m., March 6, 2017, Grievant C__ sent an email to the Assistant City Manager that said, “I won’t be in today.” The Employer paid Grievant C__ for PTO for March 6, 2017.

Grievant C__ - January 15, 2018

On the morning of January 15, 2018, Grievant C__ woke with a cold. He testified that “I did not feel well.” At 5:50 a.m., January 15, 2018, he sent an email to the Assistant City Manager that said, “Not going to be in today.” Grievant C__ did not know that Grievant D__ was not going to work on January 15, 2018. According to Grievant C__, D__ and C__ have never synchronized their time-offs.

Grievant D__ - January 15, 2018

On January 15, 2018, Grievant D__ called the County Sheriff Dispatch. Dispatch transferred him to the __ County Sheriff, then on to the City of ___. Grievant D__ then left a voice mail message with the Employer. In the voice mail message, he gave his name and said he would not be in. The voice mail message voice was the City Clerk. According to Grievant D__, he had been in a “fender bender.” This was caused by a boulder in the road. His wrist was hurt. He did not know that anyone else had called in that day for time off. He moped around the house and took care of his children. He called an MD. The MD called in a prescription for him. The next day he went to work. He has never had to fill out a form to take off a day for a sick day. On January 15, 2018, because of the accident, his phone was in Flint. Grievant D__ testified that “I did not have my phone.” All his email information was in the phone.

Grievant C__ - January 17, 2018

At 6:11 p.m., Thursday, January 17, 2018, Grievant C__ sent an email to Assistant City Manager that said, “Letting you know that I won’t be in, for Friday.” The Employer paid Grievant C__ for PTO for January 18, 2018.

January 26, 2018

A Grievance was filed on January 26, 2018, concerning the January 15, 2018, PTO situations. The Grievance stated:

> Contract violation.
>
> On January 15, 2018, C__ (Grievant) and D__ (Grievant) notified the Employer of using time off for illnesses.
>
> On January 26, 2018, D__ called [the Assistant City Manager] to see why they had not been paid for the day and was told “if they don’t come to work they will not be paid”. This is in violation of Article 12 and past practice of granting PTO for illness.

Adjustment or Settlement Requested:

> 1. The Employer cease and desist violating the agreement.
>
> 2. The Grievants be made whole for any and all lost wages and benefits.

The Employer’s February 22, 2018, Step 1 answer indicated, in part, that the Employer “finds no violation to the … CBA. The grievance is denied.”

April 25, 2018, City Manager Hearing

On April 25, 2018, the City Manager had the City Manager hearing on the Grievance. It was the practice to issue a written opinion. There is then an appeal to arbitrator. In this case, the transcript was “annexed” to the decision.

In attendance at this hearing were the Union Representative, Grievant C__, Grievant D__, the City Attorney, the Assistant City Manager, and the City Manager. This hearing was audio

recorded. I have listened to the audio recording several times. The City Manager hearing lasted 46 minutes. The Grievants were examined by the City Manager and the City Attorney.

Union Representative E__ attended the April 25, 2018, hearing. He did not receive a copy of the written City Manager decision. He did not receive a copy of the transcript. There have been five to ten City Manager hearings, **[*1468]** but this is the only one where Mr. E__ has not received a copy of the written decision. In the past, he would also receive the decision by email. The City Manager hearings are always recorded. He has never received a copy of the transcript. He has never requested a transcript.

According to Union Representative E__, this is the first time that the Employer has required pre-approval for sick leave PTO use. The practice has been that there has been no compensation denied even where not approved ahead of time. The Union Representative requested that the Employer put in writing a procedure for how employees should request PTO sick leave.

The City Manager testified that "I had no knowledge of how they were calling until I heard their testimony." The County Sheriff call-in option had not existed for nine years. According to the City Manager, the past practice was to contact the Employer via "texting." Texting was in effect as of January 2018 or late 2017. The text message would go to the Assistant City Manager. Before that, employees would orally notify or text to the City Manager. The Employer has the discretion to grant PTO. The employee cannot unilaterally determine whether he or she will have PTO. The Grievants never received approval from the department head and were not eligible for PTO for the day in question.

