

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of the Arbitration Between: *
*
CITY OF WORCESTER *
*
-and- *
*
NATIONAL ASSOCIATION OF GOVERNMENT *
EMPLOYEES, LOCAL 495 *

ARB-13-3016
ARB-13-3269
ARB-13-3270

Arbitrator:

Helen M. Bowler, Esq.

Appearances:

William R. Bagley, Jr., Esq. - Representing City of Worcester
John J. Mackin, Jr., Esq. - Representing NAGE, Local 495

The parties received a full opportunity to present testimony, exhibits and arguments, and to examine and cross-examine witnesses at a hearing. I have considered the issues, and, having studied and weighed the evidence presented, conclude as follows:

AWARD

ARB-13-3016 The City violated Article 19 of the collective bargaining agreement when it bypassed Keith Gilchrist for an overtime shift on October 18, 2011. As remedy, Gilchrist is awarded six hours pay at the applicable overtime rate.

ARB-13-3269 The City violated Article 19 of the collective bargaining agreement when it bypassed Keith Gilchrist for an overtime shift on January 13, 2011. As remedy, Gilchrist is awarded eight hours pay at the applicable overtime rate.

ARB-13-3270 The City violated Article 19 of the collective bargaining agreement when it bypassed Fran Beckwith for an overtime shift on January 13, 2011. As remedy, Beckwith is awarded eight hours pay at the applicable overtime rate.


Helen M. Bowler, Esq.
Arbitrator
December 17, 2014

INTRODUCTION

On July 26, 2013 and November 8, 2013, NAGE (Union) filed a total of three unilateral petitions for Arbitration. Under the provisions of M.G.L. Chapter 23, Section 9P, the Department of Labor Relations (Department) appointed Helen M. Bowler, Esq. to act as a single neutral arbitrator with the full power of the Department.¹ The undersigned Arbitrator conducted a consolidated hearing at the Department's Springfield offices on March 6, 2014.

The parties filed briefs on May 16, 2014.

THE ISSUE

The parties agreed on the following issue at hearing:

¹ Pursuant to Chapter 145 of the Acts of 2007, the Department of Labor Relations "shall have all of the legal powers, authorities, responsibilities, duties, rights, and obligations previously conferred on the ... the board of conciliation and arbitration ... including without limitation those set forth in chapter 23C, chapter 150, chapter 150A, and chapter 150E of the General Laws."

What should the appropriate remedy be under Article 19 of the Agreement when an employee is bypassed for an overtime opportunity?

RELEVANT CONTRACT LANGUAGE

The parties' Collective Bargaining Agreement (Agreement) contains the following pertinent provisions:

ARTICLE 11 GRIEVANCE PROCEDURE

5. The award of the arbitrator shall be final and binding upon all parties, subject to the following conditions:

a. The arbitrator shall make no award for grievances initiated prior to the effective date of this Article.

b. The arbitrator shall have no power to add to, subtract from, or modify this contract or the rules and regulations of the City and the Charter, Ordinances and Statutes concerning the City, either actually or effectively.

c. The arbitrator shall only interpret such items and determine such issues as may be submitted to him by the written agreement of the parties.

d. Grievances may be settled without precedent at any stage of the procedure until the issuance of a final award by the arbitrator.

e. Appeal may be taken from the award to the Worcester Superior Court as provided for in paragraph 6.

6. Appeal from the arbitrator's award may be made to Superior Court on any of the following bases, and said award will be vacated and another arbitrator shall be appointed by the Court to determine the merits if:

a. The award was procured by corruption, fraud, or other undue means;

b. There was evident partiality by an arbitrator, appointed as a neutral, or corruption by the arbitrator, or misconduct prejudicing the rights of any party;

c. The arbitrator exceeded his powers by deciding the case upon issues other than those specified in sections 5(b) and (c), or exceeded his

jurisdiction by deciding a case involving non-grievable matters as specified in Section 1, or rendered an award requiring the City, its agents, or representatives, the Union, its agents or representatives, or the grievant to commit an act or to engage in conduct prohibited by-law as interpreted by the Courts of this Commonwealth;

