

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of the Arbitration Between: *

CITY OF WORCESTER *

-and- *

NAGE, LOCAL 495 *

ARB-13-3268

Arbitrator:

Timothy Hatfield, Esq.

Appearances:

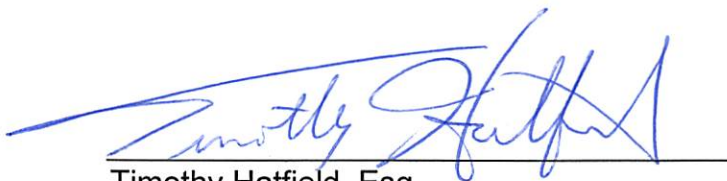
William Bagley, Esq. - Representing City of Worcester

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 October 15, 2014.

The parties filed briefs on February 2, 2016.

THE ISSUES

- 1) Is the grievance arbitrable?
- 2) If so, did the City of Worcester violate the terms of the collective bargaining agreement when it did not offer an overtime assignment to Kenneth Webster on March 26, 2012 when a laborer was assigned?
- 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 March 26, 2012, the City's Department of Public Works (DPW) was called upon in an emergency situation to fix a water main break in the June Street area of the City.

In assessing the situation, DPW foreman David Provost (Provost) spoke to a number of individuals to assess their willingness to work overtime at the June Street site should it be required. Two of the individuals asked were Kenneth Webster (Webster), and Matthew Harrington (Harrington). Neither Webster nor Harrington had been assigned to the June Street site on the day in question. Prior to 4:00 PM, DPW management determined that it would not be necessary to send a second crew to the incident. Instead, they determined that only one Laborer would be necessary. Only Harrington, a laborer, was assigned. Webster, a working foreman, was not assigned an overtime opportunity.

The Union filed a grievance with the City on March 27, 2012, which 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.

Merits

Article 19 states that "overtime will be awarded on an equal opportunity basis." It further states that: "to be eligible for overtime services employees must, in the opinion of their department head, be capable of performing the particular overtime task." Webster has been involved in hundreds of "shutdowns," and stated, when asked, that he was available for overtime on March 26, 2012. It is clear from his testimony that, in his mind, an offer of overtime was made by his foreman to which an acceptance was made.

Webster made his way back to the DPW yard in anticipation of working the overtime shift, only to discover that someone else was being sent in his place. To offer overtime to Webster, who accepts and acts in expectation and reliance on the offer, only to be replaced arbitrarily by another person, violates the spirit and language and intent of the collective bargaining agreement. This overtime cannot be considered to have been awarded on an equal opportunity basis.

Conclusion

The Union argues that the grievance be sustained, and Webster be made whole and compensated for the overtime opportunity of March 26, 2012.

THE EMPLOYERArbitrability

The instant matter is not substantively arbitrable because the City's actions are not subject to submission to the grievance procedure as 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 a working foreman to replace a laborer on an emergency overtime job site. To the contrary, the evidence presented demonstrates that the City's decision to assign a laborer to replace a laborer is not arbitrable because the parties' collective bargaining agreement excludes the purported exercise of management rights or any matter reserved to the discretion of the City from the grievance procedure.

In this instance, the Union's argument that the City was obligated to send Webster to the June Street site flies in the face of Article 4, which, by its plain language, provides that it is within the right of management to determine the classification of employees who will be called for work at times other than their regularly scheduled hours.

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

Merits

On March 26, 2012, the City faced with an emergency situation that required the DPW management team to assess its needs and options to address it. As part of that process, management needed to determine a pool of employees available to address the emergency situation as it unfolded. Webster, as well as a number of other employees, were approached by Provost and merely asked if they would be available to work after 4:00 P.M. on the June Street site. After assessing the emergency situation, management concluded that it only needed to replace one laborer who could not stay beyond 4:00 P.M. To achieve that objective, Harrington, a laborer, was assigned. The Union cannot point to any language in the collective bargaining agreement that required the City to replace a laborer with a working foreman.

Finally, the Union makes the argument that Webster should be paid for the overtime shift, because he was asked if he was available to work. Again, the Union can point to no language that required the City to pay an employee just because he was asked if he was available to work overtime in the future. In the instant case, that logic would dictate that at least three employees, who did not work, would have to be paid because they were asked if they were available, but only one employee actually was assigned the overtime shift. The collective bargaining agreement does not provide for such an illogical result.

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

OPINION

The issues before me are:

- 1) Is the grievance arbitrable?
- 2) If so, did the City of Worcester violate the terms of the collective bargaining agreement when it did not offer an overtime assignment to Kenneth Webster on March 26, 2012 when a laborer was assigned?
- 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.

Article 11 of the parties' collective bargaining agreement clearly and unequivocally excludes from the grievance and arbitration procedure "any matter involving the purported exercise of management rights." In this instance, the right being questioned by the Union is the Employer's right to "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," which is enunciated in Article 4 of the collective bargaining agreement.

When Articles 4 and 11 are read together, the Employer's right to decide whether or not to assign a working foreman to an emergency overtime shift at the June Street site on March 26, 2012 is not a subject that I, as Arbitrator, have the authority over which to rule. 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 a dispute over the assignment of overtime under Article 19, because, in the stipulated issue, the Union acknowledges that Webster was not offered an overtime shift on March 26, 2012, but a laborer was. In agreeing to frame the issue before me in the manner it did, the parties squarely agreed to place the focus of the dispute on the City's right to assign a laborer instead of a working foreman, a right the parties have agreed to exclude from the grievance and arbitration procedure.

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