

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-12-2485

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

The City did not violate Article 35 of the collective bargaining agreement when the City refused to pay Daniel Page, Edward Larson and David McPherson two additional hours of holiday pay, and the grievances are denied.

(KE)

Helen M. Bowler

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

INTRODUCTION

On December 17, 2012, NAGE (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 Helen M. Bowler, 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 Springfield offices on February 21, 2014.

The parties filed briefs on May 16, 2014.

THE ISSUE

Whether the City violated Article 35 of the collective bargaining agreement when it refused to pay Page, Larson and McPherson an additional two hours holiday pay?

If so, what shall be the remedy?

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:

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."

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.

ARTICLE 20 COMPUTATION OF OVERTIME PAY

1. Each employee shall be paid overtime at the rate of one and one-half (1½) times his regular rate of pay for working in excess of eight (8) hours in one day or forty (40) hours in one week.

2. In computing the first forty (40) hours of actual work by any employee in any one week for the purposes of paying overtime compensation for time worked in excess of forty (40) hours, paid holiday leave not in excess of eight (8) hours in any one week shall be regarded as hours actually worked. Paid vacation leave and paid bereavement leave shall be regarded as hours actually worked for purposes of paying overtime compensation for work in excess of forty (40) hours in said week.³

ARTICLE 21 RECALL TO DUTY

In accordance with the overtime rules and regulations, any employee recalled to duty shall be credited with not less than four (4) hours for such recalled duty.

ARTICLE 35 HOLIDAYS⁴

1. Subject to the rules and regulations promulgated by the City Manager, full-time employees of the City shall be entitled to eleven (11) paid

² Department Head shall mean member of the Cabinet.

³This provision is subject to the Memorandum of Agreement dated June 27, 1995 which provides that sick leave shall count as time worked. The Memorandum of Agreement is incorporated as part of this Collective Bargaining Agreement.

⁴ The parties added Paragraphs 5 and 6 after the adoption of the 2000-03 Agreement.

holidays enumerated below, in addition to any regular days off to which they may be entitled:

- (a) First day of January, or the day preceding when said day occurs on a Saturday, or the day following when said day occurs on a Sunday;
- (b) Third Monday in January;
- (c) Third Monday in February;
- (d) Third Monday in April;
- (e) Last Monday in May;
- (f) Fourth day of July, or the day preceding when said day occurs on a Saturday, or the day following when said day occurs on a Sunday;
- (g) First Monday in September;
- (h) Second Monday in October;
- (i) Eleventh day of November or the day preceding when said day occurs on a Saturday, or the day following when said day occurs on a Sunday;
- (j) A day in November proclaimed Thanksgiving Day;
- (k) Christmas Day or the day preceding when said day occurs on a Saturday, or the day following when said day occurs on a Sunday.

2. Employees who actually work on the three (3) days enumerated below shall be entitled to time and one-half pay and not leave for any hours worked on said holidays, in addition to their regular holiday pay for said holidays:

- (a) The first day of January, or the day preceding when said day occurs on a Saturday, or the day following when said day occurs on a Sunday;
- (b) A day in November proclaimed Thanksgiving Day;
- (c) Christmas Day or the day preceding when said day occurs on a Saturday, or the day following when said day occurs on a Sunday.

Employees who actually work on the remaining holidays listed in Section 1 above, shall be entitled to straight time pay, not leave, for any hours worked on said holidays, in addition to their regular holiday pay for said holiday.

3. Part-time employees, who are regularly scheduled to work at least 20 hours per week, shall be entitled to receive holiday pay on a prorated basis, provided they have worked for the City continuously for one (1) year.

4. For Saturday holidays, employees shall receive the preceding day as the holiday in accordance with and subject to Section 10 of Article 3 of the Revised Ordinances of 1996, and employees shall not receive any so-called Saturday holiday pay effective with any Saturday holiday occurring after July 1, 1984.

5. Notwithstanding Section 2 above, if an employee is regularly scheduled to work on a holiday and actually works eight (8) hours on said holiday, the employee shall be entitled to receive eight (8) hours of straight time pay, subject to Section 2, plus an additional two (2) hours of holiday pay, for a total of ten (10) hours of holiday pay.

6. If an employee is on a day off and is recalled to duty for an emergency by the City on a holiday and actually works less than four (4) hours on said holiday, he/she shall be guaranteed a minimum of four (4) hours of straight time pay. If the employee actually works on said holiday he/she shall be entitled to an additional two (2) hours of holiday pay.

FACTS

The grievants, Edward Larson (Larson), David McPherson (McPherson) and Daniel Page (Page) are City of Worcester (City) pump station operators and assigned to the Reservoir Division of the City's Department of Public Works. The Union represents the three employees for collective bargaining purposes. As part of their job responsibilities, each operator performs testing of the City's water supply to ensure that it is safe for use by its citizens. Employees test the water every day, including weekends and holidays.

Larson, McPherson and Page are scheduled to work weekends and holidays, on a rotating basis, in order to provide coverage on those days. They are paid a minimum of four hours pay for the testing work when it is performed on a non-scheduled work day, such as a holiday or weekend. When the City assigns them to work on a Saturday or Sunday and their regular work week is Monday through Friday, they are compensated on an overtime basis for the hours worked on the weekend at time and one half (1½) pay. The City pays only straight time for work performed on a holiday, with certain limited exceptions enumerated in the contract.

