

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of
CITY OF QUINCY

and

MASSACHUSETTS LABORERS'
DISTRICT COUNCIL

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Case No.: ARB-13-3199

Date Issued:

March 27, 2014

Arbitrator:

Nicholas Chalupa, Esq.

Appearances:

Michael J. Maccaro, Esq. - Representing City of Quincy

S.L. Romano - Representing Massachusetts Laborers'
District Council

The parties were provided 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 the following:

AWARD

The grievance is not procedurally arbitrable because the Union did not comply with the procedural steps of Article XXXII of the 2012-2015 collective bargaining agreement.


Nicholas Chalupa, Esq.
Arbitrator
March 27, 2014

INTRODUCTION

On October 9, 2013, the Massachusetts Laborers' District Council (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 Nicholas Chalupa, Esq., (Arbitrator) to act as a single neutral arbitrator with the full power of the Department. The undersigned arbitrator conducted a hearing at the Department's office in Boston on January 9, 2014. The Arbitrator directed the parties to submit post-hearing briefs by February 7, 2014. On January 29, 2014, the parties requested an extension of the deadline to file briefs to February 21, 2014. On February 21, 2014, the parties filed their briefs with the Department.

THE ISSUES

The parties did not agree on a stipulated issue.

The Union proposed:

Was the Appellant wrongfully denied his request for so called, "Comp Time" by the Commission of Public Works after it was authorized by the Director of Human Resources?"

The City proposed:

- 1) Is the Union's grievance arbitrable?
- 2) If so, did the City violate Article XII of the Agreement when it denied the grievant's request to use compensatory time ("comp time") in June 2013?
- 3) If so, what shall be the remedy?

Issue:

As the parties were unable to agree on a stipulated issue, I find the appropriate

issue to be:

- 1) Is the Union's grievance arbitrable?
- 2) If so, did the City violate Article XII of the Agreement when it denied the grievant's request to use compensatory time ("comp time") in June 2013?
- 3) If so, what shall be the remedy?

RELEVANT CONTRACT LANGUAGE

The parties' Agreement contains the following pertinent provisions:

Article XII: OVERTIME

Employees shall be paid overtime for all hours worked in excess of eight (8) worked in any one day or in excess of forty (40) hours worked in any one week. Employees may elect to receive compensatory time figured at time and one half for the hours worked in the week over forty (40) in lieu of overtime pay. Compensation time must be used within six (6) months of the date earned. No employee may accumulate more than one hundred twenty (120) hours of compensatory time. The use of compensatory time shall be subject to seventy-two (72) hours notice and Department Head Approval. Employees will not be required to take compensatory time off in lieu of payment.

Article XXXII: GRIEVANCE AND ARBITRATION PROCEDURE

For the purpose of this Agreement, the term "grievance" shall mean any difference or dispute between the City and the Union or between the City and any employee with respect to the interpretation, application, claim, or breach or violation of any of the specific provisions of this Agreement.

Any such grievance shall be settled in accordance with the following procedure:

- 1) An employee may and should attempt to resolve any dispute or difference with his or her immediate supervisor informally.

- 2) Failure to resolve the grievance with the immediate supervisor will result in the grievance being presented by the aggrieved employee and the Union Steward within three (3) working days – to the Superintendent or General Foreman, who will give his answer within three (3) working days thereafter. The grievance must specify the specific provision of the Agreement which has been violated and contain a concise statement of the facts upon which a grievance is based. Facts and provisions of the Agreement which are not asserted in writing at this Step shall not thereafter be asserted.
- 3) Failing to settle a grievance at Step 2 above, it shall be reduced to writing, if it has not already been, by the employee and presented to the Department Head, within three (3) working days, by the aggrieved employee and the Union representative, and the Department Head shall give his answer in writing within ten (10) working days.
- 4) If the grievance is not resolved at the Department Head level, it may be appealed by the Union, and only the Union, in writing to the Mayor or his designee within three (3) working days after the Step 3 decision is due. The Mayor or his designee shall meet with the Union representative and render a decision within ten (10) working days of presentation of the grievance at Step 3 above.
- 5) If no satisfactory resolution of the grievance is reached at Step 4 above, the Union may within forty-five (45) days after the decision is due, submit the matter to arbitration under the provisions of the American Arbitration Association, in accordance with its Voluntary Arbitration Rules.