The arbitration hearing was held before me on November 29, 2018. The arbitration hearing went from approximately 10:00 a.m. to approximately 5:20 p.m., including lunch.

6. CONTENTIONS OF THE PARTIES

a. *For the Union*

The Union contends that two long-term employees, C__ and D__, separately called in or emailed on January 15, 2018, to use PTO for purposes of sick leave. On January 15, 2018, C__ sent an email at 5:50 a.m. noting he was taking PTO that day. On January 15, 2018, D__ at about 6:00 a.m. called the Dispatch at the City's Police Department to advise he was calling off and was then directed to call the City's main telephone number and leave a message. D__ recognized the voice on the City's voice mail as the City Clerk.

Both C__ and D__ took eight hours of PTO for January 15, 2018, and both were docked pay for the day they took off. C__ testified he stayed home. D__ testified he stayed home and took care of his four year old son.

The Union filed a grievance to get both employees paid for the day they were docked. The Employer denied the grievance with an indication that "you don't come to work you don't get paid."

D__ used the procedure from an earlier CBA by calling dispatch or the City's official telephone number. Mr. D__ was then directed to leave a message at City Hall, which he did. CBA Art. 12 entitles these two seniority employees 200 hours of PTO which can be used for vacation, sick and personal time. Unlike former CBAs the current CBA, has no procedure for calling off for a single sick day. Art. 12 does not contain a provision for a procedure which an employee can use to inform the Employer of a need to use a single day of sick time.

C__ testified he had used email in the past to advise the Employer he was using a PTO day or "sick day" and in the past he was paid pursuant to the provisions of Art. 12.

D__ used the procedure from the 2007-2010 CBA. Under the 2007 CBA, employees were required to notify the Employer of use of sick time no later than 1 1/2; hours after the starting time or by 8:30 a.m., by calling the immediate supervisor, the City's Police Department Dispatch or the City Offices.

The Union requests that I grant the grievance and make the Grievants whole for their loss of pay for calling in sick on January 15, 2018.

b. For the Employer

The Employer contends that the Grievance is void where the Union failed to materially participate in the City Manager hearing. The Record of the City Manager hearing is relevant and admissible to determine whether the Union breached its CBA obligation to materially acknowledge the City Manager hearing process. The scope of my authority under the CBA is limited in reviewing the City Manager decision in an appellate capacity.

The Employer further contends that the CBA and the evidence submitted at the hearing establish that the City acted within its contractual rights when denying the Grievants' requests for PTO. The City did not breach the CBA by declining the requests for PTO where **[*1469]** it is within the City's CBA reserved discretion to deny a request for non-scheduled PTO. It is undisputed that the Grievants failed to timely submit and obtain prior supervisor approval of

their PTO requests as required by the applicable terms of the CBA. Moreover, the Grievants' failure to properly notify their supervisor of their absences by the most direct available means and their failure to request or obtain supervisor approval of the unexcused absences, constitutes discretionary managerial cause to properly deny the requests for PTO. It is undisputed that the unexcused absences on January 15, 2018, are otherwise non-compensable in the absence of CBA authorized PTO. CBA Section 17.6 expressly prohibits an arbitration award of unearned back pay. Given that the City breached no CBA obligation in denying the requests for PTO, the monetary and declaratory relief requested by the Union and Grievants is unwarranted. Because the City declined the PTO requests, the City did not reduce the Grievants' PTO banks thereby leaving the Grievants whole and undamaged. Accordingly, in the event I award the Grievants PTO pay for the missed day of work, the CBA requires a corresponding reduction in the Grievants' respective PTO banks.

The Employer requests that I deny the Grievance.

7 DISCUSSION AND DECISION

The instant case involves a contract interpretation in which I am called upon to determine the meaning of some portion of the CBA between the parties. I may refer to sources other than the CBA for enlightenment as to the meaning of various provisions of the CBA. My essential role, however, is to interpret the language of the CBA with a view to determining what the parties intended when they bargained for the disputed provisions of the CBA. Indeed, the validity of the award is dependent upon my drawing the essence of the award from the plain language of the CBA. It is not for me to fashion my own brand of workplace justice nor to add to or delete language from the CBA.

