

**Before
MARC D. GREENBAUM
Arbitrator**

In the Matter of Arbitration Between:

**REHOBOTH SUPERIOR OFFICERS
ASSOCIATION, MASSCOP LOCAL 208**

And

OPINION AND AWARD

TOWN OF REHOBOTH
(Lt. Bruce Dube – Injured on Duty)

APPEARANCES

For the Union:

Amy Laura Davidson, Esq.

For the Town:

Matthew J. Costa, Esq.

INTRODUCTION

On May 22, 2015, Rehoboth Superior Officers Association, MASSCOP, Local 208 (“the Union”) filed a grievance alleging that the Town of Rehoboth (“the Town”) violated the parties’ collective bargaining agreement (“the Agreement”) by changing the shift of Lt. Bruce Dube (“the grievant”) and by revoking his injured on duty status. When the parties were unable to resolve the grievance, the Union demanded arbitration and the undersigned was selected as arbitrator.

A hearing on the grievance was held before the undersigned on January 25, 2016. Both parties were present and represented by counsel. The grievant was also in attendance. Both parties sought leave to submit post-hearing briefs. Upon the arbitrator’s receipt of those briefs, the issue was ripe for resolution.

THE ISSUES

1. Did the Town violate Article VI Section K, Indemnification, Article VI (b) and/or Article V (e) by unilaterally altering the grievant's shift and by revoking his injured on duty status?
2. If so, what shall be the remedy?

RELEVANT PROVISIONS OF THE AGREEMENT

V. HOURS OF DUTY, RATES OF PAY

e. Hours of Work ...

Section 2. All employees who are assigned, or who work, the hours between 3.45 pm [sic] to 8:00 a.m. shall be paid a shift differential premium of 4% of their base salary. This premium shall be included in the base pay for all purposes and paid weekly.

VI. BENEFITS

b. Sick Leave

Section 1. Sick leave shall be considered to be absent from duty without loss of pay for an illness or injury, except where directly traceable to employment by an employer other than the Town (or in pursuit of any activity normally excluded from life insurance policies). The Town has accepted the provisions of General Law, Chapter 41, Section 111F. ...

Section 6. Loss of time directly attributable to injury incurred while performing assigned duties shall not be charged to sick leave. ...

k. Indemnification All full-time regular Police Officers shall continue to receive their regular compensation during any period of absence from duty because of disability (total or partial) resulting from personal injury, sickness or illness arising out of and in the course of their employment or arising out of the ordinary risks of the street while on duty.

FACTUAL BACKGROUND

The grievant joined the Town's Police Department ("the Department") as a patrol officer in 1987. Thereafter, he rose through the ranks, ultimately reaching the rank of Lieutenant. In that rank, he was generally assigned to one of the evening or night shifts.

In 1990, the grievant was involved in a serious automobile accident in the course of performing his duties. Among the injuries he suffered, was the paralysis of his fourth cranial nerve, causing him to experience double vision, more formally known as diplopia.

The grievant was out of work for a substantial time period. While he was out of work due to the injury and its aftereffects, the Town sought to have him involuntarily retired due to his disability. The Town's efforts were unsuccessful and the grievant returned to work in 1993.

The injuries did not hinder the grievant's progression through the ranks or interfere with his performance. Apart from a 2001 reprimand, the grievant's record is devoid of any discipline. Until the events giving rise to this grievance, there was no indication that the diplopia was interfering with his job performance.

The grievant claimed that he was able to use compensating mechanisms, such as closing one eye, to perform essential duties, such as driving and firing a weapon. His performance at the firing range was and continued to be excellent. Nor was there any apparent interference with his ability to perform the driving required by his position.

The grievant's ability to perform these duties is subject to two qualifications. The grievant acknowledged that he could continue everyday driving, even as of the date of the hearing, despite limitations on his ability to use a vehicle's side view mirrors. He also testified that these the accommodation he utilized to drive safely would be not be useful

if he was required to engage in a high speed chase. As he progressed through the ranks, the likelihood of his being involved in a high speed chase was substantially reduced.

