

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-12-2137

Arbitrator:

Timothy Hatfield, Esq.

Appearances:

William Bagley, Esq. - Representing City of Worcester

Julia Slattery, 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 did not violate the collective bargaining agreement when it assigned eight Street Department employees to work overtime on December 22, 2009 and six Street Department employees to work overtime on December 23, 2009. The grievance is denied.

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Timothy Hatfield, Esq.  
Arbitrator  
March 11, 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 October 2, 2015.

The parties filed briefs on November 24, 2015.

### **THE ISSUE**

The Parties were unable to agree on a stipulated issue. The proposed issue before the arbitrator is:

#### **The Union proposed:**

Did the City violate the collective bargaining agreement when it assigned eight Street Department employees to work night overtime on December 22, 2009 and six Street Department employees to work night overtime on December 23, 2009? If so, what shall be the remedy?

#### **The City proposed:**

Did the City violate the parties' collective bargaining agreement when employees on the loader operator overtime list were called to work when management decided that loader operators were needed to clear snow on December 22, 2009 and December 23, 2009? If so, what shall the remedy be?

#### **Issue:**

As the parties were unable to agree on a stipulated issue, I find the appropriate issue to be:

Did the City violate the collective bargaining agreement when it assigned eight Street Department employees to work overtime on December 22, 2009 and six Street Department employees to work overtime on December 23, 2009? 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.

#### **ARTICLE 31 MOTOR EQUIPMENT OPERATOR (In Part)**

5. Motor Equipment Operator Grade III, shall be required to possess as a minimum qualification an unrestricted Massachusetts Driver's License, a Massachusetts Commercial License (CDL), and a Hoisting License ...

6. Employees classified as Motor Equipment Operator Grade I and Motor Equipment Grade III shall be available to operate all equipment for which they are qualified, regardless of the rated category. It is understood that "qualified" means that the employee has actually demonstrated his ability to operate equipment to the satisfaction of management ...

8. Each employee classified as Motor Equipment Operator Grade I and Motor Equipment Operator Grade III shall be qualified to earn a fixed earned rate by working 1,000 hours (including overtime) on rated equipment during a fiscal year period, July 1 to June 30. When a Motor Equipment Operator's fixed earned rate is higher than his primary rate, his fixed earned rate shall be used as the basis for calculating his next higher rate of compensation upon a promotion, and shall also be his rate of compensation for sick leave, personal leave, vacation leave and holiday leave. ...

10. Less senior employees classified as Motor Equipment Operator Grade I or III shall be allowed to train for a five day period out of each 60 working days on equipment within their classification as long as no senior operator is jeopardized in gaining his fixed earned rate. Employees shall accept training on pieces of equipment within their present classification as management directs. All training shall be directed by management and shall be as the administrative schedule allows. ...

17. The equipment classification system shall be rated and maintained and updated by the Department of Public Works. All city equipment requiring operation by a Motor Equipment Operator shall be listed and rated, and the list shall be posted in all departments with rated equipment. No employee shall be paid an MEO rate for operating any piece of equipment, which has not been approved by the Department of Public Works.

### **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 December 22, 2009, the City assigned eight Motor Equipment Operators (MEOs) from the Street Department to work overtime performing snow removal. On December 23, 2009, the City assigned six MEOs from the Street Department to work overtime performing snow removal. The overtime opportunities involved different types of equipment including loaders and trucks.

Since sometime in the 1970's, the Street Department has operated an overtime list for employees that designates certain employees as eligible to work on loaders. The City and the Union developed this system jointly. The exact number of employees designated as "loaders" has varied depending on the number of pieces of loader equipment that the City has in service. In 2009, eleven employees were so designated on the overtime list.

The overtime roster for December 2009 contained a complete list of MEOs in order of seniority, as well as a list of loaders in order of seniority, and tracked all

overtime by date and shift. At the top of the roster, was a hand written designation with a color coding for “truck,” “loader,” and “laborers”. The designation of “loader” was also written beside the name of eleven MEOs on the list. Separate color coded pins for truck, loader and laborer jobs were placed after the last person who worked that type of job on overtime. Calls for subsequent overtime opportunities for that type of job would begin there and continue by seniority until the opportunities were filled. On December 22 and 23, 2009, the Department began by filling its loader overtime opportunities first. Calls began at the loader specific pin and continued by seniority until filled. Next, the Department filled its remaining overtime opportunities, again starting at the name beside the appropriate pin and continuing by seniority until the opportunities were filled. MEOs with the loader designation were also eligible for non-loader overtime and were called if their slot on the seniority list was reached.

Kevin Leary (Leary), currently the treasurer of the Union, became a foreman in the Street Department in 2001. On multiple occasions, he called in employees for overtime using the overtime sheets and pin system described above. Leary testified that on the days in question, the City filled the loader opportunities first from the eleven loader designated employees and then filled the remaining overtime opportunities by rotation, using the appropriate pin location to begin calling the names on the overtime list. Leary also testified that the overtime lists, including the loader designations, were placed on a bulletin board in the Street Department for all employees to review.



The Union filed a grievance with the City on January 25, 2010, which was denied at all steps of the grievance procedure and resulted in the instant arbitration.

