

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS

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In the Matter of the Arbitration Between: \*

TOWN OF SOMERSET \*

-and- \*

ARB-13-2610

AFSCME, COUNCIL 93 \*

\*\*\*\*\*

Arbitrator:

Timothy Hatfield, Esq.

Appearances:

Clement Brown, Esq. - Representing Town of Somerset

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 substantively non-arbitrable and the grievance is denied.



Timothy Hatfield, Esq.  
Arbitrator  
June 23, 2014

### **INTRODUCTION**

On February 12, 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.<sup>1</sup> The undersigned Arbitrator conducted a hearing at the Department's Boston office on November 19, 2013

The parties filed briefs on December 20, 2013.

### **THE ISSUES**

1. Is this matter arbitrable?
2. Did the Town violate the parties' collective bargaining agreement in connection with overtime work on December 23, 2012?
3. If so, what shall be the remedy?

### **RELEVANT CONTRACT LANGUAGE**

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

#### **Section 7 – Grievance and Arbitration Procedure (In Part)**

A grievance is a dispute between the parties which specifically relates to the application or meaning or interpretation of a specific provision(s) of this

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<sup>1</sup> 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."

Agreement. Any grievance which may arise between the parties shall be settled in the following manner:

Step IV: If the grievance is still unsettled, either party may, within fifteen (15) days after the reply of the Town Administrator is due, by written notice to the other, request arbitration.

By mutual agreement of the parties, the services of the Massachusetts Division of Labor Relations shall be utilized for the purposes of arbitration of disputes over the interpretation of application of terms of this Agreement as provided in Chapter 150E of the General Laws, as amended. ...

#### Section 12 – Overtime (In Part)

For the purposes of computing overtime pay, the standard workday of all employees covered by this contract shall consist of eight (8) hours and the standard work week shall consist of forty (40) hours. Time-and-a-half the regular hourly rate shall be paid for all time worked in excess of forty (40) hours per week. Employees who work scheduled overtime on Sundays or holidays will be paid double time for hours worked in excess of four hours with express permission of the Superintendent or his designee, except in cases of an emergency, where such permission will not be required. The employer shall provide work for a full standard work day to all employees assigned work and such work shall thereafter be provided for the full standard work week.

Overtime shall be equally and impartially distributed among personnel who ordinarily perform such related work in the normal course of their work week. An Employee must have worked during the regular work period immediately preceding the overtime period to be eligible for overtime except if all other employees refuse the overtime.

The employer shall keep records in the time book of the overtime work. ... A record of the overtime hours worked by each employee shall be posted on the Department bulletin board monthly.

#### FACTS

The Union and the Town are parties to a collective bargaining agreement. Stephen Mello (Mello) is a laborer with the Town's Water Pollution Control Department (WPCD) and local union president. Mello was carrying the "on-call" phone on the night of December 23, 2012. Bruce Ferreira works as a lab

technician for the WPCD. Formerly, Ferreira was a laborer in the WPCD. The lab technician is eligible for overtime opportunities in the WPCD. As of December 22, 2012, Ferreira had not worked any overtime hours during 2012. Ray O'Connell works as an operator in the WPCD and as of December 22, 2012 had worked 198 hours of overtime in 2012.

On the evening of December 23, 2012, Mello received a call from the police department concerning water on the road from a backed-up sewer. Mello determined that the sewer lines in the area needed to be cleared. Unable to perform the job by himself, he began calling employees who ordinarily perform the job for an overtime opportunity. He was unable to reach anyone in that category. He was able to reach Superintendent Harold Gracia (Gracia) who told him to "go by the board" and call in someone for overtime. The parties' collective bargaining agreement is silent as to the procedure to follow if no employees who ordinarily perform such related work in the normal course of their work week are available. The parties have adopted a past practice whereby the WPCD employee with the least hours of overtime worked during the year is offered the overtime opportunity. Mello did not call Ferreira who was the low man on the board with zero hours of overtime, instead he called in O'Connell, who had already worked 198 hours of overtime, to help perform the work. O'Connell worked four and a quarter hours of overtime assisting Mello in routing out the clogged lines.

On December 27, 2012, Ferreira filed a grievance over the missed overtime opportunity that was denied at all steps of the grievance procedure by the Town and resulted in the instant Arbitration.

### **POSITIONS OF THE PARTIES**

#### **THE UNION**

##### **Arbitrability**

The Union argues that while Mello is the President of Local 1701, his actions on December 23, 2012 were as an agent of the Town, which makes this a matter between the Town and the Union and not merely a matter between two employees. As this is a grievance between the two parties to the collective bargaining agreement concerning the interpretation and application of the overtime provisions, this matter is arbitrable.