In determining the meaning of the instant CBA, then, I draw the essence of the meaning of the CBA from the terms of the CBA of the parties. Central to the resolution of any contract application dispute is a determination of the parties' intent as to specific contract provisions. In undertaking this analysis, I will first examine the language used by the parties. If the language is ambiguous, I will assess comments made when the bargain was reached, assuming there is evidence on the subject. In addition, I will examine previous practice by the parties related to the subject. When direct evidence is not available, circumstantial evidence may be determinative.

In this case the issue revolves around whether the Employer correctly declined to pay PTO to the Grievants for their January 15, 2018, absences. The Union maintains that the Grievants should have been paid PTO for these absences. . The Employer maintains that it was correct in not paying PTO to the Grievants for these absences.

For the reasons that follow, I conclude that the Union met its burden of proof that the Employer should have paid PTO to the Grievants.

The Union has the burden of proof.

The Union bears the burden of proof in this CBA interpretation case. Elkouri & Elkouri, *How Arbitration Works* (8th Ed), pp. 8-104 to 8-107.

Is the Grievance void in light of the City Manager hearing?

The Employer contends that the Grievance is void because, according to the Employer, the Union allegedly failed to materially participate in the April 25, 2018, City Manager hearing. The Union contends that the Grievance is not void.

The Art. 17.3 D. Grievance Procedure states:

> If the decision [of the department head] is not satisfactory to the Union, a hearing before the City Manager may be requested within fifteen (15) regularly scheduled working days thereafter, by written notice to the City Manager, who shall, within fifteen regularly scheduled working days thereafter, grant a hearing to the employee, review the grievance and answer thereto, hear such testimony or examine other evidence which is relevant, and within thirty (30) regularly scheduled working days after the hearing, shall uphold, reverse, or modify the City's answer to the grievance in writing. This step is not optional and if the union fails to acknowledge this step in the process it shall void the grievance.

All the words of the CBA have to be given meaning. "Ordinarily, all words used in an **[*1470]** agreement should be given effect. The fact that a word is used indicates that the parties intended it to have some meaning. …" Elkouri & Elkouri, p. 9-36.

In the absence of evidence of mutual understanding of the CBA, dictionary definitions of the word "acknowledge" can be considered. Elkouri & Elkouri, p. 9-24. The common meaning of

"acknowledge" is "… accept or admit the existence or truth of. …" *New Oxford American Dictionary* (3d Ed.)(2010), p. 13.

The Employer argues that the Union did not "materially acknowledge" the City Manager hearing. The CBA says "fails to acknowledge," not "fails to materially acknowledge." The adjective "materially" has a meaning which the parties did not put in the CBA. "Materially" means "substantially, considerably." *Id.* at 1079. Significantly, "materially" is not the language that was memorialized and became part of the parties' CBA. The fact that the "materially" language was not used by the parties in the CBA supports the inference that the "acknowledge" language adopted by the parties is that which controls. Elkouri & Elkouri, pp. 9-27 to 9-28.

Art. 17.4 states:

> The arbitrator may not add to, subtract from, change or amend any terms of this agreement and shall only concern himself with the interpretation and application of the terms of this agreement.

"Ordinarily, all words used in an agreement should be given effect. The fact that a word is used indicates that the parties intended it to have some meaning. …" Elkouri & Elkouri, p. 9-36.

I may not add the word "materially" to the CBA.

The Union "accept[ed] or admit[ted] the existence" of the City Manager hearing. I find that the Union acknowledged the City Manager hearing.

Is the Record of the City Manager hearing admissible?

The Employer contends that the Record of the City Manager hearing is relevant and admissible to determine whether the Union breached its CBA obligation to acknowledge the City Manager hearing process. Although I have found that the Union did not violate its obligation to "acknowledge" the City Manager hearing process, I admit the audio recording of that hearing into evidence.

Is the scope of my authority under the CBA limited to reviewing the City Manager decision in an appellate capacity?

