

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-13-2545

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 grievance is timely filed.

The City did not violate the collective bargaining agreement on July 24, 2012 when Anne Johnson worked an overtime shift and the grievance is denied.

(CKE)

Helen M. Bowler

Helen M. Bowler, Esq.
Arbitrator
December 22, 2014

INTRODUCTION

On January 14, 2013, NAGE (Union) filed a 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 June 18, 2014.

The City filed its brief on December 13, 2014. The Union was granted an extension and filed on December 17, 2014.

THE ISSUE

The parties agreed on the following issues at hearing:

Is the matter timely?

If so, did the City violate the collective bargaining agreement on July 24, 2012 when Anne Johnson worked an overtime shift?

If so, what shall the remedy be?

RELEVANT CONTRACT LANGUAGE

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

SPECIAL ARTICLE 2 WORCESTER FREE PUBLIC LIBRARY

F. 4. The library management will attempt to rotate assignments to

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."

public service desks within divisions in an equitable manner.

ARTICLE 4 MANAGEMENT RIGHTS

In the interpretation of this Agreement, the City shall not be deemed to have been limited in any way in the exercise of the regular and customary functions of municipal management or governmental authority and shall be deemed to have retained and reserved unto itself all the powers, authority and prerogatives of municipal management or governmental authority including, but not limited to, the following examples: the operation and direction of the affairs of the departments in all of their various aspects; the determination of the level of services to be provided; the direction, control, supervision and evaluation of the employees; the determination of employee classifications; the determination and interpretation of job descriptions, but not including substantive changes; the planning, determination, direction and control of all the operations and services of the departments (and their units and programs); the increase, diminishment, change or discontinuation of operations in whole or in part; the institution of technological changes or the revising of processes, systems or equipment; the alteration, addition or elimination of existing methods, equipment, facilities or programs; the determination of the methods, means, location, organization, number and training of personnel of the departments, or its units or programs; the assignment and transfer of employees; the scheduling and enforcement of working hours; the assignment of overtime; the determination of whether employees (if any) in a classification are to be called in for work at times other than their regularly scheduled hours and the determination of the classification to be so called; the determination of whether goods should be made, leased, contracted or purchased on either a temporary or a permanent basis; the hiring, appointment, promotion, demotion, suspension, discipline, discharge, or relief of employees due to lack of funds or of work, or the incapacity to perform duties or for any other reason; the making, implementation, amendment, and enforcement of such rules, regulations, operating and administrative procedures from time to time as the City deems necessary; and the power to make appropriation of funds; except to the extent abridged by a specific provision of this Agreement or law.

The rights of management under this article and not abridged shall not be subject to submission to the arbitration procedure established in Article 11 herein.

Nothing in this article shall be interpreted or deemed to limit or deny any rights of management provided the City bylaw.

ARTICLE 10 SENIORITY

1. It is understood by both parties to this Agreement that the present practice regarding rotating shifts (including those at the Worcester

Public Library) shall continue notwithstanding the provisions contained herein.

ARTICLE 11 GRIEVANCE PROCEDURE

1. For purposes of this Article, a grievance shall be defined to be an actual dispute arising as a result of the application or interpretation of the express terms of this contract, Chapter 3 (the Leave Ordinance) and Appendix C (the Salary Ordinance) of the Revised Ordinances of the City of Worcester, 1996, providing, however, that any matter under the jurisdiction of the Civil Service Commission or the Worcester Retirement Board, any matter involving the purported exercise of management rights (Article 4 of this contract), supervisory orders or any matter reserved to the discretion of the City by the terms of this Agreement shall not be subject to this grievance procedure nor construed as being grievable. Any matter which occurred or failed to occur prior to the date of this Agreement shall not be a proper subject for binding arbitration. Grievances shall not be entertained if the cause occurred more than thirty actual working days of the employee prior to the initiation of the procedures set forth in this Article. If the Union or an employee brings a matter before the Equal Employment Opportunity Commission, the Massachusetts Commission Against Discrimination, or the Worcester Human Rights Commission, the Union or employee who files the action shall, simultaneous to the filing with the agency, notify the City of the filing and of the agency before which the matter is being brought. The parties agree that any decision of the arbitrator in a grievance between the City and the Union or an employee shall be admissible in any subsequent proceeding between the City and the Union or employee involving the same matter.

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.

² Department Head shall mean member of the Cabinet.

FACTS

The facts of this case are undisputed. The City of Worcester (City) employs Union professional, paraprofessional and custodial personnel to staff the Worcester Free Public Library (Library). Among those positions are Graduate Librarians. Graduate Librarians are assigned on a rotating schedule, which includes night and weekend work. The City also employs adjunct staff who work on a part-time basis where needed. They are not assigned to work at night. Both Graduate Librarians and adjunct staff are included in the overtime rotation.

In 2005, representatives of the Union and the Library Human Resources Director Denise Faucher (Faucher) met to develop guidelines for a rotation of assignment of overtime work. Among the issues discussed and clarified was the treatment of employees in the rotation who worked nights and would therefore not be available for certain overtime opportunities. The guidelines that the parties developed provide that an employee who is offered overtime and unable to take the assignment due to a work commitment is passed over on the list, but that pass over is not considered a refusal. The same principle is extended to employees who were absent due to illness. These guidelines have been in place since 2005 and were reduced to writing on January 14, 2005. How the City treats refusals is critical because an employee who refuses four consecutive times is removed from the overtime roster for six months, under the terms of the Agreement.