d. The arbitrator refused to postpone the hearing upon a sufficient cause being shown therefor, or refused to hear evidence material to the controversy or otherwise so conducted the hearing as to prejudice substantially the rights of a party;

e. There was no arbitration agreement on the issues that the arbitrator determined, the parties having agreed only to submit those items to arbitration as the parties had agreed to in writing prior to the hearing, provided that the appellant party did not waive his objection during participation in the arbitration hearing; but the fact that the award orders reinstatement of an employee with or without back pay or grants relief that would not be granted by a court of law or equity, shall not be grounds for vacating or refusing to confirm the award.

ARTICLE 19 ASSIGNMENT OF OVERTIME

1. Insofar as practicable in the assignment of overtime service, department heads and bureau heads will apply the following standards, consistent with efficient performance of the work involved and the best interests of the operation of the department:

(a) Overtime will be awarded on an equal opportunity basis. (It is the intent of this standard that each employee shall be afforded an equal number of opportunities to serve with no obligation on the part of the City to equalize actual overtime hours.)

(b) To be eligible for overtime service employees must, in the opinion of their department head or bureau head, be capable of performing the particular overtime task.

(c) A roster will be kept by each bureau head of overtime calls and overtime service by name, by date and by hour. In case of a grievance involving such records, they shall be subject to examination by the Union representative or the shop steward in the presence of the department head or his representative. After four (4) consecutive refusals to perform overtime service, an employee's name shall be dropped from the overtime roster for six (6) months.

(d) There will be no discrimination or personal partiality in the assignment of overtime service.

(e) Where overtime service is necessary on a particular job at the end of the working day, the overtime opportunity can be granted to the person doing that particular job on that day, without need of calling in another person under clause (a) above.

(f) Where overtime service is necessary with respect to a particular job on a day when a person who ordinarily handles that job is not on duty, the overtime opportunity can be granted to that person without need of calling in another person under clause (a) above.

2. Where overtime service must be performed on an emergency basis in the opinion of the department head, the above standards shall not apply.

3. In any situation where the above standards for overtime service are satisfied and two or more persons are equally available and qualified as determined by the department head for such service, the assignment of overtime service will be made on a seniority basis.

4. This agreement is understood to be without prejudice to the City's position that mandatory overtime service is a governmental prerogative and to the Union's position that overtime service by the employee is voluntary, provided, however both the Union and the City agree that overtime is mandatory during a declared emergency by the City Manager. Without prejudice to the City's existing position on mandatory overtime, the parties acknowledge that the Department Head² can order mandatory overtime for City services which involve preservation of life and property in the City of Worcester.

FACTS

The facts in these three consolidated cases are undisputed. Each involves a scenario where a bargaining unit member was bypassed for an overtime shift by his supervisor.

The Sewer Department (Department) within the City of Worcester (City) Public Works Department (DPW) maintains a written overtime roster of qualified employees available for overtime assignments, which is composed

² Department Head shall mean member of the Cabinet.

of a list of interested employees in rotation based upon seniority. Notations are made on the list showing calls made, service performed and refusals by employees. This roster is available for inspection by the Union and employees. At issue between the parties in all three cases is the appropriate remedy when the City fails to contact the next appropriate employee and a bypass occurs. The specifics of each case are as follows:

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On October 18, 2011 Keith Gilchrist (Gilchrist), a Laborer/MEO III in the Department, took a scheduled vacation day from work. Joe Buckley (Buckley), his Department Head, approved him in advance for the vacation day. Employees who are on approved vacation leave are eligible for overtime call backs. Gilchrist is on the overtime call back list for MEO III's. In addition, Gilchrist was the first person on the roster eligible for overtime opportunities on that day. The Department had a six hour opportunity available beginning at 4:00 pm. The Department did not call Gilchrist and was of the mistaken belief that he was out sick that day, even though Buckley had approved his vacation day. Upon Gilchrist's return, Buckley offered him the next opportunity on the overtime list. Gilchrist refused and filed this grievance, seeking pay for the missed opportunity.

