

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of the Arbitration Between: *

SCHOOL COMMITTEE OF THE *
CITY OF MEDFORD *

-and- * ARB-13-3343

AFSCME, COUNCIL 93, LOCAL 3338 *

Arbitrator:

Timothy Hatfield, Esq.

Appearances:

Howard Greenspan, Esq. - Representing Town of Dracut

Philip Brown, Esq. - Representing AFSCME, Council 93

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

The grievance is procedurally arbitrable; the School Committee did not violate Article XI, Section 8 of the collective bargaining agreement in its distribution of overtime; and the grievance is denied.

Timothy Hatfield, Esq.
Arbitrator
January 26, 2015

INTRODUCTION

On December 13, 2013, AFSCME, Council 93 (Union) filed a unilateral petition for Arbitration. Under the provisions of M.G.L. Chapter 23, Section 9P, the Department of Labor Relations (Department) appointed Timothy Hatfield Esq. to act as a single neutral arbitrator with the full power of the Department.¹ The undersigned Arbitrator conducted a hearing at the Department's Boston office on March 26, 2014.

The parties filed briefs on December 10, 2014.

THE ISSUE

- (1) Is the grievance procedurally arbitrable?
- (2) Did the School Committee violate Article XI, Section 8 of the collective bargaining agreement?
- (3) If so what shall be the remedy?

RELEVANT CONTRACT LANGUAGE

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

Article X – Grievance and Arbitration Procedure (In Part)

A grievance is a complaint of any employee which may arise concerning wages, hours, and conditions of employment covered by this Agreement and shall be settled in the following manner:

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](#)."

Step 1: The employee with a grievance will first present the grievance in writing and discuss it with her/his immediate supervisor with the object of resolving the matter informally. The employee will be required to initiate this first step within twenty-one school days after the employee or Local 3338 acquired or should have acquired knowledge of the occurrence creating the grievance. ...

If, in the judgment of the Officers of Local 3338, a grievance affects a group or class of employees, Local 3338 may submit such grievance directly to Step 2. Local 3338 may process any grievance in its own name. ...

Step 4: If the grievance still remains unresolved between the School Committee and Local 3338 and/or employee, then either party may submit the matter to arbitration by the State Board of Conciliation & Arbitration within ten school days of the School Committee's response in Step 3, provided, however, that no grievance shall be submitted to arbitration that:

- a. Involves a matter outside of the scope of the express terms of this Agreement, notwithstanding the fact that the matter may have been discussed as a grievance in Steps 1 through 3; or
- b. Involves a matter which has not been presented timely according to the time limitations as set forth herein, unless modified by the mutual consent of the parties. ...

The Arbitrator chosen shall have no power or authority to add to or subtract from or modify any of the terms of this Agreement. The decision of the Arbitrator shall be final and binding upon the parties, subject to the provisions of General Laws, Chapter 150C. ...

Article XI – Hours of Work (In Part)

Section 6 – Any employee who is required by her/his superior outside the bargaining unit to work beyond her/his regularly scheduled hours per day or per week shall be compensated for such time at her/his regular rate up to either seven and one-half hours per day or thirty-seven and one-half hours per week at either of which points she/he shall begin to be paid at the rate of one and one-half times her/his regular rate of pay.

Section 7 – All hours worked beyond an employee's regular scheduled hours per day shall be recorded by the employee's supervisor. Three times each year, on October 1, January 1, and April 1, the Union shall be provided with a list of all such hours worked during the period by each employee.

Section 8 – When overtime work is available, it will be fairly distributed. In order to insure a fair distribution, the work will be offered to all bargaining unit employees, qualified to do the work. If a particular assignment must be done by someone in a specific office or by a particular person, it may be so assigned. However, such assignments will not be made for the purpose of avoiding the fair distribution requirement. No employee will be assigned overtime work to be done at the employee's home.

Article XXVII – Miscellaneous Provisions (In Part)

Section 4 – Except for any express provision to the contrary contained in this Agreement, the failure of either party hereto to insist upon compliance with any of the terms of this Agreement on any occasion shall not be construed to be a waiver by that party of its right to insist upon compliance in the future with such terms.

FACTS

The School Committee of the City of Medford (School Committee) and the Union are parties to a collective bargaining agreement that was in effect at all relevant times to this arbitration. The bargaining unit is comprised of full-time and part-time permanently appointed school secretaries and school clerks.

Since 2011, eleven out of thirty-seven bargaining unit employees have received overtime assignments but only two of these assignments were posted and offered to other bargaining unit employees as well. Bargaining unit members were not informed of any qualifications that were necessary to fill the overtime assignments. The majority of the overtime assignments since 2011 could have been performed by bargaining unit members who were not offered the opportunity. The bargaining unit members were not offered the overtime assignments because they would be less familiar with the duties involved and would take additional time to complete the assignments.

