AMERICAN ARBITRATION ASSOCIATION

In the matter of
arbitration between

MARBLEHEAD MUNICIPAL EMPLOYEES' UNION,
LOCAL 81776, IUE-CWA

and

TOWN OF MARBLEHEAD

AAA No. 01-22-0003-2216

Date of Award: March 20, 2023

Grievance: Ed Medeiros – Health and Safety

Arbitrator: Margery E. Williams

For the Town: Jane Medeiros Friedman, Esq.

For the Union: Michael Keefe, Esq.

DECISION AND AWARD

BACKGROUND

The hearing in this matter took place on December 7, 2022 at the Marblehead Town Hall in Marblehead, Massachusetts. The parties were unable to agree to a statement of the issues. The Union proposed two alternatives:

> Did the Town violate the collective bargaining agreement when it directed Ed Medeiros to perform work in the Credit Union closet at the Mary Alley Building on May 17 and 18, 2022? If so, what shall be the remedy?
>
> or
>
> What shall be the disposition of the grievance?

The Town did not agree with either statement and offered no proposed statement of its own. The parties agreed to allow the arbitrator to frame the issue.

After hearing the evidence and reviewing the arguments of the parties, I find that the Union's second proposal encompasses the factual and contractual questions in the case. Therefore, the issue before me is:

What shall be the disposition of the grievance?

Both parties submitted post-hearing briefs on March 17, 2023.

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT and STATUTES

ARTICLE 18 – MANAGEMENT RIGHTS

> It is understood and agreed that the respective department heads and the Town retain the sole right to operate the various departments and that all management rights rest in them, in accordance with all applicable laws and regulations and subject to applicable clauses contained in this Agreement.
>
> * * *

ARTICLE 20 – GRIEVANCE PROCEDURE

> …A grievance is defined as a claim concerning the meaning, interpretation, or application of any of the specific provisions of this Agreement.
>
> * * *
>
> The arbitrator's authority shall be limited to matters involving the interpretation and application of the provisions of this Agreement. The arbitrator may not modify, amend, delete or add to the terms of this Agreement. …

G.L.c. 49, § 6½

> (b) Public employers shall provide public employees at least the level of protection provided under the federal Occupational Safety and Health Act of 1970, 29 U.S.C. 651 et. seq., including standards and provisions of the general duty clause contained in 29 U.S.C. 654.

FINDINGS OF FACT

The grievant, Ed Medeiros, has worked for the Town as a building custodian for fifteen years. He is responsible for cleaning all Town buildings (excluding the schools), emptying the trash and recycling, and "doing this and that," as he testified. The grievant has occasionally done some painting, but it is not one of his ordinary duties. The grievant's supervisor is Building Commissioner John Albright, who has worked for the Town since October, 2021. The grievant candidly testified that he and Albright "don't have a very good relationship," and the evidence tended to confirm this.

The Credit Union Closet

The events that led to this grievance took place in the Mary Alley Municipal Building. The building was formerly a small private hospital; when it closed in the mid-1960s, the Town acquired it and converted it to municipal offices. According to the grievant, the building does not have an updated HVAC system but is equipped with "univents."[1]

Near the employee entrance of the building, adjacent to a stairwell, is a closet used by the Marblehead Municipal Credit Union to store files and other property. In late April or early May, 2021, the manager of the credit union asked Albright if it would be possible to have the closet painted, because paint was flaking off the walls and falling on files. Photographs of the interior of the closet show water damage to the walls and ceiling, and loose paint and plaster littering the shelves beneath. Along one wall of the closet, two heat pipes rise from the floor to the ceiling, and through the ceiling to the

[1] "Univents" (a contraction of "unit ventilator") are individual units that supply a mixture of outside and indoor air, heated as necessary.

floor above. The pipes are (or were) thickly wrapped in white insulation which, it should be stated at the outset, contained asbestos.

Albright examined the closet and agreed that it needed painting. He noticed the insulation on the heat pipes, but it did not occur to him that it might contain asbestos. Albright has prior experience in construction, but testified that he had never dealt with asbestos, had never been trained about it, and did not know what it looked like. He testified that as far as he knew, the pipes in the closet were "just painted insulated pipe."

Around May 10, Albright directed the grievant to scrape all the loose paint in the closet, wash the walls with TSP, and paint the walls and shelves with pigmented Kilz.[2] Albright testified that the grievant was "unhappy" with the assignment.