The Employer contends that the scope of my authority under the CBA is limited in reviewing the City Manager decision in an appellate capacity. The Union contends that the scope of my authority under the CBA is not limited to reviewing the City Manager decision in an appellate capacity and that I hear and decide the case with no deference to the City Manager's findings nor the evidence and testimony presented at the City Manager hearing.

Art. 17.4 states that "[t]he arbitration shall be conducted in accordance with the rules, regulations and procedures of the American Arbitration Association." The American Arbitration Association Labor Arbitration Rules provide, in part, as follows.

> Introduction. … For decades, the American Arbitration Association® (AAA) has been a leading administrator of labor-management disputes. … Arbitration is a tool of industrial relations. Like other tools, it has limitations as well as advantages. In the hands of an expert, it produces useful results. When abused or made to do things for which it was never intended, the outcome can be disappointing. For these reasons, all participants in the process - union officials, employers, personnel executives, attorneys, and the arbitrators themselves - have an equal stake in orderly, efficient, and constructive arbitration procedures. *The AAA's Labor Arbitration Rules provide a time-tested method for efficient, fair, and economical resolution of labor-management disputes. By referring to them in a collective bargaining agreement, the parties can take advantage of these benefits.* …
>
> 1. Agreement of Parties *The parties shall be deemed to have made these rules a part of their arbitration agreement whenever, in a collective bargaining agreement or submission, they have provided for arbitration by the American Arbitration Association (hereinafter the AAA) or under its rules.* These rules and any amendment of them shall apply in the form in effect at the time the administrative requirements are met for a demand for arbitration or submission agreement received by the AAA. The parties, by written agreement, may vary the procedures set forth in these rules. … **[*1471]**
>
> 25. Order of Proceedings A hearing shall be opened by the filing of the oath of the arbitrator, where required; by the recording of the date, time, and place of the hearing and the presence of the arbitrator, the parties, and counsel, if any; and by the receipt by the arbitrator of the demand and answer, if any, or the submission. Exhibits may, when offered by either party, be received in evidence by the arbitrator. The names and addresses of all witnesses and exhibits in the order

> received shall be made a part of the record. *The arbitrator may vary the normal procedure under which the initiating party first presents its claim, but in any case shall afford full and equal opportunity to all parties for the presentation of relevant proofs.* The arbitrator, exercising his or her discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute and may direct the order of proof, bifurcate proceedings and direct the parties to focus their presentations on issues the decision on which could dispose of all or part of the case. …
>
> 27. Evidence and Filing of Documents The parties may offer such evidence as is relevant and material to the dispute, and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. An arbitrator or other person authorized by law to subpoena witnesses and documents may do so independently or upon the request of any party. The arbitrator shall determine the admissibility, the relevance, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant and conformity to legal rules of evidence shall not be necessary. *All evidence shall be taken in the presence of all of the arbitrators and all of the parties,* except where any of the parties is absent, in default, or has waived the right to be present. …
>
> 47. Interpretation and Application of Rules *The arbitrator shall interpret and apply these rules insofar as they relate to the arbitrator's powers and duties.* When there is more than one arbitrator and a difference arises among them concerning the meaning or application of any such rule, it shall be decided by a majority vote. If that is not possible, the arbitrator or either party may refer the question to the AAA for final decision. All other rules shall be interpreted and applied by the AAA. Emphasis added.

The legal principles that govern contract interpretation apply to the interpretation of arbitration agreements. Altobelli v. Hartmann, 499 Mich. 284, 295; **884 N.W.2d 537** (2016). My "primary task is to ascertain the intent of the parties at the time they entered into the agreement, which [I] determine by examining the language of the agreement according to its plain and ordinary meaning." *Id.* An arbitration agreement constitutes the "law of the case, and [I am] bound to follow the guidelines set forth in the four corners of the document." When determining whether an issue is subject to arbitration pursuant to an arbitration agreement, "[t]he burden is on the party seeking to avoid the agreement, not the party seeking to enforce the agreement." *Id.* at 295.