The grievant also acknowledged that his ability to maintain his qualifications to use a firearm, as that skill was tested by the Department. Indeed, he achieved a virtually perfect score in his October 2014 firearms qualification. The firearms qualification tests used by the Department entailed firing weapons from a static position. The grievant testified that the static nature of the test permitted him to use the accommodation techniques he had mastered, thus enabling him to demonstrate the required proficiency. He also testified that the accommodations he utilized would be ineffective in an active shooting situation when he might be required to fire his weapon while moving.

In December 2014, the grievant claimed to be having increasing difficulty compensating for his diplopia and to experiencing an increasing number of headaches. Prompted by these concerns, the grievant scheduled an appointment with one of the physicians who treated him for the 1990 injury.

The grievant saw this physician in December 2014. Thereafter, the physician wrote a letter, dated January 5, 2015, summarizing the results of that examination. The letter reviewed his 1991 diagnosis of a “right fourth cranial nerve paralysis” a condition, the letter continued, producing double vision “more so when tired and when he had to look at a lot of things.” It also noted that the “diplopia was worse in different gazes.”

The letter next reviewed the results of the December 2014 examination. It recited the grievant’s claim of “having difficulty seeing in his side view mirrors when driving because he has to tilt his head in order to try and correct the diplopia...” Thereafter the letter reviewed the grievant’s “corrected visual acuity.” Although his “best corrected

visual acuity was 20/20 in both eyes”, the letter says, “[t]he vertical diplopia is only partially corrected....” The letter notes that a “prism in eyeglasses may correct the double vision when he looks straight ahead, but when he moves his eye slightly to the right, up or down he would have diplopia.” The letter concludes by reciting the physician’s opinion that “the grievant is visually disabled by the diplopia and should not be driving a vehicle or firing a weapon because he sees double.” The letter acknowledged that the grievant was capable of performing “duties that to not involve driving, such as office work.”

Following this examination, the grievant took sick time and vacation time until February 9, 2015. At that time, the Chief granted his request for placement on injured on duty leave. During the grievant’s meeting prompting that change in status, the grievant informed the Chief that he did not expect to return to work and was applying for a disability retirement. The grievant appears to have recited his belief that his disability retirement would be approved in a matter of weeks. He was overly optimistic, to say the least, as his application was still pending at the time of the hearing in this matter.

The grievant’s disability retirement application was supported by a statement from the physician who performed by December 2014 examination. As did the January 5, 2015 letter, the statement opined that the grievant was unable to drive or use weapons, which were deemed “essential functions” of the job. The statement recites that the grievant’s condition had “not likely changed since the on-the-job auto accident in 1990” and assessed the “anticipated natural course of the diagnoses: as “stable or plateau.”

At some point following this meeting, the grievant was informed that the Town had reserved money for his sick leave buyback in anticipation of his retirement.

Otherwise things remained quiet until May 2014. On May 7, 2015, the grievant's paycheck reflected a reduction in the amount of his compensation. He learned this was due to his being reassigned from the evening shift to the day shift, thus making him ineligible for the night shift differential. The Chief explained that the reassignment was prompted by the grievant's inability to make shift bid, due to his status. He thus reassigned the grievant to the day shift as a default option.

On May 12, 2015, the grievant was informed that the Chief had revoked his injured on duty status, retroactive to February 15, 2015. The Chief testified to having basing this decision upon a reassessment of the physician's January 5, 2015 letter from the grievant's treating physician. In retrospect, the Chief concluded that the letter failed to demonstrate that the grievant was incapacitated because of a line of duty injury and that his initial placement of the grievant on injured on duty status was a mistake.

The impact of the Chief's decision on the grievant was significant. The grievant's sick leave and vacation time was charged to cover the period he had been carried on injured on duty leave. The change in status also resulted in the grievant's having to utilize his remaining accrued vacation and sick leave to stay in a pay status. Both of his sick leave and vacation banks were exhausted by early December 2015. The loss was compounded by the grievant's shift reassignment. The loss of the night shift differential would reduce the grievant's anticipated pension benefits. The Union responded by filing this grievance on May 22, 2015.

The Town's Board of Selectmen ("the Board") denied the grievance on June 29, 2015. The denial was premised on the statements in the treating physician's letter opining that the grievant's claimed disability did not result from a new line of duty injury.