The decision of the arbitrator shall be final and binding upon the parties. The cost of the arbitrator shall be borne equally by the City and the Union. The arbitrator shall not add to, subtract from, or alter any provisions of the agreement, nor may he make any decision in conflict with the laws of the Commonwealth of Massachusetts governing municipal employees.

THE FACTS

Since 2009, Stephen Kozlowski (Kozlowski) has held the position of Working Foreman/Special Heavy in the City's Department of Public Works (DPW). In June of 2013, Kozlowski worked the second shift. On June 7, 2013, Kozlowski requested to use some of his accrued comp time on June 13 and 14. Mark Vailpando (Vailpando),

Kozlowski's immediate supervisor, denied the request stating that "we do not pay time and a half for comp time" as the reason for his denial. On June 13, 2013, Kozlowski filed a Step 4 grievance directly to the City's Human Resources Department alleging that he had been wrongly denied the use of his accrued comp time. Kozlowski did not file the grievance at Steps 1, 2, or 3. On October 9, 2013, the Union filed a Step 5 request for arbitration alleging that the City is denying second shift employees' comp time requests more frequently than employees on other shifts.¹

POSITIONS OF THE PARTIES

The Union

I. Arbitrability

The Union did not address the issue of arbitrability in its brief. During the arbitration hearing, the Union argued that the former Director of Human Resources Stephen J. McGrath (McGrath), who passed away in August of 2013, told Joseph McArdle (McArdle), the Union's attorney handling Kozlowski's grievance, to bypass Step 1-3 and file the grievance directly to Step 4.

II. Merits

Article XII states that the Department Head must approve all requests to utilize comp time. Here, the Commissioner of the DPW Daniel Raymondi (Raymondi) learned that McGrath had resolved the Kozlowski grievance in conflict with the DPW's policy of not granting comp time request that generate overtime. From July 1, 2013, forward, Raymondi required McGrath to sign off on all requests to utilize comp time. Raymondi's attempt to pass the responsibility over comp time utilization requests clearly violates the

¹ The City agreed to waive the 45 day time limit contained in Article XXXII, Section 5 of the Agreement.

clear language of Article XII.

The Employer

I. Arbitrability

a. The Dispute is Not Arbitrable

The Employer contends that the dispute is not arbitrable because the Union did not follow the grievance procedure outlined in the Agreement. The Agreement between the parties unambiguously provides for a 5 step grievance process to settle “any difference or dispute between the City and the Union or between the City and any employee with respect to the interpretation, application, claim, or breach or violation of any of the specific provisions of [the] Agreement.”

It is undisputed that the Union filed the grievance at Step 4 without first completing Step 1-3. Clearly, it failed to follow the proper procedure for requesting arbitration. Since the arbitrator derives his authority solely from the Agreement, the Arbitrator has no authority to hear this dispute and should therefore deny the Union’s grievance.

b. Even if Arbitrable, the Arbitration Should be Limited to the Union’s Initial Statement of the Grievance

Step 2 of the grievance procedure provides: “Facts and provisions of the Agreement which are not asserted in writing at this Step shall not be thereafter asserted.” Here, the Union filed the grievance at Step 4, bypassing Step 2, alleging that the City violated the Agreement when it denied the use of comp time to Kozlowski. On October 9, 2013, the Union requested arbitration and stated the issue to be “2nd shift employees not being treated equally (comp time).” The Union changed its allegation from a single denial of one employee’s comp time request to a claim alleging unfair

treatment of the entire 2nd shift.

The Union should not be allowed to alter the substance of its grievance for the first time at the last step of the grievance procedure. If the Arbitrator decides to hear the Union's claim, such claim should be limited to the Union's allegation put forth at Step 4.

II. Merits

a. The City Did Not Violate the Agreement When it Denied the Grievant the Use of Comp Time

In 2012, the parties bargained for the comp time provision, Article XII, which provides for Department Head approval before an employee is allowed to use accrued comp time. Article XII unambiguously provides that the use of comp time is subject to the approval of the Department Head.

On June 7, 2013, Kozlowski requested to use comp time on June 13 and 14. Raymondi denied the request because it would cause the City to incur the additional cost of calling in a replacement at the overtime rate. It is the DPW's policy to deny requests to use comp time that would require the City to call in another worker for overtime.