Due process in civil cases generally requires notice of the nature of the proceedings, an opportunity to be heard in a meaningful time and manner, and an impartial decision maker. Hinky Dinky Supermarket, Inc., v. Dep't of Community Health, 261 Mich. App. 604, 606; 683 N.W.2d 759 (2004).

No part of arbitration is more important than selecting the impartial arbitrator. Elkouri & Elkouri, p. 4-39; and Abrams, p 37. See generally Oakland-Macomb Interceptor Drain Drainage Dist. v Ric-Man Constr., Inc., 304 Mich. App. 46; **850 N.W.2d 408** (2014).

In light of the wording of Art. 17, the scope of my authority under the CBA is not limited to my reviewing the City Manager decision in an appellate capacity. To hold otherwise would make a nullity of the "[t]he arbitration shall be conducted in accordance with the rules, regulations and procedures of the American Arbitration Association" language in Art. 17.4. Elkouri & Elkouri, p. 9-36.

Did the Employer breach the CBA by declining to allow the PTO?

The Employer contends that it did not breach the CBA by declining the requests for PTO where it is within the Employer's CBA reserved discretion to deny a request for non-scheduled PTO. The Union contends that a review of the current CBA makes it clear that there is no provision which explains how an employee can use his PTO for calling in for a single sick day. The CBA contains an ambiguity regarding the procedure for an employee to contact the Employer to seek permission to take paid time off for a single sick day. A prior CBA contained a call-in procedure. While the current CBA provides employees with PTO, it fails to specifically detail how to request a sick day.

Art. 12 explains:

> 1. how much time a seniority employee has of PTO [Art. 12.2]; **[*1472]**
>
> 2. how to request vacation leave [Art. 12.3 A, B C and D];
>
> 3. how military leave is treated for purposes of PTO [Art. 12.3 E]
>
> 4. how an employee who requests vacation and becomes ill during that vacation leave may request rescheduling of vacation leave [Art. 12.3 F];

> 5. the Employer's prerogative to cancel an employee's PTO [Art. 12.3.G];
>
> 6. how a carry over of PTO could occur and how PTO could be paid out if the employee is prevented from taking PTO leave [Art. 12.3.H];
>
> 7. how an employee could carry over up to 40 hours of PTO [Art. 12.3 I];
>
> 8. the Employer's right to schedule an employee's PTO leave [Art. 12.3.J];
>
> 9. that a written request for use of PTO is required except in a family related emergency [Art. 12.3.K]; and
>
> 10. that no more than 50% of the workforce shall be off on scheduled PTO and PTO is approved on a first come first served basis. [Art. 12.3 L].

Nowhere in Art. 12.3 A-L is there a provision for how to take a single sick day under the PTO provision.

Negotiating history can be important to interpreting CBA language. Elkouri & Elkouri, pp. 9-26 to 9-29. Negotiating history can sometimes aid in the interpretation of what at first glance might appear to be clear and unambiguous CBA language. City of Frankfort v POAM, unpublished per curiam opinion of the Court of Appeals, issued October 18, 2011, Docket No. 298307, lv dn ___ Mich. ___ (2012). Abrams, *Inside Arbitration,* pp. 238-239. "[M]inutes of bargaining meetings provide important evidence, as well as the actual text of the proposals exchanged by the parties during negotiations." Elkouri & Elkouri, p. 9-30.

In the case before me there is no direct evidence of negotiating history. There were no statements from one side to the other at the bargaining table that will help me in discerning the requirements requesting sick leave under the circumstances of this case. I am left only with the wording the CBA from which to derive a resolution to this question. *Id.* at 9-7. Abrams, p. 244.

It has been stated that:

> Although [I] may use [my] expertise in interpreting and applying the contractual provisions, [I] cannot substitute [my] own sense of equity and justice but the award must be grounded in the terms of the agreement. To do otherwise would, in effect, be to change or alter the agreement through indirection. This [I] cannot, and should not do in the interest of *all* parties and the collective bargaining process. In other words, it is the [my] duty … to interpret the contract as precisely as [I] can, and not to rewrite it. Johnston-Tombigbee Mfg Co., **113 LA 1015** , 1020 (Howell, 2000).

