

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of the Arbitration Between:

CITY OF FALL RIVER

-and-

AFSCME, COUNCIL 93, AFL-CIO

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ARB-12-1944

Arbitrator:

Nicholas Chalupa, Esq.

Appearances:

Gary P Howayeck, Esq. - Representing the City of Fall River

Philip Brown, Esq. - Representing AFSCME, Council 93, AFL-CIO

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 of Fall River violated Article VI of the collective bargaining agreement when it failed to pay Sandra Froment the summer rate for one hour worked daily between June 1 and October 31, 2012 and 2013. However, the City did not violate Article VI of the collective bargaining agreement by not offering Sandra Froment the opportunity to work summer hours. The City is hereby ordered to make Froment whole for unpaid wages from June 1 through October 31, 2012 and June 1 through October 31, 2013 and pay Froment the additional hour of pay at the summer rate for future 9:00 a.m. to 5:00 p.m. shifts worked between June 1 and October 31.



Nicholas Chalupa, Esq.

Arbitrator

February 3, 2014

INTRODUCTION

On June 19, 2012, AFSCME, Council 93, AFL-CIO (Union) filed a unilateral petition for Arbitration with the Department of Labor Relations (Department). Under the provisions of M.G.L., Chapter 23, Section 9P, the Department appointed Nicholas Chalupa, Esq., to act as a single neutral arbitrator with the full power of the Department.¹ The undersigned Arbitrator conducted a hearing in Boston, Massachusetts on December 31, 2013. The Union and the City of Fall River (City) filed their briefs on January 22, 2014.

THE ISSUES

The parties agreed to the following issues:

- I. Did the City violate the Collective Bargaining Agreement by denying Sandra Froment Summer Hours in the years 2012, 2013 and in the future?
- II. If so, what shall be the remedy?

RELEVANT CONTRACT LANGUAGE

The July 1, 2008 – June 30, 2011 collective bargaining agreement (CBA) between the Employer and the Union provides in pertinent part as follows:

Article VI: Hours of Work

4. In no event shall any employee ... who is hired after [March 12, 2012] be eligible for any Summer Hours. Said new hires will not be eligible regardless of any upgrade, transfer or promotion undertaken by such employee. This provision shall not be

¹ 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."

applicable to any current City of Fall River employee and does not apply to any upgrades, transfers or promotions of current employees.

The City will offer a maximum of forty (40) employees a voluntary opportunity to work 10:00 a.m. to 5:00 p.m. or forego their summer hours and work 9:00 a.m. – 5:00 p.m. from June 1 through October 31.

Depending on the Administration staffing requirements, the most senior employee(s) in a department will be offered this opportunity.

If there is no volunteer(s) in a department, the less senior employee(s) in that department will be required to work 9:00 – 5:00 shift on a temporary basis.

Employees who work from June 1 through October 31 will be paid for the additional hours worked at straight time based upon a thirty-five (35) hour work week.

No employee prior to the signing of this agreement shall be required to work until 5:00 p.m. on any given day in the absence of employees who volunteered or were involuntarily assigned to the 9:00 – 5:00 shift.

NEW HIRES; TRANSFERS

Personnel hired or transferred into a department after . . . October 16, 2006 will replace voluntary or involuntary employees in departments only if they choose to revert back to the 9:00 – 4:00 shift.

Hours of work for new hires shall be 9:00 a.m. to 5:00 p.m. or 10:00 a.m. to 5:00 p.m. from June 1st through October 31st, per discretion of the City upon hiring. Employees hired for the 9:00 a.m. to 5:00 p.m. shift shall be paid the extra hour.

THE FACTS

Stipulated Facts

1. Sandy Froment (Froment) was hired as a Bank Account Clerk (6A) with the City of Fall River on January 23, 2012.

2. Froment was informed during the hiring process that she would not receive summer hours.
3. Froment's standard work hours are 9:00 a.m. – 5:00 p.m.
4. Froment worked from 9:00 a.m. – 5:00 p.m. from June 1 through October 31 of 2012 and 2013.
5. Froment was paid her base salary over the dates referenced in stipulation 4.

Findings of Fact

In 2000, City employees were first given an option to work shorter “summer hours” from June 1 to October 31 and continue to receive a full week’s pay, or work normal hours and receive an additional hour of pay each day at the “summer rate.” The summer rate is calculated by taking the employee’s weekly base rate of pay and dividing by 30.

The CBA contains the “summer hours” benefit² and sets forth three sets of options for different categories of employees: employees hired before October 16, 2006, employees hired after October 16, 2006, but prior to March 12, 2012, and employees hired after March 12, 2012. Froment falls under the second category of employees. Employees in this group work either 9:00 a.m. – 5:00 p.m. or 10:00 a.m. – 5:00 p.m. from June 1 – October 31. The City has the discretion whether to offer employees in this group the opportunity to work summer hours.

The total number of employees working the 10:00 a.m. to 5:00 p.m. shift in the summer has changed year-to-year. From June 1, 2011 to October 31, 2011,

² The parties sometimes colloquially refer to both the shorter schedule and the extra pay aspects of the benefit as “Summer hours.”

41 employees worked summer hours, exceeding the 40 employee cap. From June 1, 2012 – October 31, 2012, 37 employees worked summer hours. From June 1, 2013 – October 31, 2013, 34 employees worked summer hours.