On April 16, 2012, a holiday, the City scheduled Larson to work four hours performing water testing. On May 28, 2012, another holiday, McPherson was scheduled to perform the testing duties for four hours. On July 4, 2012, a holiday, Page worked for four hours testing the water supply. Each operator was scheduled in advance on a rotating basis. Each was paid for four hours at straight time in addition to holiday pay for the time worked.

POSITIONS OF THE PARTIES

THE UNION

The Union contends that the City violated Article 35, "Holidays," of the collective bargaining agreement (Agreement) when the City failed to pay the three operators two hours premium pay for hours worked on the three holidays, April 16th, May 28th and July 4, 2012. According to the Union, this work on the aforementioned holidays is beyond what the employees do in a regularly scheduled work week. Therefore, this holiday work should be compensated as overtime, and the employees are eligible for premium pay. Any work beyond the regularly scheduled week, even if the employees know in advance that they are working, is performed on a day off and therefore subject to the recall provisions of Article 21 of the contract. In addition, the water testing worked performed is in the nature of an emergency or emergency prevention, and thus subject to premium pay. The parties intended through the negotiation of Paragraphs 5 and 6, which were added after the 2000-03 agreement, to pay each employee a premium of two additional hours pay for each holiday worked. Therefore, the arbitrator should

find a violation of the Article 35 of the Agreement and award an additional two hours of premium pay to each grievant for work performed on a holiday.

THE EMPLOYER

The City argues that the language of Article 35 is clear and unambiguous. An employee is only entitled to two hours premium pay in two instances by contract, neither of which is present here. Under Paragraph 5 of Article 35, if an employee works a full eight hour day on a holiday, he is entitled to two hours premium pay for a total of ten hours pay, plus standard holiday pay. Secondly, under Paragraph 6 of Article 35, if the City recalls an employee for duty due to an emergency, he is entitled to a four hour minimum and an additional two hours holiday pay, if he actually works on the holiday. According to the City, neither factual circumstance is present; therefore, paragraphs 5 and 6 do not apply to the water testing events at issue here. Routine maintenance work, no matter how critical to the City's operations, does not satisfy the requirements of an emergency. Accordingly, the arbitrator should apply the clear language of the Agreement and deny the grievances.

OPINION

The stipulated issue before me is: whether the City violated Article 35 of the Agreement when it refused to pay Page, Larson and McPherson an additional two hours holiday pay? If so, what shall be the remedy?

For all the reasons stated below, I find the City did not violate the Agreement and the grievances are denied.

Article 35 of the parties' Agreement, "Holidays," controls resolution of this dispute. This provision needs to be read as a harmonious whole, each paragraph consistent with other paragraphs of the Article; not as isolated sentences, standing alone, without significance to the other language contained in the Article and the Agreement.

Paragraph 1 of Article 35 lists eleven holidays for which the City compensates employees at straight time holiday pay. The Agreement refers to the three holidays that are the subject of this arbitration case in Paragraph 1 of this Article. Paragraph 2 lists three of the holidays listed in Paragraph 1: New Year's Day, Christmas Day and Thanksgiving Day, as distinct in terms of compensation. Employees required to work on those three days are entitled to time and one half (1½) for hours worked in addition to holiday pay. Paragraph 2 goes on to state that employees required to work the remaining holidays in Paragraph 1 are entitled to "straight time pay" for hours worked on such holidays, in addition to holiday pay. Therefore, Larson, McPherson and Page are, at minimum, entitled to eight hours holiday pay and additional pay at straight time for hours worked on holidays, in accordance with Paragraph 2. The parties agree up to that point.

However, the parties disagree over what additional earnings the three grievants are entitled to beyond the pay for time worked on the holidays enumerated in Paragraph 1. Article 21 of the Agreement, "Recall to Duty," provides for a four hour minimum upon recall to duty. This also appears to be undisputed, as the three employees were compensated for four hours on

each holiday, in addition to holiday pay, whether based on the hours actually worked or the four hour minimum of Article 21.

Article 35, Paragraph 5 provides for premium pay of two hours beyond eight hours pay on a holiday, but only if the employee is regularly scheduled to work eight hours. According to testimony in this case, none of the employees were scheduled for eight hours on the holidays at issue, therefore Paragraph 5 does not apply.

Likewise, the qualifiers for an additional two hours pay contained in Paragraph 6 do not apply to the facts in this case. In order for an employee to be eligible for an additional two hours of holiday pay under this paragraph, an employee has to be recalled to duty due to an "emergency." The Agreement does not define an emergency, but an emergency is defined by Webster's Dictionary as, "An unexpected, serious occurrence or situation urgently requiring prompt action." Absent a different, agreed upon definition of emergency, the arbitrator must give a word its plain language meaning. While it may be inconvenient for employees assigned to work on a holiday, if known in advance, it cannot be considered an emergency.

The Union also argues that the essence of what the parties negotiated was to provide that anyone working on a holiday is entitled to an additional two hours holiday pay. However, neither the clear, unambiguous language of the Agreement, nor the evidence presented at hearing support this conclusion. There would be no need for paragraph 5 or the first sentence of paragraph 6 if the parties intended to pay all workers working on a holiday an additional two hours holiday pay. In addition, while it may be the Union's

belief that the parties negotiated an additional two hours holiday pay, it was unable to offer any specific evidence or bargaining history to support this result.

Therefore, having found that the Agreement does not support the payment of an additional two hours holiday pay to the grievants, the grievances are denied.

AWARD

The City did not violate Article 35 of the collective bargaining agreement when it refused to pay Page, Larson and McPherson an additional two hours holiday pay, and the grievances are denied.

(KE)



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