In 2010, the School Committee, in response to a reduction in force, provided limited cross-training for certain bargaining unit members to perform work on the Massachusetts Teachers Retirement System.

POSITIONS OF THE PARTIES

THE UNION

Procedural Arbitrability

This matter is timely as it is a continuing violation by the School Committee. The improper distribution of overtime was ongoing prior to the Union's grievance filing and has continued through the date of the Arbitration. The weight of arbitral authority notes that a grievance may be filed at any time during the continuing violation period, subject only to recovery limitations. Pursuant to the language of Article XXVII, a prior failure of the Union to demand that the School Committee comply with the terms of Article XI, Section 8 (Section 8) is not a waiver of the Union's right to bring this grievance to Arbitration and have the matter heard on its merits.

The only limitations to arbitrability under Article X of the collective bargaining agreement are that the issue must not involve a matter outside the scope of the express terms of the Agreement and that the issue must not be untimely. The current case involves the express terms of Article XI and the School Committee's failure to comply with Section 8 of that provision. Also, the provisions of Article X of the collective bargaining agreement do not provide a time limit for filing of class action grievances. Under the provisions of the collective bargaining agreement, matters affecting a class of employees may be

commenced at Step 2. Nothing in the provisions of Step 2, however, place a requirement on when the Union is to present the issue being grieved to the employer. Because there is no time limit to Step 2 filings, the matter cannot be untimely.

Merits

The first sentence of Section 8 describes the parties' intent that overtime distribution be fairly distributed. In order to ensure equitable distribution, all employees qualified to perform an overtime assignment must receive an offer to perform that work. There is only one circumstance which alleviates that requirement and that is when the work must be performed by a particular employee or office. Even with this exception, the Employer cannot apply this exception in order to subvert the fair distribution requirement.

When the Employer assigned overtime to bargaining unit members, it did not offer that overtime to all qualified employees. Thus, it did not equitably assign the overtime. The Employer only posted a guidance department and a special education assignment for all qualified bargaining unit members. For all other overtime opportunities, the Employer only offered the assignments to certain bargaining unit members. This is clearly in contravention of the language of Section 8 which requires all qualified bargaining unit members to receive overtime offers. It is clear that the School Committee, acting through its agents, hand selected the employees to whom it desired to provide overtime.

Qualification of Bargaining Unit Employees

The School Committee must offer overtime opportunities to all qualified bargaining unit employees. The Employer never posted overtime opportunities that listed preferred or required qualifications. Also, in instances where there was no posting, the Employer did not notify employees through any other means, that certain qualifications were preferred or required. As such, there is no evidence that there were any qualifications to perform overtime assignments other than being a bargaining unit member.

To be qualified to perform work does not mean that an employee must be as efficient or familiar with the work as the individual assigned or who normally performs the work during regular work hours. To hold out efficiency as a qualification is inappropriate. If the Arbitrator finds that employees are unqualified if they can perform the work but are not as familiar with the work as employees regularly performing the work, the arbitrator would effectively read out the equalization provision within the collective bargaining agreement.

Because the Union has demonstrated that bargaining unit members are qualified and that the Employer has inequitably distributed overtime opportunities, the Employer has the burden to demonstrate that its assignment falls under the exception to Section 8's fair distribution requirement. The School Committee has not satisfied this burden because it has not shown that a specific office or particular person must perform the overtime assignments which were not offered to other qualified bargaining unit members. The Employer is permitted to assign a specific person or office to an overtime assignment only

when that person or office is indispensable for the work to be performed. Familiarity with a position's duties does not meet the level of necessity required by the use of the word "must" in Section 8 of the collective bargaining agreement. Efficiency of operation is not the exception included in the parties Agreement.

Applicability of Article XI, Section 6

Article XI, Section 6 (Section 6) discusses the compensation to be paid to employees who work overtime hours. Section 6 is the only area within the collective bargaining agreement that details the compensation received by employees working beyond ordinary work hours. Section 6 only provides compensation information and does not detail how the overtime work is to be distributed. Information about the proper distribution of overtime is only provided in Section 8.

Conclusion / Remedy

The School Committee violated the collective bargaining agreement when it failed to offer or equitably distribute overtime to bargaining unit members. As a remedy, the Union asks the Arbitrator for a make whole award of back-pay in the amount of \$1456.29 for 2012, \$931.44 for 2013, and \$212.54 for 2014 for those employees denied equitable distribution of overtime opportunities.