POSITIONS OF THE PARTIES

THE UNION

Article VI is unambiguous. Employees hired to work from 9:00 a.m. to 5:00 p.m. from June 1 to October 31 receive an additional hour of pay at the summer rate. The payment of the extra hour is not at the City's discretion or limited by the number of employees already working summer hours. The 40 employee cap refers to the number of employees offered the opportunity to work the shorter summer hours. This is clear because the 40 employee cap is contained in the paragraph describing the offer of shortened summer hours to employees hired before October 16, 2006, and it does not explain how employees who chose not to work summer hours are paid for the additional time.

The payment of the extra hour is discussed under the subheading "New Hires; Transfers" which applies to employees hired after October 16, 2006, and therefore, to Froment. In the earlier clause, the employee was offered the option as long as the cap wasn't reached. In the New Hires; Transfers clause, the employee doesn't have the option. The City has the discretion whether to offer a newly hired employee summer hours or require them to work 9:00 a.m. to 5:00 p.m. It specifically states that "[e]mployees hired for the 9:00 a.m. to 5:00 p.m. shift shall be paid the extra hour." Froment was hired to work the 9:00 a.m. to 5:00 p.m. shift and is entitled to back pay for the extra hour of pay at the summer

rate for all days worked from June 1, 2012 to October 31, 2012 and June 1, 2013 to October 31, 2013. Froment should also be paid the additional hour of pay at the summer rate for all days worked from June 1 to October 31 in future years.

The City's argument that Froment is not entitled to the extra hour of pay because more than 40 City employees were already working summer hours is without merit. Even if the 40 employee cap somehow applied to Froment's situation, the City has treated 40 as a soft cap. In many summers, the City had more than 40 employees working summer hours.

THE CITY

When the City hired Froment, it had reached its maximum requirement of 40 employees working summer hours, and therefore Froment was not offered the voluntary opportunity.

While the City has gratuitously offered some employees the summer benefit even when it reached the 40 employees cap, the City is not mandated to disregard the cap and offer summer hours to every employee. Gratuitously offering summer hours to some employees for unknown reasons in the past does not grant every employee hired by the City an automatic offering of summer hours – to do so would make the 40 employee cap meaningless.

OPINION

The issue before me is whether the City violated Article VI in the parties' CBA when it denied Froment the summer hours benefit in the 2012 and 2013, and whether she is entitled to the benefit going forward. For the reasons stated below, I find that the City violated Article VI of the CBA by failing to pay Froment

for an hour each day at the summer rate from June 1 to October 31, 2012 and 2013. I do not find that the City violated Article VI by not offering Froment the opportunity to work shortened hours from June 1 to October 31.

I find no ambiguity in Article VI of the parties' CBA. For employees hired after October 16, 2006, such as Froment, the City has the discretion to assign them to work a 10:00 a.m. to 5:00 p.m. shift or a 9:00 a.m. to 5:00 p.m. shift from June 1 to October 31. The City chose to assign Froment to the 9:00 a.m. to 5:00 p.m. shift. The Union appears to concede this point in its post-hearing brief by stating that the only issue is the "improper denial of wages" and does not argue that Froment should be allowed to work a shortened shift during the summer months. Accordingly, I deny the portion of the grievance alleging that the City was required to offer Froment the option to work Summer hours.

However, while the City has the discretion whether or not to assign new hires to a 10:00 a.m. to 5:00 p.m. or a 9:00 a.m. to 5:00 p.m. summer shift. The City has no discretion over Summer hour payment to employees who work from 9:00 a.m. to 5:00 p.m. The CBA states that "[e]mployees hired for the 9:00 a.m. to 5:00 p.m. shift shall be paid the extra hour." The City has not paid Froment for the extra hour.

The City's only argument in support of its decision not to pay Froment the extra hour of pay is that the City had reached the 40 employee cap. I find that the 40 employee cap does not apply to any employee hired after October 16, 2006. For employees hired before October 16, 2006, the CBA states that the City will offer up to 40 employees the voluntary opportunity to work a shortened summer

shift. After October 16, 2006, however, there is no mention of a 40 employee cap and the decision-making power shifts from the employee to the City. The CBA gives the City complete discretion whether or not to hire an employee to work a 10:00 a.m. to 5:00 p.m. shift or a 9:00 a.m. to 5:00 p.m. shift for the summer months.

In this case, the City exercised that discretion and assigned Froment to work a 9:00 a.m. to 5:00 p.m. shift from June 1 to October 31. The City based its decision on the number of employees working a shortened summer shift at that time, but that does not excuse the City from its obligation under the CBA to pay Froment for the extra hour.

For all the above reasons stated, I find that the City violated Article VI of the CBA by failing to pay Froment for the extra hour she worked daily from June 1 through October 31, 2012 and June 1, 2013 through October 31, 2013.

AWARD

The City of Fall River violated Article VI of the collective bargaining agreement when it failed to pay Sandra Froment the summer rate for one hour worked daily between June 1 and October 31, 2012 and 2013. However, the City did not violate Article VI of the collective bargaining agreement by not offering Sandra Froment the opportunity to work summer hours. The City is hereby ordered to make Froment whole for unpaid wages from June 1 through October 31, 2012 and June 1 through October 31, 2013 and pay Froment the additional hour of pay at the summer rate for future 9:00 a.m. to 5:00 p.m. shifts worked between June 1 and October 31.

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DEPARTMENT OF LABOR RELATIONS

A handwritten signature in black ink, appearing to read 'N. Chalupa', is written over a horizontal line.

NICHOLAS CHALUPA, ESQ.
ARBITRATOR