The grievant had never seen the interior of the closet, and after taking a look at it, he told Albright he was reluctant to scrape the walls because the old paint might contain lead. Over the ensuing weekend, Albright bought a lead test from a hardware store and tested the paint in the closet. The results were negative. Albright left the test strips in the closet and sent the grievant an email, informing him of the negative result. He added, "Please make the closet painting an absolute priority. … Let's get this done asap so … MMCU can get back in the space."

The Grievant Paints the Closet

On May 17, 2022, the grievant began scraping the loose paint in the closet, wearing a blue surgical facemask and latex gloves.[3] Because the closet is unventilated,

[2] Kilz is a quick-drying primer that blocks stains on the underlying surface. The Town maintains that the grievant had used it in previous painting jobs, but the grievant testified that the closet job was the first time he used it.

[3] The gloves and mask were the grievant's own. The Town does not provide him with personal protective equipment ["PPE"]. Albright recalled instructing the grievant to wear gloves and a mask, but the grievant denied this.

he left the closet door open, plugged in a box fan, and opened the nearby door of the building. Standing on a ladder and wearing a backpack vacuum, the grievant scraped with one hand and vacuumed up the debris with the other.

The grievant testified that while he was scraping the upper corner of a wall, next to the point where the heat pipes enter the ceiling, he accidentally bumped against the the pipes and knocked a piece of the insulation to the floor.[4] Like Albright, the grievant testified that he did not realize it contained asbestos and thought it was "just an insulation type of thing."

While the grievant was painting, Building Inspector Roger Ennis happened to pass by and noticed the chunk of insulation on the floor of the closet. Recognizing the material as asbestos, Ennis stopped and said to the grievant, "I'm not sure that the insulation is safe." Ennis testified that the grievant replied, "What if I just bag this up and I'll get rid of it?" Ennis replied, "I'm not telling you to do anything."

Ennis went to Albright's office and told him that the grievant seemed to have removed some insulation that might contain asbestos. He and Albright went to the closet and examined the material on the floor. Ennis went on his way, and Albright said to the grievant, "Let's clean it up and bag it." Albright gave the grievant a KN95 mask (or, according to the grievant, a "used" N90 mask), and he and the grievant swept up the insulation and triple-bagged it in fifty-gallon trash bags. Albright then directed the grievant to triple-bag all the material in the vacuum, which he did. Albright placed the

[4] According to Albright, the grievant later stated that he had intentionally removed the insulation because it was in his way, and that he had "ripped insulation off pipes my whole life." The grievant denied making that statement.

two bags of debris in separate closets in his office, and the grievant emptied, disassembled, and cleaned the vacuum and left it in the slop sink.

On May 18, the grievant submitted a Report of Accident to Albright (as required by the Town's workers' compensation carrier), stating "Exposure to possible asbestos." He then continued to paint the closet.[5] In the meantime, Albright contacted an asbestos abatement company, A-Best Abatement, and also the Massachusetts Department of Environmental Protection ("DEP"), both of which advised him to cover the insulation remaining on the pipe with strong tape. This Albright did.

The grievant testified that at around 8:00 on the night of May 18, he began to experience vertigo, nausea, and vomiting. He believed his illness was caused by the Kilz.[6] The grievant called out sick on Thursday and Friday, May 19 and 20, by text message to Albright. The grievant testified that his text included the statement "Having a bad reaction to the paint," but Albright denied this.

The Asbestos Abatement

On May 23, A-Best Asbestos Abatement confirmed that the material in the closet contained asbestos. During the next month, Albright discussed the situation with A-Best, DEP, and others. At the direction of these entities, Albright locked and taped the Credit Union and slop-sink closets and posted "Do Not Enter" signs on June 2. He also triple-bagged the vacuum and stored it in his office; had the air in the Mary Alley Building tested on June 4 (it was negative for asbestos); and had the building "wipe

[5] There was initially some confusion about whether the grievant continued to paint on May 18, but at the hearing it was agreed that he did.
[6] The grievant did not seek medical attention, and there are no medical records in evidence.

tested" by Northeast Environmental Testing Labs, which also submitted a detailed plan for asbestos abatement and training.

Albright obtained a proposal for asbestos abatement from A-Bate. DEP required extensive revisions, and A-Bate submitted a second proposal on June 22, which included not only the Credit Union closet but the slop-sink closet and the two closets in in Albright's office where he had stored the bagged insulation and vacuum.

DEP approved the abatement proposal with a list of conditions, including pre- and post-abatement inspection by DEP, regular air monitoring, and certain requirements for disposal of the material. On July 2, 2022, A-Bate removed and disposed of the remaining insulation from the heat pipes in the Credit Union closet, the bagged insulation, and the bagged vacuum, all in accordance with DEP's requirements.

