

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the matter of the arbitration between: *

CITY OF WORCESTER *

-and- *

NAGE, LOCAL 495 *

ARB-12-2135

Arbitrator:

Timothy Hatfield, Esq.

Appearances:

William Bagley, Esq.

- Representing City of Worcester

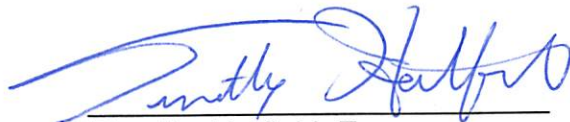
John Mackin, Jr., Esq.

- 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 City failed to call Joseph LeBeau for an overtime opportunity on December 12, 2010 in violation of Article 19 of the Collective Bargaining Agreement. The City is ordered to make LeBeau whole for his losses consistent with this arbitration award.



Timothy Hatfield, Esq.

Arbitrator

March 7, 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 (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 7, 2017.

THE ISSUE

Did the City fail to call Joseph LeBeau for an overtime opportunity on December 12, 2010? If so 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, Joseph LeBeau (LeBeau), works in the Streets Division of the City's Department of Public Works. Overtime opportunities for bargaining unit members employed in the Department of Public Works are governed by Article 19 of the Collective Bargaining Agreement.

On December 12, 2010, an overtime opportunity was available to members of the Streets Department, as the City needed to begin a sanding operation due to inclement weather. Two supervisors split the overtime list in half and began making calls to bargaining unit members for an overtime shift. LeBeau was not called, even though the overtime list used for that day indicated a notation of "ANS" beside his name. The "ANS" notation is used to indicate that a call was placed but not answered, and the call went to voicemail. This notation for LeBeau was incorrect as evidence produced during the arbitration hearing showed that the City failed to place a call to LeBeau's cell phone on the day in question. Based on the lack of a call from the City, LeBeau missed the overtime opportunity.

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

LeBeau is an employee of the City in the Streets Division of the Department of Public Works. Eligibility for overtime is addressed in Article 19 of the parties' collective bargaining agreement. LeBeau testified that because of bad weather, the Streets Division was called out to salt the City's streets.

LeBeau stated that he did not receive a call, even though he was anticipating one due to the weather.

LeBeau testified that he receives all calls for overtime on his T Mobile cell phone, and phone records confirm that no call was received from the City on the day in question. LeBeau also testified that he was told that the list was split in half with two individuals calling names on the list and nobody called him, which is a violation of Article 19.

Proper Remedy

In the Union's post hearing brief, a prior arbitration decision involving multiple cases between the City and the Union was attached. In that case, Arbitrator Bowler 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. The Union argues that this is also the proper remedy in this case.

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

THE EMPLOYER

The City did not skip LeBeau for an overtime opportunity on December 12, 2010. LeBeau was called, the call went to his voicemail, and the notation of "ANS" was entered on the overtime call sheet by the supervisor making the call. This notation was made for LeBeau and eight other employees called on December 12, 2010, and Le Beau is the only employee to file a grievance and

claim that he was not contacted. The Union has failed to carry its burden of proving that LeBeau was skipped for an overtime opportunity on December 12, 2010. For the foregoing reasons, the City asks that the grievance be denied.

OPINION

The issue before me is: Did the City fail to call Joseph LeBeau for an overtime opportunity on December 12, 2010? If so what shall be the remedy?

For all the reasons stated below, I find that the City failed to call Joseph LeBeau for an overtime opportunity on December 12, 2010 in violation of Article 19 of the Collective Bargaining Agreement. The City is ordered to make LeBeau whole for his losses consistent with this arbitration award.

Evidence produced during the arbitration hearing shows that an overtime list was used to make calls for a sanding operation on December 12, 2010. The list includes the phone number used to reach each employee, including LeBeau, for overtime opportunities. A notation beside LeBeau's name seems to indicate that: a call was made to him, it went unanswered and then went to voice mail. The Union, however, produced LeBeau's cell phone records that definitively show that no call was placed by the City to that phone on December 12, 2010. Based on the cell phone records, I find that LeBeau was not called for the overtime opportunity on December 12, 2010, and that the City's failure to call him resulted in a violation of Article 19 of the collective bargaining agreement.

REMEDY

I order the City make LeBeau whole for the overtime opportunity missed on December 12, 2010 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 that LeBeau is owed.

AWARD

The City failed to call Joseph LeBeau for an overtime opportunity on December 12, 2010 in violation of Article 19 of the Collective Bargaining Agreement. The City is ordered to make LeBeau whole for his losses consistent with this arbitration award.

A handwritten signature in blue ink, appearing to read "Timothy Hatfield", is written over a horizontal line.

Timothy Hatfield, Esq.
Arbitrator
March 7, 2017