##### **Agency**

In an employment relationship, the doctrine of respondeat superior creates liability to the employer for actions performed by the employee with the purpose of accomplishing the master's work. To determine whether a employee's conduct is within the scope of employment, the courts look at whether the action "is of the kind he is employed to perform ...; if it occurs substantially within the authorized time and space limits ...; and if it is motivated, at least in part, by the purpose to serve the employer." Only if the employee, "acts from purely personal motives ... in no way connected with the employer's interests" is he considered to have departed from the scope of his employment. In the instant matter, Mello became an agent of the Town generally through his employment with the Town

and specifically when the Town instructed him to call the overtime list to repair a blockage on December 23, 2013.

Mello was acting with a purpose to serve the Town. Mello's decision to call in O'Connell strayed from the past practice of the Town, because he desired to accomplish the Town's business; i.e. to fix the blockage in as efficient manner as possible. Knowing O'Connell's work experience and not Ferreira's, Mello made the decision that the best way to effectuate the Town's business was to call in O'Connell rather than Ferreira. Mello was not aware of Ferreira's prior work as a laborer who had experience with blockages. Although Mello's reliance upon his personal experience with employees led to the improper assignment, his actions were still within the scope of his employment thereby creating liability for the Town.

### **Overtime Bypass**

In overtime bypass situations where the contract requires the employer to equitably distribute overtime assignments, once the Union has demonstrated inequitable distribution, the burden falls on the employer to justify its actions. In the instant case, the collective bargaining agreement states that "overtime shall be equally and impartially distributed among personnel who ordinarily perform such related work in the normal course of their work week." When none of those employees are willing and/or able to perform the overtime assignment, the past practice of the Town is to call all employees on the overtime list in ascending order from the employee with the least amount of overtime to the employee who

has received the most amount of overtime. The employee must have worked the regular workweek immediately preceding the overtime opportunity.

On December 23, 2012, an overtime opportunity became available to repair a blockage. The work to be done was the type of work ordinarily performed by laborers. No laborers accepted the assignment, so based on past practice, the overtime should have been offered to the employee with the lowest amount of overtime. Ferreira was the individual with the least amount of overtime. Ferreira had worked on blockages before and had received zero hours of overtime as of December 23<sup>rd</sup>. This prior experience and lack of overtime hours required the Town to offer Ferreira the overtime opportunity prior to O'Connell who had worked 198 hours of overtime.

As O'Connell had received 198 hours of overtime more than Ferreira, the distribution of overtime to O'Connell instead of Ferreira was clearly inequitable. The Town's only justification for this assignment is that the known abilities of O'Connell outweighed the, at least, adequate abilities of Ferreira. As ability to perform the work better is not a reasonable justification for inequitable distribution, the Town has failed to show that it administered the overtime equalization provision in a reasonable manner. As such, the Town has violated the collective bargaining agreement in the assignment of overtime on December 23, 2013.

### **Remedy**

Ferreira's contract rights have been violated. The overtime opportunity that Ferreira should have performed was given to O'Connell. The only way to

make him whole is by paying him the amount of money that he would have earned had his contract rights been respected. Rotating Ferreira to the next available overtime opportunity does not work. There are few, if any, overtime slots for lab technicians, and the only time laborer overtime is available to Ferreira is if all laborers decline to work an overtime opportunity, which is also rare. Additionally, the overtime opportunity missed was for Sunday overtime at a rate of double time instead of time and one-half, which means that for Ferreira to be made whole an overtime opportunity on a Sunday, in which all the laborers declined to work, would have to become available. This is too narrow a window of opportunity to make Ferreira whole. Ferreira is entitled to a make whole remedy and not merely an opportunity to work future overtime hours that may never materialize. The Union requests that Ferreira be paid for four and a quarter hours of overtime at the rate of double pay.

## **THE EMPLOYER**

### **Arbitrability**

This matter is not arbitrable because it does not concern the interpretation of any language in the parties' bargaining agreement. The grievance goes beyond the express bargaining agreement language, and does not involve the "application or meaning or interpretation" of bargaining agreement provisions. The collective bargaining agreement limits the subject matter of grievances to "a dispute between the parties which specifically relates to the application or meaning or interpretation of a specific provision(s) of this Agreement." In this

case, the Union has only pointed to one specific provision that it claims was violated by the Town, Section 12.