The Grievance and Requests for Information

In the meantime, on Friday, May 20, the grievant contacted Union President Theresa Tauro, described his symptoms and the events of that week, and told her he "was afraid to go back into the closet," Tauro testified. When the grievant returned to work on Monday, May 23, he went back to his usual duties and did not resume painting.[7]

Tauro promptly began an email exchange with Albright, beginning by asking for a copy of the grievant's Report of Accident. She added, "It is my understanding that he was very sick from painting a closet with a strong product and was concerned about asbestos exposure." On May 27, Tauro followed up with an email stating, "Grievance attached." The attachment read:

[7] The grievant testified that he had finished "99%" of the painting.

> I am currently investigating a serious health and safety violation involving asbestos exposure and illness from toxic paint fumes…. I have requested information on 3 occasions since Monday 5/23/22 which is not forthcoming.
>
> … The [grievant] was never informed of the presence of the deadly insulation, has not been trained for its removal or presence, and was actually instructed to continue painting an unventilated storage closet after the discovery was made. …
>
> …Mr. Medeiros became sick from the paint fumes and was out for 2 days with an extreme headache and nausea. …

On May 31, Tauro asked Albright for "results of the asbestos test, the required air testing results, and the Town's protocol for accidental exposure…." The next day, she wrote to the Town's Director of the Board of Health, requesting:

1. The town's Risk Assessment Plan as it pertains to asbestos/toxic exposure.
2. Protocols/S.O.P. for mitigation procedures immediately following a suspected accidental asbestos exposure.
3. Procedures for follow up to asbestos exposure
4. The town's most up to date heat map for all municipal buildings known to have asbestos….

Tauro then wrote a lengthy email to Albright, beginning, "I have not received a response to the grievance or any of the information requested …." Albright responded with a detailed chronological account of the May 17 incident, from his point of view.[8] Tauro responded, thanking Albright for his "timeline," repeating her request for information to Petty, and adding:

> …I am also requesting…the 2 days of sick time used for illness from the paint fumes on 5/19 and 5/20 be credited back to Ed Medeiros and any medical appointments required in the past, present and future that related to this incident not be charged against his leave time.

[8]It is not clear that Albright realized that Tauro's May 27 email was a grievance (at one point, he referred to it as a "letter") or, if so, that he was the Step 1 respondent. In fairness to Albright, while the email itself uses the word "grievance," the attachment does not identify itself as such, use the word "grievance," or cite the CBA.

At that point, Albright forwarded the whole correspondence to Thatcher Kezer, the Step 2 grievance respondent, who had just begun his new job as Town Administrator on June 6.

On June 10, Tauro moved the grievance to Step 2. On June 14, she sent an email entitled "Additional Information Requests and Bargaining Demand" to Town Administrator Kezer:

> …The Union requests…copies of(1)any contact between the Town and A-Best Abatement; (2) any and all correspondence between Town employees and A-Best Abatement…(3) any plans and documentation related to the Towns abatement of the asbestos at issue…(4) any and all correspondence sent and received by you, John Albright, [other Town officials], and any other Town employees, which is in any was related to the events underlying the grievance.
>
> …The Union further demands to bargain with the Town about safe work procedures, including, but not limited to, the procedures that the parties will follow when the own directs employees to perform work in areas where there is a hazard, such as asbestos, that either is known or should be known to the Town. …

On June 15, 2022, Tauro received the Town's response to her various requests for information from Administrative Aide to the Selectboard Kyle Wiley. It consisted of a single sentence: "Please be advised that there are no records responsive to your request."[9]

Involvement of the Department of Labor Standards

In addition to her other activities, Tauro contacted the Massachusetts Department of Labor Standards ("DLS") in late May, 2022. DLS oversees and enforces

[9] At some point, the Union filed a charge with the Department of Labor Relations, alleging that the Town was violating G.L.c. 150E by refusing the supply the requested information. The charge was pending as of the date of arbitration, although it was partially settled when the Town provided some or all of the information.

health and safety regulations for public employees in the Commonwealth.[10] On June 16, a DLS representative inspected the Mary Alley Building and met with Tauro, the grievant, Albright, and perhaps others. On July 29, 2022, DLS issued a "Written Warning and Order to Correct," finding that the Town:

- "did not provide employees protection from falling" from a retaining wall outside the building;
- "did not train each employee in the proper care, inspection, storage, and use of ladders…";
- failed to provide "personal protective equipment for eyes and extremities" while painting with Kilz and failed to train employees in the use of PPE.
- Failed to maintain a "written hazard communication program."

DLS ordered the Town to take corrective action by August 31, 2022. The Town was in the process of complying as of the date of arbitration.