### **POSITIONS OF THE PARTIES**

#### **THE UNION**

The City violated the collective bargaining agreement when it assigned eight MEOs from the Street Department to work night overtime on December 22, 2009 and six MEOs from the Street Department to work night overtime on December 23, 2009.

The language of Article 19 governing overtime is clear that: "overtime will be awarded on an equal opportunity basis. Article 19 further states that: "it is the intent of this that each employee shall be afforded an equal number of opportunities to serve with no obligation on the City to equalize actual overtime."

The City's manipulation of a singular overtime roster of MEOs into two rosters clearly violates Article 19. The City handwrote "loader" next to eleven out of thirty-three MEO IIIs on the overtime roster. That designation indicated that those MEOs were qualified to operate the loader. The general foreman assigned to the garage made overtime calls and used separate pins for loader jobs and truck jobs. The MEO IIIs with a loader designation were called for both loader and truck overtime opportunities, while the remaining MEOs were only called for truck opportunities.

#### **Inequity of Two Overtime Lists**

The City called some MEOs for loader opportunities on December 22<sup>nd</sup> and December 23<sup>rd</sup>, and called other MEOs for loader opportunities on one day and truck opportunities on the other day. The remaining MEOs on the roster were not called on either date. While the language in Article 19 gives the department head some discretion with respect to determining whether an employee is capable of performing an overtime task, it does not give him the right to use two separate rosters. The result is an inequity among MEOs with respect to overtime opportunities. MEOs qualified for the loader were getting twice as many overtime opportunities as the other MEOs within their classification and they had a monopoly on the more lucrative loader overtime opportunity.

Sean Maher (Maher), President of Local 495 testified to the procedures that have been in place to effectuate the language of Article 19 in the twelve other divisions, which employ bargaining unit members. In his experience, a roster, as prescribed by the collective bargaining agreement, exists for overtime. Employees are grouped by classification and listed thereon and called in order of seniority. A pin is placed after the last person who worked an opportunity, and a call to fill the next opportunity for that classification starts at the pin. The language and the procedure for filling overtime by strict rotation according to seniority ensures that each employee within a classification is afforded an equal number of opportunities to serve.

The City does not dispute the use of a separate list for loaders, even describing it as the "loader list". The City contends that the use of a separate list for loader opportunities was put into place by an agreement between the City and

the Union. Labovites testified that the loader list had been in place since the 1970s, even though he himself has only worked for the City since 1984. The City also provided no specifics on who made the alleged agreement and no paperwork was ever submitted to support Labovites' assertion.

#### No Binding Past Practice

For a past practice to be binding on both parties, it must be: (1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. Here, the use of a separate list of MEOs for loader jobs was not unequivocal or made clear to the Union and bargaining unit employees. Leary testified that he became aware of a loader designation in 2001, when he took a supervisory position as foreman in the Street Department. Leary, however, was not an MEO and was not a steward for the Union. Although Leary became treasurer of the Union in 2007, he traditionally looked after the local's finances. Union President Maher was surprised to learn of the use of a separate loader list and pursued a grievance on the matter as soon as a bargaining unit member notified him about it.

The City's use of a separate roster was not readily ascertainable over a reasonable period of period of time as a fixed and established practice. Leary testified about what he was told to do on the few occasions when he was called upon to fill overtime during an emergency. The City did not present any witnesses or evidence which showed that the procedure was followed on a regular basis and

had become readily ascertainable as an established practice. The evidence clearly shows it was not an accepted practice by the Union.

Inequity of the Limited Number of MEOs Qualified on the Loader

The inequity among MEOs on the overtime roster is further evidenced by the City's capping of the number of MEOs qualified on the loader. MEO III's are qualified to use loaders in the eyes of the Commonwealth. Under Article 31 of the collective bargaining agreement, MEO IIIs are required to hold a hoisting license, which authorizes them to use hoisting equipment such as the loader. Section 7 of Article 31 states that all MEO I and IIIs shall be available to operate all equipment for which they are qualified, regardless of rated category. The Article defines qualified as "the employee has actually demonstrated his ability to operate equipment to the satisfaction of management." It is undisputed that the then Director of the Street Department, Peter Paldino (Paldino) was the person responsible for qualifying MEOs on the loader. In his testimony at the hearing, Leary stated that he never saw Paldino qualifying MEOs on the loader. In fact, Labovites testified that there was a cap on the number of MEOs, who could be qualified on the loader, which was tied to the number of loaders in the fleet. Thus, MEOs with the proper license were not being allowed to show their qualifications to operate the loader and were being denied increased compensation. Leary further testified that he never saw MEOs training on the loader for a five day period. Maher testified that he had fielded complaints from MEOs who had requested training and didn't receive it.

For all the foregoing reasons, the Union asserts that the arbitrator should uphold the grievance and require the City to compensate MEOs Nicholas Alexanian, Scott Lucier and Craig Kobel for eight hours overtime for December 22, 2009 and to compensate Paul DiBaro, Manuel Herrera and Brad Hylton for eight hours overtime for December 23, 2009. The Union also requests that the arbitrator order the City to utilize one overtime list for MEOs and to provide training to MEOs on rated equipment for five days out of sixty days, as referenced in the collective bargaining agreement.

