

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS

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In the Matter of the Arbitration Between:

CITY OF WORCESTER

-and-

NAGE, LOCAL 495

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ARB-107-2009

Arbitrator:

Timothy Hatfield, Esq.

Appearances:

William Bagley, Esq.

- Representing City of Worcester

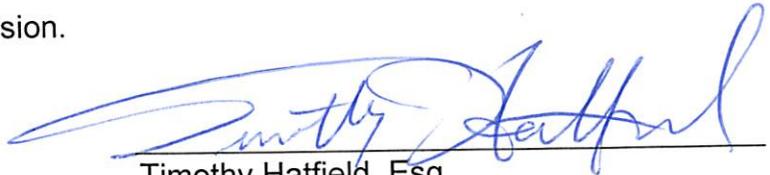
Timothy McGoldrick, Esq.

- 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 is not authorized to offer an opportunity out of turn in the event of an overtime skip and Robert Berenson shall be made whole for all lost overtime wages consistent with this decision.



Timothy Hatfield, Esq.  
Arbitrator  
December 1, 2015

### **INTRODUCTION**

NAGE, Local 495 (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. The undersigned Arbitrator conducted a hearing at the Worcester Department of Public Works on June 29, 2015.

The parties filed briefs on September 14, 2015.

### **THE ISSUES**

1. Whether the City is authorized to offer an opportunity out of turn in the event of an overtime skip?
2. If so, did Mr. Berenson accept an opportunity out of turn as a remedy for an overtime skip on February 3, 2009?
3. If not, what shall be the remedy?

### **RELEVANT CONTRACT LANGUAGE**

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

#### **ARTICLE 11 GRIEVANCE PROCEDURE (In Part)**

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 (In Part)**

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.

**FACTS**

The City of Worcester (City) and the Union are parties to a collective bargaining agreement that was in effect at all relevant times to this arbitration. The grievant, Robert Berenson (Berenson) was inadvertently skipped for an overtime opportunity on February 3, 2009. When Berenson became aware of the missed overtime opportunity, he brought it to the attention of his supervisor Richard Cavalieri (Cavalieri) and Assistant Director of Sewer Operations Joseph Buckley (Buckley). A review of the overtime roster determined that Berenson had been skipped. This was the first time Berenson had been skipped.

A few days later, Berenson was called into a meeting with Buckley and informed that an error had been made and he would be given the next overtime opportunity out of turn. This meeting lasted less than five minutes. The City argues that Berenson accepted the out of turn opportunity at this meeting, while the Union argues that no acceptance was given by Berenson.<sup>1</sup> After the meeting, Berenson discussed this issue with Union President Sean Maher (Maher) who suggested that Berenson decline the offered shift out of turn and file a grievance. Berenson declined the offer to work when he was called for his out of turn opportunity. Berenson gave no reason for declining the shift and never informed the City that he was declining its offer and was instead going to file a grievance.

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<sup>1</sup> Based on the reasoning of this decision that the City is not authorized to offer out of turn overtime opportunities, I need not reach a conclusion of whether Berenson accepted the City's offer.

The Union filed a grievance over the missed overtime opportunity, which was denied at all steps by the City and resulted in the instant arbitration.

### **POSITIONS OF THE PARTIES**

#### **THE UNION**

##### **Acceptance**

The City's baseless argument is that Berenson accepted their offer of the make-up shift, because, although he never actually accepted it in the Buckley meeting by any act, word deed or writing, he never actually rejected it either, so he was therefore "ok" with it and that equals acceptance. The City blindly ignores a number of undisputed facts in its long reach to this conclusion, including: 1) the City called Berenson for the shift and he expressly refused their offer; 2) the City acknowledged that they explained no other options to Berenson; 3) the City acknowledged that they did not expect or demand an answer from him at the meeting; 4) the City told Berenson he could explore other options after the meeting; 5) the City gave no timeline or deadline regarding their offer; and 6) the City was fully aware Berenson had a right to speak to the Union and file a grievance under the collective bargaining agreement.