Following this denial the Union, through its counsel, requested the treating physician to clarify and elaborate upon the statements in his January 5, 2015 letter. That request posed a series of specific questions to which it asked the physician to respond.

The physician replied in a letter dated August 3, 2015. The letter first reiterated the physician's belief that the grievant was disabled from performing the duties of a police officer and that the disability was causally related to the 1990 accident. The physician's letter then supplied detail that was not included in either his January 5, 2015 letter or in his statement to the retirement board.

The letter recites that the treating physician reviewed the results of an examination of the grievant performed by another physician (now deceased) in 1991. At that time, the grievant's diplopia was corrected by a "3 diopter prism in a straight ahead gaze." When he examined the grievant on December 18, 2014, the treating physician found that the "diplopia was corrected by a 6 diopter prism in a primary gaze."

Translating those results into English, the physician stated:

the diplopia has gotten worse by double since 1991. The prism only corrects the double vision when looking straight ahead. Even with a prism correction in his glasses he would have double vision when looking left, right, up, and down.

He viewed these results as demonstrating an "exacerbation of the original on the job injury in 1991" with no intervening event explaining the deterioration.

This letter resulted in the Union's requesting the Board to reconsider its denial of the grievance. The Board replied by making any reconsideration dependent upon the grievant's submitting to an independent medical examination by a Town designated physician. The Town designated a physician who had examined the grievant after the original accident in 1992.

The grievant agreed and the examination was performed on September 28, 2015. By a letter dated that same day the Town designated physician rendered his verdict. The reported test results differ somewhat from that tests performed by the grievant's treating physician. The Town designated physician reported that the grievant had "8 diopters of hypertropia in primary gaze." The treating physician found six diopters for what appears to be the same measurement. This suggests, using the treating physician's formula, a more significant deterioration than reported by the treating physician.

The Town designated physician concluded that the grievant's complaints of double vision "appear to be worsening" and attributed the double vision to the 1990 accident. He noted that the grievant had "anatomically narrow angles in both eyes" which, among other things, were suggested as accounting for his headaches. Ultimately, he opined that the grievant "can continue working in his capacity as a police officer, however due to the worsening of his double vision he should probably work at a desk job unless the symptoms improve." He also noted that it was "hard to determine whether he is temporarily or permanently incapacitated." He expressed uncertainty about the reasons for the apparent worsening of the grievant's condition.

A month later, the Board effectively denied reconsideration of its denial of the Union's grievance and reinstated the grievant to work on a light duty assignment. The Union's President protested, arguing that the parties' agreement made no provision for light duty assignments which, it recited, were a mandatory subject of bargaining. The President's letter was reinforced by a subsequent letter from Union counsel. The letter stated that the Town could not unilaterally require an officer to work light duty. That same letter noted that the grievant's acceptance of a light duty assignment would

prejudice the grievant's disability retirement application because it would suggest that such work was available when that was not the case. The Town responded by rescinding the vote placing the grievant on light duty. Counsel for the Town also placed the Union on notice of the Town's intention to put the light duty issue on the agenda when the parties Agreement was ripe for renewal.

POSITIONS OF THE PARTIES

Union Position:

The Union first contends that the evidence demonstrates the Town violated the Agreement by refusing to place the grievant on injured on duty leave. The Agreement, the Union avers, entitles the grievant to receive his regular compensation when disabled by a line of duty injury. The evidence demonstrates, it argues, that the grievant suffered such an injury in 1990 and that the original injury resulting from the accident left him disabled by late 2014.

The medical records demonstrate, the Union continues that there had been a significant deterioration in the grievant's vision at the time he requested placement on injured on duty status. Contrary to the Chief's assumption, the Union says, the grievant's double vision did not abate following his return to work in 1993. What changed, the Union says, was the grievant's ability to compensate for the double vision, compensations which ceased being effective by the time of the events underlying this grievance. Thus, it avers, the grievant's disability was shown to have resulted from a pre-existing condition caused by a line of duty injury. As such, it concludes on this point, the Agreement compelled the grievant's placement on injured on duty status.

The Union also contends that the Town violated the Agreement by transferring the grievant to the day shift. Such a unilateral shift transfer of officers on injured on duty status, it argues, has been held to violate applicable law. The grievant, it concludes, was injured by that action because the grievant's removal from his historical evening assignment, resulted in his losing the night duty premium.