The testimony of the witnesses does not resolve how the CBA mandates that sick leave be applied for. The negotiating history proposal provides little guidance.

> The primary rule in construing a written instrument is to determine, not alone from a single word or phrase, but from the instrument as a whole, the true intent of the parties, and to interpret the meaning of a questioned word, or part, with regard to the connection in which it is used, the subject matter and its relation to all other parts or provisions. Riley Stoker Corp., **7 LA 764** , 767 (Platt, 1947).

Kentwood v. Police Officers Labor Council, 483 Mich. 1116; **766 N.W.2d 869** (2009), denied the City's application for leave from Kentwood v. Police Officers Labor Council, unpublished per curiam opinion of the Court of Appeals, issued October 28, 2008 (279993). This denial of application left intact the Court of Appeals' reversal of the Circuit Court's vacatur of a labor arbitration award. The arbitrator had held that the grievant was to be assigned a take-home vehicle because there was a past practice of assigning vehicles, and the burden was on the employer to prove it had repudiated the practice without objection by the union. The arbitrator held the past practice became a binding working condition that could not be altered without mutual consent where the CBA was silent on the assignment of vehicles. The arbitrator held the policy manual provision was only valid to the extent it was consistent with the CBA, including established practices. The arbitrator concluded the decision not to assign a vehicle was inconsistent with the past practice. See generally Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements,* Proceedings of the 14th Annual Meeting of NAA (1961). http://naarb.org/proceedings/pdfs/1961-30.PDF **[*1473]**

Justice Markman dissented, with Justice Corrigan joining, indicating he would reinstate the Circuit Court's order vacating the award. The dissent said the CBA does not refer to vehicles, and department policy accords the Chief discretion in assigning vehicles.

There are subparts of Art 12 that cover vacations, need for leaving sick arising while already at work, and other situations. Both parties agree that a person whose need for sick leave does not become known until before the start of the shift, is entitled to the utilization of a day's PTO sick leave. The question is, how does an employee go about communicating this need to the Employer? Grievant C__ had successfully done this communication several times before

January 15, and at least once after January 15, 2018, via using an email to the Assistant City Manager at her City email address. Grievant D__ relied on language from a former CBA and made a telephone call to dispatch and was then directed to leave a voice mail message at the Employer's offices. Both Grievants relied on a method each had formerly successfully used to inform the Employer that they were using PTO.

Is there an adverse inference concerning Grievant D__ not producing requested information?

Grievant D__ testified that he had a fender bender and hit a boulder in the road the day before January 15, 2018. He hurt his wrist. He called a doctor and the doctor called a prescription in for him. He did not have his phone on January 15, 2018. All his email information was in his phone.

During the City Manager hearing, the City Manager responded to the doctor calling in a prescription situation. The City Manager said to Grievant D__, "Do you want to add that later? That would be useful." It is not clear that Grievant D__ realized the arguable importance of satisfying the City Manager's desire. The City had declined to pay the PTO for January 15, 2018, because of the City's disagreement with the manner in which the requests for PTO leave were made, not whether or not the Grievants were ill. There is no evidence that the Employer has asked for medical information from any employee who requested last minute PTO for sickness related reasons. The City Manager issued a "Discussion and Findings" based on the information submitted at the April 25, 2018, hearing. The Discussion and Findings do not discuss Grievant D__'s delayed providing of information, the medical prescription document, or whether or not either Grievant was actually ill. This is a "did the Grievants properly apply for PTO case," not "were the Grievants actually ill" case.

Based on the totality of the circumstances, I do not make an adverse inference concerning Grievant D__ not producing information.