POSITIONS OF THE PARTIES

The Union's Position.

Article 18 requires the Town to exercise its management rights "in accordance with all applicable laws and regulations." This language is exceptionally broad, plainly covering OSHA and the cognate state law, G.L.c. 149, § 6½(b), as well as the regulations under both statutes. Under arbitral common law, it is not unusual for safety protections to be found in management-rights clauses, as well as general health and safety articles. Indeed, even without an express incorporation of external law, arbitrators have found that health and safety laws have such an impact on public-sector agreements that they are, in effect, a contractual condition of employment.

[10] The federal Occupational Safety and Health Act ("OSHA"), 29 USC §651 *et seq*. (1970), does not apply to state public-sector employees. But G.L.c.49, § 6½(b), requires Massachusetts public employers to provide "at least the level of protection provided" by OSHA.

The Town violated Article 18 when it directed the grievant to paint the Credit Union closet under unsafe conditions. G.L.c. 149, § 6 ½ (b) requires public employers to provide "at least the level of protection provided by" OSHA, including the obligation to provide a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm." 29 U.S.C.§ 654(a)(1)-(2). DLS has promulgated regulations that expressly incorporate the federal regulations under OSHA. 454 CMR § 25.00 *et seq.*

The federal regulations governing PPE and toxic and hazardous substances are of particular relevance here. 29 CFR Part 1910, Subpart I & Subpart Z. The Town violated OSHA's PPE standards by failing to provide the grievant with eye and skin protection, failing to assess the workplace for hazards which would necessitate the use of PPE, failing to provide PPE training, and failing to maintain a written hazard communication program. 29 C.F.R. § 1910.132(a), § 1910.132(d)(1), § 1910.132(f)(1), and § 1910.1200(e)(1). The Town also violated the OSHA asbestos standards by failing to provide appropriate PPE, failing to communicate the presence of asbestos in the closet to the grievant, failing to train employees about asbestos, and directing the grievant to dry-sweeping the insulation and use a vacuum which may not have had a HEPA filter. 29 C.F.R. § 1910.1001(h), (j), and (k).

As a remedy, the Union asks the arbitrator to order the Town to cease and desist from violating the Agreement; to credit the grievant with two days of sick leave; to pay for the grievant to be examined annually by a licensed physician of his choosing with respect to his asbestos exposure; and to allow the grievant to attend any medical appointments during his normal working hours with paid release time. The arbitrator

should also order the Town to have the grievant's vehicle and house tested for the presence of asbestos and properly cleaned if necessary; to replace the backpack vacuum with a HEPA-filtered vacuum; and to maintain a copy of the award in this case in the Town Administrator's office as a record of the grievant's asbestos exposure. The arbitrator should also retain jurisdiction to address any remedial issues.

The Town's Position.

The Union's contention that the Town violated Article 18 is unsupported by both the contractual language and the evidence. An arbitrator must interpret the collective bargaining agreement according to its plain meaning in order to discern the parties' intent. The Union attempts to infer intent and meaning that simply do not exist in Article 18. The purpose of Article 18 is to articulate the rights of management. It says nothing about employee safety.

The record does not support the Union's allegations of wrongdoing by the Town. The evidence clearly indicates that the Town was concerned with employee safety and responsive to the grievant's concerns. Albright instructed him to wear gloves and a mask while painting the closet, and confirmed that the old paint did not contain lead. When Albright inspected the closet before the grievant began the work, the heat pipes were fully encapsulated, with no exposed insulation.

The grievant, who had fourteen years of experience, had previously been assigned to prep and paint walls, but never complained that Kilz made him ill. Nor did he complain about fumes while painting the closet. He had access to a box fan to provide ventilation. In his Report of Accident, the grievant referred to possible exposure to asbestos, but did not mention paint fumes.

Although the grievant testified that he accidentally dislodged the insulation, it is far more likely that he intentionally removed it. There was no loose insulation before the grievant began working, and the photographs show that the insulation came off in strips, not scattered pieces. The grievant did not ask Albright whether he should remove any insulation, nor did he inform him after removing it. After the insulation was removed, Albright immediately sought professional guidance, and the Town promptly abated the asbestos, in accordance with a DEP-approved plan.

DISCUSSION AND DECISION

The evidence in this case was rather complicated, and there were a number of factual disputes, most of which concerned what Albright said to the grievant and vice versa. However, it is not necessary to resolve them, because I have concluded that the grievance is not arbitrable, for the following reasons.