The City did not violate the Agreement by denying Kozlowski's request. Article XII specifically and unambiguously allows it to do so.

b. The City does not treat employees differently when it evaluates requests for the use of comp time

Even if the Arbitrator decides to hear the Union's claim that all 2nd shift employees are treated unfairly, this claim is patently false. Raymondi assesses each request for the use of comp time in the same manner. Where the use of comp time will cost the City additional money, the request is denied. In any case, the Union has failed

to produce evidence to show any unequal treatment between the shifts.

c. The Grievance has no remedy

It is undisputed that Kozlowski lost none of his accumulated comp time. It is also undisputed that if an employee does not use accrued comp time within six months, the employee is paid for the time. The Arbitrator has no authority to require a Department Head to approve the use of comp time and cannot ignore the plain language of the agreement.

OPINION

At the outset, the City raised a question of procedural arbitrability, claiming that the Union failed to properly process the grievance through the steps of the contractual grievance-arbitration procedure.

The City contends that the grievance is not arbitrable because the Union bypassed Steps 1-3 and filed the grievance directly to Step 4. Article XXXII states:

Any such grievance shall be settled in accordance with the following procedure:

- 1) An employee may and should attempt to resolve any dispute or difference with his or her immediate supervisor informally.
- 2) Failure to resolve the grievance with the immediate supervisor will result in the grievance being presented by the aggrieved employee and the Union Steward within three (3) working days – to the Superintendent or General Foreman, who will give his answer within three (3) working days thereafter. The grievance must specify the specific provision of the Agreement which has been violated and contain a concise statement of the facts upon which a grievance is based. Facts and provisions of the Agreement which are not asserted in writing at this Step shall not thereafter be asserted.
- 3) Failing to settle a grievance at Step 2 above, it shall be reduced to writing, if it has not already been, by the employee and presented to the Department Head, within three (3) working days, by the aggrieved employee and the Union representative, and the Department Head shall give his answer in writing within ten (10) working days.

- 4) If the grievance is not resolved at the Department Head level, it may be appealed by the Union, and only the Union, in writing to the Mayor or his designee within three (3) working days after the Step 3 decision is due. The Mayor or his designee shall meet with the Union representative and render a decision within ten (10) working days of presentation of the grievance at Step 3 above.

A plain reading of Article XXXII shows that before moving to Step 4, both parties must follow Steps 1-3. The facts before me do not show that the Union ever filed its grievance at Steps 1-3.

I turn first to consider whether the Union and the City agreed to waive the contractual requirement that the Union file at Steps 1-3 before moving on to Step 4. The Union argues that McGrath, who is now deceased, and McArdle had an agreement to waive Step 1-3. McArdle testified that he and McGrath "settled" the matter and McGrath told him to send the grievance directly to him. However, because the Union presented nothing to bolster the hearsay evidence offered to establish a pivotal point to its case, I decline to credit the argument. Hearsay testimony is inherently unreliable. Additionally, the Union did not provide any evidence that McGrath had previously asked the Union to send grievances directly to him or that the parties had a past practice of deviating from the grievance-arbitration procedure as written.

Finally, I consider whether any unusual circumstances existed at the time to justify the Union's failure to file at Steps 1-3 of the grievance-arbitration procedure. Compare Glen Cove Center, 118 LA 1682 (Nadelbach, 2003) (justifying the union's failure to file at Step 3 when a nursing home administrator, who was the Step 3 hearing officer, resigned, and the employer did not fill the position) with Flexsteel Industries, 58 LA 170 (Sinieropi, 1972) (not condoning the failure to file at Step 3 even though the parties had developed a practice whereby the same individual was the Step 2 and 3

hearing officer for time study disputes). A review of the record reveals no unusual circumstances that could excuse bypassing Steps 1-3. Therefore, I conclude that the Union was not justified in filing the grievance at Step 4.

Because I have found that the Union failed to comply with the contractual grievance-arbitration procedure by not filing its grievance at Steps 1-3, and that no past practice or unusual circumstances existed to justify the Union's failure to so file, I conclude that the grievance is not procedurally arbitrable. The grievance is denied.

AWARD

The grievance is not procedurally arbitrable because the Union did not comply with the procedural steps of Article XXXII of the 2012-2015 collective bargaining agreement.



Nicholas Chalupa, Esq.
Arbitrator
March 27, 2014