THE EMPLOYER

Procedural Arbitrability

The grievance, in this matter, was not filed in a timely manner pursuant to the terms and conditions of the collective bargaining agreement. The grievance was filed on February 23, 2013 and alleges that the employer violated Article XI,

Section 8 in the assignment of overtime. Article X, Section 1 of the collective bargaining agreement states that employees will be required to initiate the first step of the grievance procedure within 21 school days after the employee or the Union acquired or should reasonably have acquired knowledge of the occurrence that resulted in the grievance. The evidence presented at the hearing demonstrated that the practice of assigning overtime to employees who regularly perform those duties has been a long standing practice of the employer. Because the Union's bargaining unit members provide payroll services for the employer, the Union knew or reasonably should have known of the distribution of overtime work for months or years prior to the grievance. This is not a case where the wording of the contractual time limits is ambiguous or unclear. The Union has not presented evidence that the School Committee and the Union entered into an agreement to waive the time limits. Based on the fact that the Union did not file the grievance in a timely manner, it should be dismissed.

Merits

The School Committee did not violate the collective bargaining agreement in the distribution of overtime. Superintendent Belson testified that up until the early 1990's, Section 6 was the only overtime provision section in the collective bargaining agreement. Superintendent Belson testified that when Section 8 was added later, the School Committee wanted to retain its ability to assign overtime to someone in a specific office or a particular person. Thus, the only limitation contained in Section 8 to the employer's discretion is that assignments will not be made for the purpose of avoiding fair distribution requirements.

The Union had only one witness Susan Lungo (Lungo), who testified that her only responsibilities were in the Special Education Department and that she had no knowledge if any of the overtime was done at the direction of a supervisor. Finally, the Union also raised the issue of cross-training under a memorandum of agreement that resulted from a reduction in force. The cross training was in the event of a change in job titles and classifications and was unrelated to the overtime provisions of the collective bargaining agreement.

Conclusion

The School Committee requests that the grievance be denied.

OPINION

The issues before me are:

- (1) Is the grievance procedurally arbitrable?
- (2) Did the School Committee violate Article XI, Section 8 of the collective bargaining agreement?
- (3) If so what shall be the remedy?

For all the reasons stated below, the grievance is procedurally arbitrable; the School Committee did not violate Article XI, Section 8 of the collective bargaining agreement in its distribution of overtime; and the grievance is denied.

Procedural Arbitrability

By agreement between the parties and the Arbitrator, procedural arbitrability was argued first at the arbitration hearing and taken under advisement by the Arbitrator. The parties were directed to address this issue first

in their post hearing briefs and the matter of procedural arbitrability would be resolved prior to any discussion on the merits in the final decision.

While the School Committee is correct that the collective bargaining agreement contains specific timelines for all steps of the grievance procedure, the application of those timelines is not fatal to the current grievance, as the Union's allegations form the basis for a potential continuing violation. In situations involving a continuing violation, the Union's grievance may be found timely, but will be limited in respect to any potential remedy. In this case, while the Union asks for a remedy that seeks redress for violations back to 2011, any potential remedy would be limited to violations occurring within twenty-one school days from when the Union acquired, or should have acquired knowledge of the subject matter of the grievance. As I find this grievance to concern a potential continuing violation, I find the grievance to be procedurally arbitrable, but limited in potential remedy.

Merits

The parties have crafted the issue before me to be limited in scope to whether the School Committee violated Section 8 of the collective bargaining agreement in the manner in which it distributed overtime to bargaining unit members.

The Union argues that the clear intent of Section 8 is the equal distribution of overtime assignments. The Employer has only posted two of the overtime assignments that bargaining unit members recently performed, which, the Union claims, is not the fair distribution of overtime intended by Section 8. While I

agree that one of the goals of Section 8 of the collective bargaining agreement is the equitable distribution of overtime, it must also be noted that Section 8 includes a large caveat to which the parties have agreed. Specifically, the School Committee may assign a specific person or office to a particular overtime assignment. The only restriction on this authority is that such an assignment may not be made for the purpose of avoiding the fair distribution of overtime.

The record before me is devoid of any evidence that the School Committee has assigned overtime with the purpose of avoiding fair distribution. Superintendent Belson testified that the main reasons that most of the overtime opportunities stay within a department and/or with a specific person were for the need for certain technical skills, familiarity with the duties, and efficiency. Having bargaining unit members from outside a particular department come in to work overtime and then having to spend time bringing them up to speed and/or teaching them the specifics of an assignment is not efficient. Although the Union does not agree with the use of efficiency and familiarity as reasons to assign overtime opportunities to specific employees, the contractual language clearly states that the only restriction on the School Committee is that it may not purposely assign overtime to avoid fair distribution. Absent specific evidence showing that the School Committee had assigned overtime in such a manner, I am unable to find that the School Committee violated Section 8 in the distribution of overtime and the grievance is denied.

AWARD

The grievance is procedurally arbitrable; the School Committee did not violate Article XI, Section 8 of the collective bargaining agreement in its distribution of overtime; and the grievance is denied.

Timothy Hatfield, Esq.
Arbitrator
January 26, 2015