As a result of the discussions, the Library maintains a written roster where it tracks overtime calls that it makes to employees. Employees are

listed on the roster by seniority. The Library notes on the roster when overtime is offered, whether employees accept or refuse the overtime, records if they are unavailable, and if so, the reason. The roster is available to the Union and the employees to review.

After the roster was established, the Union steward, Mary Cocorochio (Cocorochio), approached Faucher again in 2008 or 2009 to modify the rotation practice and have Anne Johnson (Johnson), an adjunct staff member in the cataloguing department, marked as not available, even if she was available, in order to equalize the distribution of overtime at night to include Graduate Librarians. Johnson and the adjunct staff do not work nights. The City refused to change the procedure.

On July 24, 2012, the Library contacted Johnson and offered her an overtime assignment. She accepted the overtime assignment as did one of the Adjunct Librarians. The City passed over several of the Graduate Librarians to reach Johnson because they were already working that evening, and, therefore, unavailable. As a result, the Union filed a grievance on August 3, 2012.

POSITIONS OF THE PARTIES

THE UNION

The City violated the contract and the violation is one of a continuing nature. Therefore, a grievance can be filed within the contractually specified time period after its last occurrence, which in this case occurred on the evening of July 24, 2012. The grievance was timely filed and is arbitrable.

The language of Article 19 is clear and provides that overtime will be awarded on an equal opportunity basis. That provision needs to be read in conjunction with Special Article 2, which requires management to attempt to rotate assignments in an equitable manner. The City does not award overtime on an equal opportunity basis because some personnel are precluded from overtime opportunities due to their work schedule. Therefore, the arbitrator should find that the Agreement was violated and the affected employees who were passed over for overtime should be made whole for their losses.

THE EMPLOYER

The grievance was not timely filed and, therefore, is not arbitrable under the Agreement. It is undisputed that the Union was aware of the issue in 2008 or 2009 and the Union had an obligation to file within thirty days of their first awareness of the grievance. In addition, the guidelines fall within the management rights of the City to establish procedures, rules and regulations, and actions under them cannot be arbitrated by the Union.

Finally, the City followed the well-established list and offered overtime in order of seniority from the roster. An employee who is working, cannot accept overtime, and the Union is well aware of that fact. In addition, the Union cannot attempt to bargain a change through the contractual grievance procedure rather than through the negotiations process. Therefore, the grievance should be denied on its merits.

OPINION

The stipulated issues before me are:

Is the matter timely? And, if so, did the City violate the collective bargaining agreement on July 24, 2012 when Anne Johnson worked an overtime shift? If so, what shall the remedy be?

For all the reasons stated below, I find the grievance timely filed and further, that the City did not violate the Agreement when Anne Johnson worked an overtime shift on July 24, 2012. Therefore, the grievance is denied on its merits.

Timeliness

The City contends that the grievance dated July 31, 2012 was untimely filed on August 3, 2012, even though the action complained of occurred on July 24, 2012, approximately one week prior to the filing of the grievance. The grievance procedure, Article 11 of the Agreement, requires the Union to file a grievance within "thirty actual working days" of the event causing the grievance. The City argues that the parties' consistent practice of rotation on the overtime list extends as far back as 2005, when the City established the January 14th written protocol, and that the Union cannot initiate a complaint at this late date. The Union contends that the violation of the Agreement is continuing in nature and therefore, each occurrence or violation triggers a new grievance. I agree with the Union that the grievance was timely filed.

This is a case that falls within the continuing violation doctrine. Each instance arises out of a denial of compensation which reoccurs each time an employee is awarded overtime and another is not. Therefore, I find that the grievance was timely filed on July 31st for an incident which occurred on July 24th and it is appropriate to rule on the merits of the Union's claim.

Merits

The Union claims that the guidelines developed in 2005 to administer the overtime rotation violate the Agreement. After considering several provisions cited by the parties, I find that both the City's actions and its guidelines are consistent with the parties' Agreement and that no violation occurred.

Article 4 of the Agreement, the Management Rights Clause, reserves to the City the right to assign overtime and to make rules for its enforcement. Under the provisions of Article 19, Assignment of Overtime, the City has an obligation to develop an overtime roster and track its calls to employees. Under the language, the City has a further obligation to award overtime on an equal opportunity basis. It is not required under this standard to equalize the number of actual overtime hours, but create a process to give staff an equal access to overtime opportunities.

To that end, the City operates on a strict rotation by seniority. Acknowledging the penalty for refusal of overtime, the City has accommodated those employees who are sick or already working, by agreeing not to count those instances as refusals and jeopardize their removal from the list.

The Union does not fault the City's adherence to the guidelines. Instead, it is critical of the results of the process which has created a disproportionate share of overtime going to the adjunct staff members who do not work nights, rather than the Graduate Librarians, who do. However, the Agreement specifically relieves the City from any obligation to equalize hours.

An employee cannot accept an overtime assignment if he or she is already working. Therefore, the City has fulfilled its obligation under Article 19 to offer opportunities on an equitable basis and has not violated that provision of the Agreement.

The Union further cites Special Article 2, addressing Library employees specifically. Special Article 2 provides in pertinent part, "The library management will attempt to rotate assignments to public service desks within divisions in an equitable manner." However, this provision covers assignment to "public service desks" and does not govern the assignment of overtime. Again, the Union has failed to prove a violation of this article of the Agreement.

AWARD

The grievance is timely filed.

The City did not violate the collective bargaining agreement on July 24, 2012 when Anne Johnson worked an overtime shift and the grievance is denied

Helen M. Bowler

Helen M. Bowler, Esq.

Arbitrator

December 22, 2014

(KE)