Section 12 states that "overtime shall be equally and impartially distributed among personnel who ordinarily perform such related work in the normal course of their work week." This provision is inapplicable because, as conceded by Mello, he did not call in someone who ordinarily performs such related work. In the absence of a relevant contractual provision, there is nothing to grieve and consequently this matter is not arbitrable. In this case, it is clear that when there are no employees available who ordinarily perform such related work in the normal course of their work week, it is the past practice to have the person carrying the on-call phone contact the man with low hours on the board. A challenge to compliance with a departmental past practice is not a proper subject for grievance arbitration based on the plain language of the contract. The grievance is not arbitrable.

### **Merits**

The Union incorrectly argues that Mello was the Town's agent, when he called in O'Connell instead of Ferreira. However, Mello is a union member and president of the local. It is an essential principal of agency law that the agent can only act within the scope of his agency. A principal is not bound by the contracts made by his agent which are beyond the scope of his actual and apparent authority. In this instance, not only did the past practice require Mello to call the man with the low hours, but Gracia specifically instructed by him to do so. In

doing something different from his instructions, Mello was acting outside of the scope of his agency to the extent that it even existed in the first place.

### **Remedy**

Gracia testified that in the past, when it was found that someone was inadvertently denied overtime, the remedy was to provide that employee with an extra turn at overtime the next time it was available. To the extent that there is any violation at all in this matter, that should be the remedy, not an award of pay for work not performed.

For the foregoing reasons, the arbitrator should find that this matter is not arbitrable and dismiss the grievance. In the alternative, the arbitrator should find that the Town did not violate any provision of the collective bargaining agreement and should deny the relief sought by the Union.

### **OPINION**

The issues before me are:

1. Is this matter arbitrable?
2. Did the Town violate the parties' collective bargaining agreement in connection with overtime work on December 23, 2012?
3. If so, what shall be the remedy?

For the reasons stated below, I find this matter to be substantively non-arbitrable and the grievance is denied.

By agreement between the parties and the Arbitrator, 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 arbitrability would be resolved prior to any discussion on the merits in the final decision.

Section seven of the parties' collective bargaining agreement states that:

A grievance is a dispute between the parties which specifically relates to the application or meaning or interpretation of a specific provision(s) of this Agreement.

The Union argues that the present matter specifically relates to the interpretation and application of the overtime provisions of the collective bargaining agreement. Section twelve states that:

Overtime shall be equally and impartially distributed among personnel who ordinarily perform such related work in the normal course of their work week. An Employee must have worked during the regular work period immediately preceding the overtime period to be eligible for overtime except if all other employees refuse the overtime.

In the present matter, it is undisputed that on the evening of December 23, 2012, when Mello decided that he needed assistance clearing a blocked sewer line, he was unable to contact anyone in the WPCD who "ordinarily perform(s) such related work in the normal course of their work week." Unable to obtain anyone to work overtime as directed by the clear and unambiguous language of Section 12, Mello was directed by Gracia to follow the past practice of the WPCD and call the "low man on the board" and offer the overtime opportunity. Mello failed to follow the directive and instead of calling Ferreira, he called O'Connell who worked the overtime.

Unfortunately, for the Union and ultimately Ferreira, the issue raised in this grievance, concerns a violation of a past practice and not a violation of a "specific provision(s) of this Agreement." Ferreira, as a lab technician, does not "ordinarily

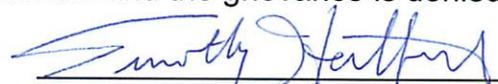
perform such related work in the normal course of [his] work week.” In the past as a laborer, Ferreira had experience with blocked sewers, but as a lab technician, it is no longer part of his ordinary duties. Once he became a lab technician, he was no longer covered by the explicit language of Section 12 when it related to overtime opportunities that involved laborer’s work duties. Section 12 of the parties’ collective bargaining agreement does not state what should happen when, as was the case on December 23, 2012, nobody who “ordinarily perform such related work in the normal course of their work week” is available for overtime. The collective bargaining agreement is silent on this issue. The parties have addressed the collective bargaining agreement’s silence on this issue by developing a past practice that calls for a rotating distribution of overtime that starts with the employee with the lowest amount of overtime as listed on the bulletin board in the WPCD. A violation of this practice however does not meet the strict definition of a grievance as defined in Section 7.

Section 7 clearly and unambiguously defines what a grievance is, and the issue in this case does not meet that definition. As such, I am left with no choice but to find the grievance non-arbitrable.

For all the reasons stated above, I find this matter to be substantively non-arbitrable and the grievance is denied.

#### **AWARD**

The grievance is substantively non-arbitrable and the grievance is denied.



Timothy Hatfield, Esq.

Arbitrator

June 23, 2014