

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of the Arbitration Between: *

CITY OF WORCESTER *

-and- *

NAGE, LOCAL 495 *

ARB-106-2009

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

The grievance is not substantively arbitrable, and the grievance is denied.



Timothy Hatfield, Esq.
Arbitrator
July 14, 2016

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 26, 2014.

The parties filed briefs on February 2, 2016.

THE ISSUES

- 1) Is the matter arbitrable?
- 2) If so, was Mr. Sweeney entitled to be called for a one-hour overtime shift prior to his regular shifts on August 21, 2008 and August 26, 2008?
- 3) If so, what shall be the remedy?

RELEVANT CONTRACT LANGUAGE

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

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 by law.

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. On August 21, 2008 and August 26, 2008, the City's Department of Public Works (DPW) assigned paving crews to work from 6:30 AM until 2:45 PM. Sweeney, who was not assigned to a paving crew on either day, worked an assigned shift of 7:30 AM until 3:45 PM. There was no overtime assigned by the DPW on either August 21, 2008, or August 26, 2008.

The Union filed a grievance with the City alleging that Sweeney was bypassed for one hour of overtime on August 21, 2008 and August 26, 2008. The grievance was denied at all steps of the grievance procedure and resulted in the instant arbitration.

POSITIONS OF THE PARTIES

THE UNION

Arbitrability

The grievance is arbitrable. The collective bargaining agreement provides in Article 11 that a grievance shall be defined to be an actual dispute arising as a result of the application or interpretation of the express terms of the contract. This grievance regards a violation of Article 19, the assignment of overtime, which states that overtime should be awarded on an equal opportunity basis in accordance with an overtime roster. When opportunities are awarded to a junior man in seniority, there is no equality.

Merits

Sweeney was denied overtime on August 21, 2008 and August 29, 2008. On those dates, certain employees were offered overtime before the start of the day shift to do paving work, beginning at 6:30 AM. In the past, Sweeney has worked overtime doing paving work.

The overtime roster for August 2008 was introduced into evidence at the arbitration hearing, and there is no dispute that names listed below Sweeney on the seniority list were listed as working the paving crew on the days in question. Sweeney is senior to Justin Hyland and should have been awarded the overtime opportunity on both days.

Conclusion

The Union argues that the grievance be sustained and Sweeney be made whole for the lost overtime opportunities of August 21, 2008 and August 26, 2008.

THE EMPLOYERArbitrability

The instant matter is not substantively arbitrable because the City's actions are not subject to the grievance procedure set forth in the collective bargaining agreement.

The Union presented no evidence to establish that there is contract language that compels the City to assign Sweeney to the laboring assignment of his choosing. To the contrary, the evidence presented demonstrates that the City's decision to assign Sweeney to a patching crew on August 21, 2008 and a

trenching crew on August 26, 2008 is not arbitrable, because the assignment of employees is a right reserved to management pursuant to Article 4 of the parties' collective bargaining agreement. Additionally, to the extent that it attempts to do so, the Union also cannot grieve the fact that the paving crews commence their regular work day at 6:30 AM as opposed to 7:30 PM, as it is also a management right to schedule and enforce work hours.

Because the rights of management pursuant to Article 4 are not subject to the arbitration procedure established by Article 11, this matter should be dismissed.

Merits

The issue in this case is whether Sweeney was entitled to be called for a one-hour overtime shift prior to his regular shift on August 21, 2008 and August 26, 2008. The evidence clearly demonstrates that Sweeney is not entitled to be called in for a one-hour overtime shift because no such shift exists, nor was one offered on either date.

On each of the dates in question, Sweeney was assigned to begin his regular workday at 7:30 AM and work through 3:45 PM. The paving crews, to which Sweeney was not assigned, were scheduled to begin their work at 6:30 AM and work through 2:45 PM. This start time is standard when a full day of paving is assigned and, on each date in question, it was the regular start time for the employees assigned to the paving crews.

Since the Union has failed to carry its burden of proving that there was an overtime shift from 6:30 AM to 7:30 AM on either August 21, 2008 or August 26, 2008, the grievance should be denied.

OPINION

The issues before me are:

- 1) Is the matter arbitrable?
- 2) If so, was Mr. Sweeney entitled to be called for a one-hour overtime shift prior to his regular shifts on August 21, 2008 and August 26, 2008?
- 3) If so, what shall be the remedy?

Under an agreement between the Arbitrator and the parties, the issue of substantive arbitrability was briefed together with the merits of the grievance, with the understanding that the issue of substantive arbitrability would be addressed first, prior to any potential discussion on the merits of the grievance. For the reasons stated below, I find that the grievance is not substantively arbitrable, and the grievance is denied.

When Articles 4 and 11 of the collective bargaining agreement are read in conjunction, those provisions clearly and unequivocally exclude from the grievance and arbitration procedure "any matter involving the purported exercise of management rights." In this instance, the rights ultimately being questioned by the Union are the Employer's right to "assignment of employees," and the right to "schedule and enforce work hours," both rights enunciated in Article 4 of the collective bargaining agreement.

The Employer's right to decide whether or not to assign Sweeney to a paving crew with a start time of 6:30 AM, instead of 7:30 AM is not a subject that I, as Arbitrator, have the authority to rule on under the provisions of the parties' collective bargaining agreement. It is a right the parties have agreed to exclude from the grievance and arbitration procedure.

I am unpersuaded by the Union's argument that this case is, in fact, a dispute over the assignment of overtime under Article 19, because there was no DPW overtime offered on either August 21, 2008, or August 26, 2008. As such, Sweeney was not and could not have been bypassed for overtime.

For the reasons stated above, the grievance is not substantively arbitrable, and the grievance is denied.

AWARD

The grievance is not substantively arbitrable, and the grievance is denied.



Timothy Hatfield, Esq.

Arbitrator

July 14, 2016