The crucial points in this case include:

1. The meaning of the word "acknowledge;"

2. the examinations of the Grievants by the City Manager and the City Attorney at the City Manager hearing;

3. the CBA providing that "[t]he arbitration shall be conducted in accordance with the rules, regulations and procedures of the American Arbitration Association";

4. clear and unambiguous language that is interpreted consistent with the parties' intent as reflected by clear and explicit terms;

5. ordinary meaning given to words unless they are clearly used otherwise;

6. the CBA not clearly providing the specific procedure for an absent employee while off work to request, prior to the beginning of the work day, a day's PTO sick leave;

7. the absence of a clear unambiguous preexisting published policy providing the specific procedure for an absent employee while off work to request, prior to the beginning of the work day, a day's PTO sick leave;

8. the January 21, 2017, March 6, 2017, and January 17, 2018, email PTO requests by Grievant C__ were accepted by the Employer;

9. the lack of a timely response by the Employer to the Grievants' January 15, 2019, absence notification communications;

10. the City Manager's June 6, 2018, Discussion and Findings did not mention the situation which the Employer later argues gives rise to an adverse inference;

11. the totality of the circumstances; and

12. the wording of the CBA.

The Employer violated the CBA when it did not pay PTO to the Grievants for their January 15, 2018, absences.

I grant the D__ and C__ Grievance.

This decision neither addresses nor decides issues not raised by the parties. **[*1474]**

Remedy

I have found that the Employer violated the CBA when it failed to pay PTO to the Grievants for January 15, 2018. The Union requested that I make the Grievants whole. The Employer requested that I deny the Grievance in its entirety. In the alternative, should Grievants prevail, the Employer argued that I should have the Employer deduct a day from the Grievants' PTO banks and pay that day of PTO to the Grievants. According to the Employer, because the Employer declined the PTO requests, the City did not reduce the Grievants' PTO banks, thereby leaving the Grievants whole and undamaged, and in the event I award Grievants PTO pay for the missed day of work, the CBA requires a corresponding reduction in the Grievants' PTO banks.

The parties are now in a different year than when the January 15, 2018, non-pay situation occurred. The Grievants were paid one less day than they were entitled to during the year containing January 15, 2018. Given my finding of a CBA violation they are entitled to be made whole for that day. The only way for them to be made whole is for the Employer to pay them a day's pay in light of their having been paid nothing for January 15, 2018. The Grievants were entitled to be paid for all work days and PTO legitimately taken in the year containing January 15, 2018. That is probably 52 × 5 equals 260 days without holidays being considered. Since the parties are no longer in the year containing January 15, 2018, deducting a day from the Grievants' PTO banks in a subsequent year would be inconsistent with their being made whole for the year containing January 15, 2018. Elkouri & Elkouri, pp. 18-2 to 18-5 and 18-15 to 18-18; Abrams, p. 175. The Employer is ordered to pay each of the Grievants a day's pay for their January 15, 2018, loss.

8. AWARD

Having heard or read and carefully reviewed the evidence and argumentative materials in this case and in light of the above discussion, I grant the D__ and C__ Grievance. I order that the Employer make the Grievants whole for their loss of pay resulting from the Employer not having paid them PTO for January 15, 2018. In order to preserve the integrity of the Grievants receiving a full year's worth of pay, there will be no deduction from the Grievants' PTO balances.

I retain jurisdiction over this matter for the sole purpose of resolving any issue(s) pertaining to the order of rights and privileges contained in this Award:

> (a) Such retention of jurisdiction shall be for a period of sixty calendar days following the date of the Award. Absent a request for an extension of the sixty-day period, any request for the exercise of my jurisdiction over this matter shall be deemed untimely, and no further proceedings shall be had before me;
>
> (b) My retention of jurisdiction may be extended by agreement of the parties and/or upon application to me made within the sixty-day period set forth in "(a)" above;
>
> (c) A request to me to exercise jurisdiction shall be made in writing to me with a copy to the other party, and the request shall state the exact issue(s) in dispute; and
>
> (d) It is within my sole discretion to determine whether the issue(s) presented by the party or parties is/are within the jurisdiction of this provision pertaining to the retention of jurisdiction. Elkouri & Elkouri, pp. 7-49 to 7-54.

Nothing set forth in the above "retain jurisdiction" portion of this Award shall prevent the Award from being final and binding for all purposes upon the execution of the Award by me.

Dated: February 19, 2019, Traverse City, Michigan.