

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of the Arbitration Between: *
*
CITY OF WORCESTER *
*
-and- *
*
NAGE, LOCAL 495 *

ARB-041-2011

Arbitrator:

Timothy Hatfield, Esq.

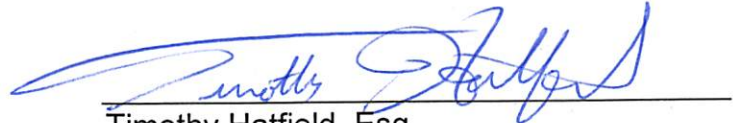
Appearances:

William Bagley, Esq. - Representing City of Worcester
John 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

Messrs. LeBeau and Sweeney were not entitled to an overtime opportunity on the afternoon of December 9, 2009, and the grievance is denied.



Timothy Hatfield, Esq.
Arbitrator
March 13, 2017

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 (DLR) appointed Timothy Hatfield, Esq. to act as a single neutral arbitrator with the full power of the DLR. The undersigned Arbitrator conducted a hearing at the Worcester Department of Public Works on June 26, 2014.

The parties filed briefs on February 7, 2017.

THE ISSUE

Whether Messrs. LeBeau and Sweeney were entitled to an overtime opportunity that arose on the afternoon of December 9, 2009? If so what shall the remedy be?

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 grievants, Joseph LeBeau (LeBeau) and Steve Sweeney (Sweeney) work in the Streets Division of the City's Department of Public Works (Department).

On December 8, 2009, the City began making calls for an overtime opportunity from 3:30 AM to 7:30 AM on December 9, 2009. The calls began with the name on the overtime roster which had a pin beside it. On this occasion, the pin was located beside the name of Paul Comptois (Comptois). The entire roster was called for the overtime opportunity, which left the pin again beside Comptois' name. Notwithstanding the entire roster being called for the early morning December 9th overtime opportunity, the pin would not have moved in any event as the shift being filled was four hours in length and did not reach the five hour minimum necessary for an overtime opportunity to qualify as an overtime shift. As such, when the Department decided it needed three trucks on the road for an overtime shift of eight hours during the afternoon of December 9th, the pin continued to reside beside Comptois.

The Department began making calls with Comptois, who declined. The Department's needs were fulfilled upon Daniel Foy's (Foy) acceptance of the overtime opportunity in the third truck. Neither LeBeau, nor Sweeney were reached on the overtime roster, and thus, were not called for the afternoon overtime opportunity.

The Union argues that LeBeau and Sweeney were in fact skipped for the overtime opportunity. It filed a grievance over the alleged missed overtime opportunity, which was denied at all steps by the City and resulted in the instant arbitration.

POSITIONS OF THE PARTIES**THE UNION**

LeBeau and Sweeney are employees of the City in the Streets Division of the Department. Eligibility for overtime is addressed in Article 19 of the parties' collective bargaining agreement.

On December 9, 2009, the entire Streets Department was called in for a 3:30 AM to 7:30 AM sanding operation. Sweeney and LeBeau then worked their regular shift from 7:30 AM to 4 PM. The City then determined that three employees would be extended for another overtime sanding operation from 4PM – 12 AM. Sweeney testified that he and LeBeau were intentionally skipped for this overtime opportunity. Sweeney testified that Director Peter Paldino (Paldino) told him that he had already received his overtime that morning.

For an overtime opportunity to count as an overtime shift, it must be at least five hours in length. The morning overtime opportunity on December 9th was only four hours and would not have qualified as an overtime shift. As such Sweeney and LeBeau should have been eligible for the eight hour shift in the afternoon.

An examination of the overtime roster shows that the last entry for December 5th is James Shannon. The next entry is Comptois on December 6th, and there is an entry for every name on the list through the last name, Harvey Joslin. There were no overtime opportunities on December 7th or 8th. The next entry for December 9th is the first name on the list, Teddy Siliados. The grievants' names appear on the overtime list before David Hultberg who actually

worked the shift. The City should have called the grievants for this overtime opportunity.

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

THE EMPLOYER

LeBeau and Sweeney were not skipped when an overtime opportunity arose during the afternoon of December 9, 2009. Rather, the City did not offer them the overtime opportunity because they were not reached based on their positions on the overtime roster, which the Department properly used to fulfill its needs.

Once the Department determines it needs an overtime opportunity, it uses the roster to offer the opportunity to employees, beginning with the name of the individual where the pin is located, and then calling employees in order of seniority based on the roster. In the instant case, the pin was located next to Comptois on December 8th, when the entire roster was called for an early morning shift on December 9th. Accordingly, the pin remained next to Comptois' name. Moreover, even if the entire roster had not been called, the pin would have remained on Comptois because, as Sweeney testified, the four hour opportunity would not have met the five hour minimum requirement to constitute a shift.

When the Department sought to fill three trucks during the afternoon of December 9th, Comptois was the first individual contacted, and he refused. On

the roster, Comptois is two positions below Sweeney and four positions below LeBeau. When the Department reached the bottom of the roster, it returned to the top of the roster and continued making calls. When Foy accepted the opportunity to fill the third truck, the Department's needs were fulfilled. Foy's position on the roster is eighteen positions above LeBeau and twenty positions above Sweeney.

Since the Union has failed to carry its burden of proving that LeBeau and Sweeney were skipped for an overtime opportunity on the afternoon of December 9th, the grievance should be denied.

OPINION

The issue before me is: Whether Messrs. LeBeau and Sweeney were entitled to an overtime opportunity that arose on the afternoon of December 9, 2009? If so what shall the remedy be?

For all the reasons stated below, Messrs. LeBeau and Sweeney were not entitled to an overtime opportunity on the afternoon of December 9, 2009 and the grievance is denied.

The parties agree on the fact that the overtime opportunity on the morning of December 9th, which was four hours in length, did not qualify as an overtime shift that would move the pin on the overtime roster. Where the parties disagree, is the location of the pin prior to the overtime opportunity for the afternoon of December 9th.

Sweeney testified that the pin resided on LeBeau and that the calls for the afternoon overtime opportunity should have begun with LeBeau and, in turn,

reached Sweeney, who is listed two slots below LeBeau. As such, when neither LeBeau nor Sweeney were called for the opportunity, they were skipped in violation of the collective bargaining agreement. The Union, in its post hearing brief, offers a different analysis of the overtime roster. The Union argues that the calls began with the first name on the list, Siliados, and concluded with Hultberg, who is below LeBeau and Sweeney on the overtime roster. Hultberg being called and accepting the overtime opportunity with no call to LeBeau or Sweeney is violation of the collective bargaining agreement according to the Union.

The City provided the overtime sheet used for the month of December and the two sheets used for the two overtime opportunities on December 9th. Those sheets support Paldino's testimony that the pin resided on Comptois for the overtime opportunity in the afternoon of December 9th and that the Department's needs were fulfilled upon Foy's acceptance of the overtime. Foy appears on the overtime roster well before LeBeau and Sweeney. The testimony of Paldino and the overtime records contradict the testimony of Sweeney and the Union's alternative argument in its post hearing brief, and provide sufficient evidence to support the City's arguments.

The City's proper use of the overtime roster on December 9th resulted in the overtime opportunity being filled prior to reaching LeBeau or Sweeney. The Department did not skip LeBeau and Sweeney in violation of the collective bargaining agreement, and the grievance is denied.

AWARD

Messrs. LeBeau and Sweeney were not entitled to an overtime opportunity on the afternoon of December 9, 2009 and the grievance is denied.



Timothy Hatfield, Esq.
Arbitrator
March 13, 2017