For these reasons, the Union asks that the grievance be sustained and the grievant made whole in all respects, including but not limited to the restoration of the grievant's vacation and sick leave time.

Town Position:

The Town contends that the evidence fails to demonstrate that the grievant was incapacitated by a line of duty injury at the time of events underlying this grievance. It thus asks the arbitrator to conclude that the Union failed to demonstrate the Town's violation of the Agreement.

The grievant's medical conditions by themselves, the Town avers, cannot constitute an incapacitating injury. The grievant, the Town says, returned to duty and had a successful career as a police officer since returning to duty in 1993. The evidence also fails to demonstrate, it continues, that his condition had deteriorated so as to render him incapacitated at the time of the events giving rise to this grievance.

. The medical evidence, the Town continues, does not sustain the Union's burden of persuasion. The independent medical examiner, it avers, was unable to determine whether the grievant was incapacitated. The statement by one of the grievant's physicians, it argues, demonstrates that he had the same condition in 2015 that he did in

1993 when the grievant was able to return to work. The grievant's successful performance on the job since his return, it avers, is consistent with his lack of incapacity.

The grievant's own testimony and other evidence, the Town continues, is also consistent with such a finding. The grievant, the Town says, acknowledged that he intends to continue driving. His perfect score on his firearms qualifications, it avers, also undermines his claim of being disabled from performing an essential function. It is also consistent, the Town observes, consistent with his physician's statement that the grievant's condition likely had not changed since 1990.

At most, the Town argues, the evidence could be deemed to demonstrate that driving and using firearms were tasks that the grievant should avoid, but not tasks that he was unable to perform. Since the grievant was "comfortable" performing these tasks in 1993 when he was returned to duty, the Town avers, the evidence fails to demonstrate that anything had really changed since that time.

Indeed, the Town continues, the grievant never complained about any diminished capacity until early 2015. Even then, it observes, the grievant was prompted to seek medical evaluation not by declining vision, but by headaches, a condition unrelated to his original line of duty injury. The grievant's expressed surprise about the stated increase in his double vision, is also consistent with finding that the grievant was not incapacitated as the result of his line of duty injury. The Town also notes that the grievant's claim should be viewed in conjunction with his decision not to return to light duty for fear it would undermine his disability retirement application.

So viewed, the Town concludes, the evidence fails to demonstrate that the grievant's condition had changed since 1990. Since he worked between 1990 and the

time of the events giving rise to this grievance, the Town says, the arbitrator cannot conclude that he was incapacitated because of the line of duty injury. The Town thus requests that the grievance be denied.

OPINION

The basic issue before the arbitrator is straightforward. There is no dispute that the grievant suffered a line of duty injury in 1990. Thus, the question presented is whether the resulting diplopia had deteriorated and, if so, whether that deterioration resulted in the grievant's being totally or partially disabled from performing the duties of a police officer. If the Union demonstrated that both questions must be answered in the affirmative, the grievance would have to be sustained, with a resulting imposition of a make whole remedy. If either or both questions are answered in the negative, denial of the grievance would be compelled.

Under Article VI, Section K of the Agreement, the Town must carry and maintain the grievant on line of duty injury status if he was absent "from duty because of disability (total or partial) resulting from personal injuryarising out and in the course of [the officer's] employment." There is no disputing the fact that the grievant suffered a line of duty injury in 1990. It is also hornbook law, under contract provisions like Article VI, Section K, that the aggravation or deterioration of a condition caused by a line of duty injury resulting in an officers' incapacity qualifies an officer for injured on duty status.

There is no evidence of any event, job related or otherwise, between the 1990 accident and February 15, 2015 that could have aggravated the grievant's diplopia. Thus viewed, the question is whether the Union demonstrated, by a fair preponderance of the

evidence, that the grievant's condition had deteriorated to the point that he was disabled. On this record, those questions must be answered in the affirmative.

Viewed as a whole, the medical evidence compels finding that there was a deterioration in the grievant's condition between his 1993 reinstatement and February 2015. To be sure, if we confined our analysis to the treating physician's January 5, 2015 letter and his statement to the retirement board, the conclusion would be in doubt. His August 3, 2015 letter removes any doubts.