The City ignores all of the above, and takes the fantastical position that once the City places the shift out of turn slip in the overtime roster, Berenson is deemed to have accepted the offer and they consider the matter closed to his satisfaction. In this process, the City distorts basic terms, such as offer and acceptance, concluding that if an employee doesn't affirmatively reject the proposal in the initial meeting, he must have accepted it. This, in spite of specific

grievance procedures and timelines in the collective bargaining agreement that the City is aware of, a party to, and does not dispute in this proceeding.

There is absolutely no evidence that Berenson expressly accepted any offer by the City. The only remotely plausible City claim is that there was implied acceptance. In the present case, however, there were no acts or words that would fairly support Berenson's non-existent alleged assent to the City's proposal.

The City's argument of acceptance also implies Berenson waived grievance protections of the collective bargaining agreement. Here, the overtime skip occurred on February 3<sup>rd</sup> and the meeting happened in the following days with the slip being placed in the overtime roster on February 6<sup>th</sup>. In that short time frame, there is no evidence that Berenson waived his rights under the collective bargaining agreement and accepted the City's proposal. In fact, the only evidence of affirmative conduct is Berenson refusing the make-up shift and filing a grievance.

#### Proper Remedy

In a recent decision involving multiple cases between the City and the Union, an Arbitrator ruled that the proper remedy for an Article 19 violation, involving an overtime skip, was for the City to pay the employee that applicable overtime rate for the missed shift. Arbitrator Bowler found:

"compensation is the appropriate remedy where an employee loses an opportunity to earn additional money on an overtime basis. I agree with the Union that a lost overtime opportunity cannot be duplicated by offering the next overtime."

The City's insistence on using a broken process for years has caused problems, confusion and litigation. There is no consequence to the City for violations of Article 19 if they can simply slide the missed employee's name in another spot on the list at some future time and conclude they have rectified the situation. As illustrated here, this haphazard system has promoted confusion on issues such as offer, acceptance, and waiver of rights under the collective bargaining agreement. Further, some members may accept and some may not, and this promotes further confusion and grievances, not only to the person skipped, but additional employees down the list, who were expecting to be called, but were not because of a shift out of turn.

For all of the foregoing reasons, the Union asserts that the grievance should be upheld and respectfully requests that Berenson be made whole for all losses.

#### **THE EMPLOYER**

There is no language in the parties' collective bargaining agreement that precludes the City from offering an opportunity out of turn as a remedy to resolve an overtime skip. In fact, there is no language in the collective bargaining agreement preventing the City from offering any form of remedy to resolve a grievance. To the contrary, it is clear from reading Article 11 that the objective of the parties is for grievances to be resolved informally and at the earliest possible step in the grievance procedure. Here, the City and Berenson reached an agreement to amicably resolve his grievance, and then Berenson refused to

honor his agreement because he was unable to work when the opportunity was offered to him.

Although the Union will argue that this case is governed by *Matter of City of Worcester and NAGE Local 496, ARB 13-3269, ARB 13-3270, and ARB 13-3016*, that is not the case. In those matters before Arbitrator Bowler, the grievants had each refused the opportunity out of turn when it was offered by the City. Here, Berenson accepted the opportunity out of turn and then pursued a grievance only after he was not able to work the opportunity when it was offered to him.

Assuming Arbitrator Bowler's opinion precludes the City from imposing an opportunity out of turn as the sole remedy, based on the then applicable language of the parties' collective bargaining agreement, her opinion clearly does not preclude grievances from being resolved in other manners that are agreeable to the parties.

#### Acceptance

Pursuant to Article 11, upon receipt of Berenson's complaint Buckley and Cavalieri conducted an investigation, reached a conclusion in favor of Berenson, and then met with him to acknowledge the error and dispose of the matter. When Buckley offered the opportunity out of turn to Berenson, as he had done with numerous employees both before and after this incident, Berenson accepted and the grievance was resolved.

Berenson acknowledged at the hearing that he did not, at any time prior to being offered the opportunity out of turn, inform Buckley or any other member of

management that he had changed his mind. Even when called and offered the opportunity, Berenson did not state any objection to the agreed upon resolution, but instead reported that he wasn't able to come in. The evidence demonstrates that Buckley and Berenson agreed to dispose of Berenson's grievance through an opportunity out of turn. The City honored its obligation pursuant to the agreement by offering an overtime opportunity. When he was unable to work, Berenson breached the agreement, arguing that he was entitled to monetary damages.