ARB-13-3269 and ARB-13-3270

On January 12, 2011, Gilchrist was assigned to plow during a snowstorm. He finished his shift at approximately 10:00 pm. The City places a pin on the person's name on the roster where the rotation for overtime will

begin the next overtime opportunity. Gilchrist was the next name on the list. Instead, the supervisor, Rocky Cataldo (Cataldo), started calling names on the overtime roster from the top of the overtime list, rather than beginning with the name where the pin was located. As a result, Gilchrist and Fran Beckwith (Beckwith), another MEO III, were bypassed for available eight hour shifts beginning at midnight on January 13th. Gilchrist brought this error to Cataldo's attention before the start of the overtime shift. Cataldo acknowledged the error but refused to make any adjustment to the assignments. Gilchrist and Beckwith filed grievances seeking pay for the missed eight hours overtime on January 13th.

POSITIONS OF THE PARTIES

THE UNION

The Union contends that the employees are entitled to overtime pay for the City's bypass in each of the three instances above. The City admits that an error was committed in each case, but argues that the appropriate remedy is to award the impacted employee the next available assignment in the rotation. The Union argues that this is an insufficient remedy. If the solution is to offer the next available overtime opportunity, then another person is displaced on the list and the situation is never resolved. This results in the continual shuffling of personnel and filing of grievances by those who are displaced.

According to the Union, a single overtime opportunity should stand on its own merits and be remedied by monetary compensation to the bypassed

employee. An overtime opportunity is for a certain number of hours on a certain day. Awarding the bypassed employee the next opportunity is not an equitable remedy because it could be shorter or longer in duration than the earlier opportunity. This option would also render the contractual provision regarding equitable opportunity for overtime meaningless.

The Union offers three prior arbitration decisions³ between the parties regarding bypass of overtime as guidance in the matter. In each instance, the arbitrator decided that compensation was the appropriate remedy.

Therefore, according to the Union, this arbitrator should find a violation of the Article 19 of the Agreement, and award monetary compensation to each grievant equivalent to the amount of overtime pay lost when the bypass occurred.

THE EMPLOYER

The City does not dispute the facts or its violation of Article 19 of the Agreement, but argues that the appropriate remedy where an individual is inadvertently skipped is to provide the grievant with an overtime opportunity out of turn.

According to the City, the Agreement guarantees an equal number of opportunities for overtime, but creates no obligation to equalize actual overtime hours. The remedy of compensation, sought by the Union,

³ ARBS 64-2002, 107-2002, 109-2002, 115-2002, 149-2002, 021-2003 (Hanson, 2004); Grievance 1670 (Irving, 1994); and Grievance 1726 (Irving, 1997).

contradicts that standard established by the Agreement, which is merely to equalize opportunities.

The City also cites a prior arbitrator's ruling⁴ that the City implemented an appropriate solution by providing the next overtime opportunity to an employee who voluntarily relinquished an opportunity when too many employees were called in for overtime. To grant an employee the next overtime opportunity is in keeping with the spirit of the Agreement to equalize opportunities. To do otherwise and grant a monetary remedy for an administrative error punishes the City by requiring them to pay twice for worked performed on an overtime shift.

Therefore, the arbitrator needs to respect the parties' clear intent regarding Article 19 and award each grievant the next opportunity for overtime.

OPINION

The stipulated issue before me is:

What should the appropriate remedy be under Article 19 of the Agreement when an employee is bypassed for an overtime opportunity?

For all the reasons stated below, I find the City violated the Agreement and the appropriate remedy in these three instances is compensation to the employees at the appropriate overtime rate for the hours they should have worked on January 13 and October 18, 2011.

⁴ ARB-079-2009 (Hatfield, 2012).