### **THE EMPLOYER**

Here, the Union seeks an order from the DLR invalidating an overtime procedure that has been in place for at least thirty years and that was established with the Union's cooperation and approval.

Under Article 4 of the collective bargaining agreement, management has the right to make: "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." Additionally, Article 4 reserves to management, "the making, implementation, amendment, and enforcement of such rules, regulations, operating and administrative procedures from time to time as the City deems necessary." In the 1970's, in cooperation with the Union, the City established the classification of "loader" and, over the years that followed, exercised its rightful discretion to amend the loader list to increase its size in correlation with an increase in the size of its fleet of loader equipment.

As Labovites testified, and the Union did not dispute, the loader list has been in existence for at least three decades and was established with the knowledge and consent of the Union. The determination, as to the number of individuals permitted to be on the loader list, and the determination, as to the individuals who are qualified to be on the loader list, have at all times been within the sole discretion of the City. The number of individuals, who are on the loader list, has at all times been dependent on the number of loaders in the City's fleet, which the City also has exclusively determined based on its operational needs.

Leary, in his testimony confirmed that on December 22, 2009, and December 23, 2009, the City followed the same procedure to offer overtime opportunities to individuals classified as loaders, as has been applied since Leary joined the Streets Division in 2001. Once the City determined that it had a need for loader equipment, it utilized the overtime roster and called employees, who were designated as loader operators, starting with the name beside the pin associated with the loader operators, and offered the overtime opportunities to the loader operators until the City's need was filled. There was no deviation in the practice used.

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

### **OPINION**

The issue before me is: Did the City violate the collective bargaining agreement when it assigned eight Street Department employees to work overtime on December 22, 2009 and six Street Department employees to work overtime on December 23, 2009? If so, what shall be the remedy?

For the reasons stated below, the City did not violate the collective bargaining agreement when it assigned eight Street Department employees to work overtime on December 22, 2009 and six Street Department employees to work overtime on December 23, 2009, and the grievance is denied.

The manner in which the City assigned overtime on December 22 and 23, 2009 is not a violation of the collective bargaining agreement. The procedure used was agreed to by the parties, has remained unchanged for years, and was readily ascertainable to both bargaining unit members being called for overtime and bargaining unit members making the overtime calls.

The evidence submitted at the hearing by the City, via the testimony of Labovites, was that the current manner in which the Street Department calls employees in for overtime has been in place since the 1970's and is a product of an agreement between the City and the Union. Current Union president Maher claims he was unaware of the system used by the Department until he received the employee complaint which resulted in the present grievance. However, it is undisputed that Union Treasurer Leary has been aware of the procedure since his elevation to Street Department foreman in 2001. On multiple occasions, Leary has called employees from the overtime list to fill overtime opportunities.

Leary repeatedly followed the system of filling loader overtime opportunities first by calling the names on the overtime list, who were designated as loaders. Leary began at the loader specific pin and moved down by seniority, prior to filling the remaining overtime needs using the other color coded pins. It is also undisputed that the overtime rosters, including the loader designation for the

eleven employees, has been posted on the department bulletin board for all members to review. The Union's argument that it was unaware of how the City filled its overtime opportunities, including the use of eleven specific employees with a loader designation, is unpersuasive.

Furthermore, there is nothing in the collective bargaining agreement that prohibits the City from creating a list of employees who have demonstrated a proficiency working on loader equipment and designating them as such for the purposes of overtime on the loader equipment. The City is not obligated by the collective bargaining agreement to offer loader overtime to individuals, who have not demonstrated the ability to operate the loader. Nor, does the collective bargaining agreement restrict the City from capping the loader list at any number that it deems appropriate. At the time of the grievance the number was eleven but the number has fluctuated as the City exercised its prerogative to determine the number of loader operators that were needed.

The Union, at both the hearing and in its post hearing brief, argued that the City was in violation of Article 31 of the collective bargaining agreement for allegedly failing to train MEOs I and III on equipment within their classification for a five-day period out of sixty working days. The City's alleged violation of this provision is not properly before me in this arbitration. The Union did not raise this alleged violation in its proposed issue submitted before the hearing, nor is there any evidence of this issue being raised during the grievance procedure. I will note for the record that, even if this issue was properly before me, the Union provided no evidence that it had ever requested such training or that it was unreasonably



denied by the City. Additionally, there was no evidence that the Union ever filed a grievance on the matter. The only evidence presented was that Union president Maher had at some unspecified point received a complaint from a member about the lack of training opportunities. No evidence was submitted that any further action was taken by the Union. Ultimately, however, even if a violation of Article 31 had been established, it would have no bearing on the City's ability to designate certain employees as loader-eligible and the manner in which it assigns both loader and non-loader overtime.

### **AWARD**

The City did not violate the collective bargaining agreement when it assigned eight Street Department employees to work overtime on December 22, 2009 and six Street Department employees to work overtime on December 23, 2009. The grievance is denied.

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Timothy Hatfield, Esq.  
Arbitrator  
March 11, 2016