For the foregoing reasons, the City asks that the grievance be denied.

### OPINION

The issues before me are: 1. Whether the City is authorized to offer an opportunity out of turn in the event of an overtime skip? 2. If so, did Mr. Berenson accept an opportunity out of turn as a remedy for an overtime skip on February 3, 2009? 3. If not, what shall be the remedy?

The parties, in agreeing to the issue to be placed before me, were very specific in its crafting. First and foremost, I am asked whether the City is authorized to offer (overtime) opportunities out of turn. Only if I find that the City is so authorized can I move to the issue of Berenson and his actions or lack thereof in relation to the overtime skip on February 3rd. For the reasons stated below, I find that the City is not authorized to offer overtime opportunities out of turn as a remedy for overtime list infractions, and thus, I am precluded from answering the second and third questions that were contingently posed.

The issue of overtime opportunity mistakes, often called overtime skips, has been a long standing issue between the City and the Union. Arbitrations ranging as far back as 1994 spotlight the difficulties that the parties have had in managing overtime opportunities and properly remedying violations of Article 19 of the collective bargaining agreement. A review of those arbitration decisions, however, shows that since 1994, the parties have clearly and unambiguously been on notice that offering the next available overtime opportunity after an overtime skip is an inappropriate remedy to correct a contract violation. For example, Arbitrator John Hanson, in a January 21, 2004 decision, concerning six consolidated cases from 2002 and 2003 stated that:

I do not believe the Employer's remedy [of offering the next overtime opportunity] here is sufficient. While it is true that the contract contains specific language that overtime hours are not necessarily equalized among bargaining unit members, they have the right to expect when they may be called upon to work. They also have the right to expect that a system be in place, despite past errors, that not only guards against deliberate bypasses, but also against inadvertent errors. It is management's failure to make any attempt at having a procedure in place, despite past errors that is at issue here. Should I agree with the employer, I believe that I would do a disservice to the language and spirit of Article 19 of the collective bargaining agreement. In effect, I would be agreeing that equal opportunity was being offered, despite a haphazard process that clearly has not worked and is not working. I therefore find that the employer has violated Article 19 of the contract and that the Grievants shall receive overtime compensation for the hours that they should have worked.

Based on the parties' extensive procedural history with this issue,<sup>2</sup> I am unwilling and unable to rule that the City is authorized to make an offer to an individual employee that it is conclusively aware is an inappropriate remedy for a violation of Article 19 of the collective bargaining agreement. While the City may have a certain flexibility to offer the Union a remedy to a grievance that may be inconsistent with the collective bargaining agreement, it may not do so with an individual employee who has no standing to agree to a remedy that violates the contract. The Union, as representative of the bargaining unit as a whole, may decide, for any number of legitimate reasons, to accept an offered remedy from the City that it feels may be in the best interest of all of its unit members. That same offer however, cannot be made to an individual employee. Therefore, the City cannot remedy its overtime skip of Berenson by offering a proposal that would violate the collective bargaining agreement.

#### **REMEDY**

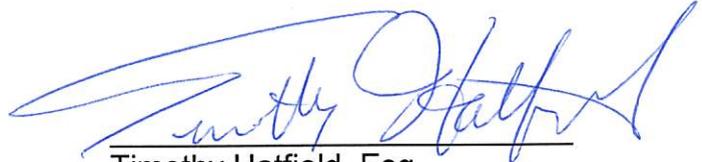
I order the City make Berenson whole for the overtime opportunity missed on February 3, 2009 by compensating him at the then applicable rate for the overtime hours lost. As the exact number of overtime hours lost was not presented by the parties at the arbitration hearing, I will retain jurisdiction for thirty days from the date of this decision while the parties work to agree on the proper number of hours owed Berenson.

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<sup>2</sup> I also take notice that after the date of this incident, but prior to the hearing and my ruling on this matter, the parties received a decision from Arbitrator Bowler in three consolidated cases finding that compensation, not the next available overtime opportunity, was the appropriate remedy for Article 19 violations.

**AWARD**

The City is not authorized to offer an opportunity out of turn in the event of an overtime skip and Robert Berenson shall be made whole for all lost overtime wages consistent with this decision.



Timothy Hatfield, Esq.  
Arbitrator  
December 1, 2015