The issue of bypass of employees for overtime opportunities is not a new dispute between the parties. As the prior arbitration awards provided by both parties show, the City and the Union have a long history of disputes over the administration of its overtime lists. The language of Article 19 of the Agreement, however, has remained unchanged. The parties have chosen not to deal with the remedy issue by contractual language, choosing instead to leave that up to a series of arbitrators to provide remedial relief based on the facts presented.

While arbitrators are not strictly bound to give preclusive effect to prior decisions between the parties, in the interests of labor stability, it is important to ascertain whether the same parties are submitting the same issue under the same contract language and seeking a different result. To ignore the precedential effect of prior rulings in that situation would destroy the “common rule of the workplace”, where “contract terms are expected to be applied uniformly to all similarly situated employees.....Accordingly, regardless of the decision an arbitrator might be inclined to render, were a dispute brought to him [or her] as a matter of first impression, he [she] is bound to defer to the opinion of a prior arbitrator upon the same issue.” Burnham Corp., 88 LA 931, 934-35 (Ruben, 1987) cited in Elkouri and Elkouri, *How Arbitration Works*, 7th Edition, Ch. 11.2.A (2012).

In this case, both parties cite prior decisions as controlling in this dispute. In order to determine any preclusive effect of those rulings, I must first be satisfied that the issue here is identical to the one presented in the

previous case, and, secondly, that there are no changed circumstances which would make it inappropriate to adhere to a previous ruling. Finally, I must define the nature and extent of the previous rulings and apply them to the facts in this case.

The City cites the 2012 decision of Arbitrator Timothy Hatfield finding no violation of Article 19 of the Agreement in a dispute over the overtime rotation. In that instance, the City called in too many employees for an available overtime shift, and one employee voluntarily agreed to take the next opportunity in lieu of overtime that evening. The grievant in that matter was the employee who was then precluded from the next opportunity by settlement of the previous instance. The facts are not parallel to this case. In each of the three cases before me, the City bypassed employees and attempted to remedy the situation by offering the employee the next available opportunity, which each refused. Therefore, the Hatfield award is not dispositive of the matters before me.

In contrast, the Union brought forward three prior arbitration decisions highlighting the City's longstanding problems with administration of the Department's overtime list under the Agreement. While the three cited decisions all have relevance to the disputes before me, the Hanson award, which was the most recent and factually closest to the three pending cases, is instructive and offers guidance to the outcome of this matter. The question squarely before Arbitrator John Hanson in the six consolidated cases from 2002 and 2003 was the appropriate remedy when an employee is bypassed

for overtime. That identical question is presented to me. In addition, the language of the Agreement remains unchanged.

Arbitrator Hanson reasoned:

I do not believe the Employer's remedy [of offering the next overtime opportunity] here is sufficient. While it is true that the contract contains specific language that overtime hours are not necessarily equalized among bargaining unit members, they have the right to expect when they may be called upon to work. They also have the right to expect that a system be in place, despite past errors, that not only guards against deliberate bypasses, but also against inadvertent errors. It is management's failure to make any attempt at having a procedure in place, despite past errors that is at issue here. Should I agree with the employer, I believe that I would do a disservice to the language and spirit of Article 19 of the collective bargaining agreement. In effect, I would be agreeing that equal opportunity was being offered, despite a haphazard process that clearly has not worked and is not working. I therefore find that the employer has violated Article 19 of the contract and that the Grievants shall receive overtime compensation for the hours that they should have worked.

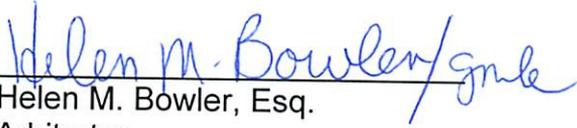
Compensation is an appropriate remedy where an employee loses an opportunity to earn additional money on an overtime basis. I agree with the Union that a lost overtime opportunity cannot be duplicated by offering the next available overtime in the Department. Therefore, given the strong precedent in comparable cases and the appropriateness of the remedy of compensation to the affected employees, I find that the City violated Article 19 of the Agreement and award each grievant compensation in these matters as specified below.

AWARD

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