Unlike its predecessors, that letter compared the results of the grievant's December 2014 examination with a parallel examination performed in 1991. The differences between the findings of the two examinations are striking. In 1991, the grievant's diplopia could be corrected with a 3 diopter prism in a straight ahead gaze. In December 2014, the same correction required a 6 diopter base down prism. The treating physician opines this means that the grievant's "diplopia has gotten worse by double since 1991." The Town designated physician's examination appears to reflect an even greater deterioration since the same measurement performed by that individual required an 8 diopter prism.

The medical evidence is thus consistent with the grievant's claim that the compensating mechanisms he had been using to perform his duties were no longer working to the extent necessary to permit him to perform the duties of a member of the Department. Both medical professionals attribute the diplopia to the grievant's 1990 accident and neither posits any non-job related intervening cause for that deterioration. We thus have a classic case of the deterioration of the preexisting condition resulting

from a line of duty injury, thus bringing the grievant squarely within the coverage of Article V, Section K of the Agreement.

There is no real dispute that the deterioration made the grievant unable to perform essential duties of a police officer. The treating physician opined, on three occasions, that the grievant was unable to perform the essential tasks of driving and using a firearm. The Town designated physician effectively reached the same conclusion by opining that the grievant should be assigned to desk duties “unless the symptoms improve.”

The limitations approved by both medical professionals demonstrate their belief that the grievant is unable safely to perform all of the duties that may be required of a police officer. Both physicians recognize that there are some duties he can perform. They also agree that there are others, such as firing a weapon or driving a vehicle in the line of duty that he cannot safely perform. Their opinions thus demonstrate that the grievant is at least partially disabled from performing all of the duties of a police officer and that is all that is required by Article VI, Section K.

The Town places great stress on the grievant’s performance on the October 2014 firearms qualification as evidencing his lack of disability. The grievant, however, credibly explained that the compensating devices he had developed out of necessity permitted him to perform at the required level and above on a static shooting test. There is no evidence undermining the grievant’s statement that his compensation skills would unlikely suffice in an active shooting situation. This testimony is fully consistent with the opinions of the two physicians.

A similar rationale undermines any argument based upon the grievant’s ability to perform everyday driving. Common experience suggests that such driving, while

demanding, pales in comparison to what might be required of a driver in a high speed chase. To be sure, the Department's Lieutenants might not ordinarily be required to engage in such driving. However, the possibility cannot be ruled out and thus the grievant would be in the position of having to choose between performing his duties or risking injury to himself or others if he engaged in a high speed chase despite his visual limitations. The Agreement does not require the grievant to be put in the position of making such a choice.

The record demonstrates that the diplopia resulting from the grievant's 1990 line of duty injury has deteriorated significantly and that such deterioration rendered him at least partially disabled from performing the duties of a police officers. Thus, the Town's May 15, 2015 retroactive revocation of his injured on duty status violates the Agreement.

That also compels finding that the change in the grievant's shift violated the Agreement. When the grievant was initially placed on light duty, he was being paid a night shift premium. Since he was working on a shift eligible for the night shift premium when he was placed on injured on duty status, that premium is part of his regular compensation as that term is used in Article VI, Section K of the Agreement. A make whole remedy would require that he be paid his "regular compensation" while he was on injured on duty status. Thus, the change in his shift assignment and his loss of the night shift premium violated the Agreement.

An Award will enter sustaining the grievance and directing that the grievant be made whole in all respects.

AWARD

1. The Town violated Article VI Section K, Indemnification, Article VI (b) and/or Article V (e) by unilaterally altering the grievant's shift and by revoking his injured on duty status. The grievance is therefore sustained.

2. As a remedy, the grievant shall be made whole in all respects. This shall include but not be limited to restoring him to injured on duty status as February 15, 2015, restoring any vacation and sick leave time that he has been charged with utilizing since that time, treating the grievant as being assigned to a shift eligible for the night shift differential for purposes of determining his regular compensation and compensating the grievant for any lost earnings since he was placed on injured on duty status.



Marc D. Greenbaum, Arbitrator
Dated: February 22, 2016