It is widely recognized that the primary function of grievance arbitration is the resolution of disputes arising under the terms of collective bargaining agreements. Arbitrators are not judges of general jurisdiction, nor are we experts in state or federal law. Our expertise, such as it is, is in interpreting and applying the language of collective bargaining agreements. Of course, the parties always have the option of expanding this traditional arbitral jurisdiction by "incorporating by reference" statutory material. That phrase signifies that the collective bargaining agreement refers to the statute in a manner that clearly indicates the parties' mutual intent to convert the requirements of the statute into terms of their contract. Where those conditions are fulfilled, the arbitrator is bound to interpret and apply the statute.

Initially, I note that Article 20 defines a grievance as "a claim concerning the meaning, interpretation, or application of any of the specific provisions of this Agreement." It further provides: "The arbitrator's authority shall be limited to matters involving the interpretation and application of the provisions of this Agreement." On its face, this language expresses the traditional, limited view of arbitral jurisdiction.

The Union attempts to get around this problem by arguing that Article 18, the management-rights clause, makes G.L.c. 49, § 6½ and its regulations, and, by extension, OSHA and *its* regulations, "specific provisions" of the CBA, thereby empowering the arbitrator to enforce those provisions. It relies on the following language of Article 18:

> It is understood and agreed that the respective department heads and the Town retain the sole right to operate the various departments and that all management rights rest in them, in accordance with all applicable laws and regulations and subject to the applicable clauses contained in this Agreement.

As the Union interprets this sentence, the phrase "in accordance with all applicable laws" applies to the word "operate"; in other words, the sentence requires the Town "to operate the various departments in accordance with all applicable laws and regulations." But that is far from clear. It is at least equally likely that the phrase "in accordance with all applicable laws" applies to the words "all management rights" of the Town, in which case it means "All management rights rest in the town, in accordance with all applicable laws and regulations providing such rights."

The latter interpretation is more consonant with the ordinary function of a management-rights clause, which is not to provide expanded rights to the Union, but to protect the employer's right to manage the enterprise. It also avoids a significant problem with the Union's interpretation, which is that it would fold into the CBA not only

health and safety laws, but *all* "applicable laws and regulations." That would convert grievance arbitration into a species of state trial court. I find it implausible that such was the parties' intent.

State and federal workplace-safety laws are complex statutory schemes with detailed regulations. If the parties had meant to incorporate these mandates into the CBA, I doubt they would have done so by indirect, ambiguous means. In short, I am simply unconvinced that such was the parties' intent when they negotiated Article 18.

The Union has an additional argument, which is that even if the parties did not incorporate the health and safety statutes and regulations in the CBA, OSHA and its kin are such a pervasive, integral part of the American workplace that they are, in effect, a universal contractual term. Regardless of whether I accept that general proposition, the parties themselves foreclosed it in Article 35, "Health and Safety."[11] That short article is limited to the creation of a joint labor-management "Health and Safety Committee," to meet "not more than quarterly…to discuss health and safety matters." It continues:

> It is understood that the provisions of this Article are consultative only and will in no way be construed as broadening the scope or application of the Agreement as a whole. …

In my view, this language expressly and plainly rebuffs any attempt to imply health and safety protections into the CBA, beyond the "Health and Safety Committee" itself.

For all of the foregoing reasons, the grievance does not present "a claim concerning the meaning, interpretation, or application of any of the specific provisions"

[11] Ordinarily, I avoid referring to contractual articles that the parties themselves did not mention. Neither the grievance nor the parties' briefs mention Article 35, nor did the parties raise it at the hearing. However, it is directly responsive to the Union's argument, and given the choice between ignoring the argument and discussing the article, the latter seems the better course.

of the CBA." Since my authority extends only to such claims, the grievance is not arbitrable, and must be denied.

In conclusion, I make the following observations. Marblehead is renowned for its stock of historic buildings, some of which date to the eighteenth century. (The very Town Hall in which this arbitration took place is a Victorian masterpiece.) It is reasonable to infer that there are many private houses, commercial buildings, and public buildings that were retrofitted with heating systems and other updates at a time when asbestos was a common building material. In fact, there was evidence that at some point in the past, asbestos was abated in the Mary Alley building. Yet it is undisputed that at the time of these events, the Town had no protocols or procedures for asbestos, nor did it train its employees and managers -- including those in the Building Department, which is charged with permitting and inspecting construction in Marblehead -- in the identification and cleanup of asbestos. That is surprising, to say the least. While it is true that the grievance is not arbitrable, the Union's vigorous advocacy in the earlier steps of the grievance procedure has accomplished the beneficial purpose of bringing these deficiencies to the Town's attention.

AWARD

The grievance is denied.

March 20, 2023

Margery E. Williams
Somerville, Massachusetts