COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

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In the Matter of the Arbitration Between: *

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CITY OF WORCESTER *

*

-and- * ARB-14-3760

*

NAGE, LOCAL 495 *

****

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 substantively arbitrable, but the City did not violate the collective bargaining agreement when Ms. Coles was not called for overtime opportunities on November 25, 2013, November 27, 2013, and November 30, 2013. The grievance is denied.

Timothy Hatfield, Esq.
Arbitrator
September 7, 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 Police Department on July 23, 2014.

The parties filed briefs on February 2, 2016.

THE ISSUES

1) Is the matter arbitrable?
2) Did the City violate the collective bargaining agreement when Ms. Coles was not called for overtime opportunities on November 25, 2013, November 27, 2013, and November 30, 2013?
3) If so, what shall the remedy be?

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 15 SICK LEAVE (In Part)

(b) **...** the accumulation ... at the rate of one and one-fourth (1¼) credit per month. ...

(e) That the administration of sick leave will be subject to such regulations as may be deemed necessary by the City Manager to effectuate the provisions of the allowance.

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 23 STABILITY OF AGREEMENT

1. No agreement, understanding, alteration or variation of this agreement's terms and provisions herein contained shall bind the parties unless made and executed in writing by the parties hereto.

2. The failure of the City or the Union to insist in any one or more incidents, upon performance of any of the terms or conditions of the agreement, shall not be considered as a waiver or relinquishment of the right of the City or Union to future performance of any such term or condition, and the obligations of the City and the Union to such future performance shall continue in full force and effect.

RELEVANT ADMINISTRATIVE DIRECTIVES

Emergency Communications Department

Administrative Directive #09-001

January 1, 2009

To: All Personnel
From: David W. Clemons, Director
Re: Overtime

Effective at 0700 hrs on January 1, 2009 any employee calling in sick will be ineligible for any overtime until they returned (sic) to work and have worked a regular shift.

Emergency Communications Department

Administrative Directive #10-001 (In Part)

May 5, 2010

To: All Personnel
From: David W. Clemons, Director
Re: Sick Leave

> Sick Leave has two basic purposes. It secures an employee's income during periods of illness or injury and it protects the health of the employee and co-workers. ...
>
> The City provides sick leave for absences from work for short term personal illness or injury, when the employee has a medical, dental or eye appointment/examination for which arrangements cannot be made outside of working hours ...

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 Jackie Coles (Coles) is a dispatcher, employed in the City's Emergency Communications Department (Department).

On January 1, 2009, David Clemons (Clemons), the then Director of the Emergency Communications Department, issued Administrative Directive #09-001 (2009 Directive) stating that:

> Effective at 0700 hrs on January 1, 2009 any employee calling in sick will be ineligible for any overtime until they returned (sic) to work and have worked a regular shift.

Since its inception, the Department has uniformly enforced this overtime restriction[1] for both employees who call in sick for an entire shift, as well as employees utilizing sick leave for only a portion of their shift. Prior to 2014, the Union has never filed a grievance over the overtime eligibility restriction for employees utilizing sick leave.

On November 23, 2013, Coles called in sick for her shift, utilizing her available sick leave. Beginning on November 24, 2013, Coles was on vacation until December 1, 2013. During Coles' vacation, overtime opportunities became

[1] Except for the shift worked by Johnson on November 29, 2013, which is detailed below.

available on November 25, 2013, November 27, 2013, and November 30, 2013. The City following the 2009 Directive which required an employee who utilizes sick leave to return to work a regular shift before being eligible to work overtime, did not call Coles for any of the shifts.

On December 1, 2013, upon her return to work, Coles noted that Carrie Johnson (Johnson), another Communications Department employee, had worked overtime on November 29, 2013, after utilizing sick leave on November 24, 2013, and had not worked a regular shift in the interim as required by the 2009 Directive.

Acting Director Richard Fiske (Fiske) testified at the arbitration hearing that Johnson had in fact worked the overtime shift in question, without working a regular shift prior, but that it was a mistake by the Department and not a change in policy, and was, in fact, the only instance of the 2009 Directive not being followed since its inception. No other information to the contrary was provided at the arbitration hearing.

The Union filed a grievance with the City alleging that the failure to call Coles for the overtime opportunities was improper and a violation of the collective bargaining agreement. 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 concerns 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. Because the City denied Coles the overtime opportunities based on an invalid Administrative Directive, its actions constituted a contractual violation.

Merits

On November 23, 2013, Coles called in sick for her first shift of the work week. The following day, Coles began a vacation that lasted until December 1, 2013. Coles testified that she had worked overtime while on vacation leave in the past as long as the overtime shift did not conflict with her regularly scheduled shift on that particular day. As such, she testified that she should have been offered the 3 PM – 11 PM shift on November 25, 2013, the 11 PM – 7 AM shift on November 27, 2013, and the 3 PM – 11 PM shift on November 30, 2013.

When Coles returned to work, a check of the roster revealed that Johnson had worked overtime on November 29, 2013, after utilizing sick leave on November 24, 2013, and before returning to work a regular shift prior to the overtime shift on November 29, 2013. The City's witness Fiske called this a

mistake. Additionally, on cross examination, Fiske agreed that there is no language in Article 19 of the collective bargaining agreement, or in Administrative Directive #10-001, which requires an employee who has been out sick to work a regular shift before they are eligible for overtime.

Furthermore, Article 23 (Stability of Agreement) of the collective bargaining agreement states that "no agreement, understanding, alteration, or variation of this agreement's terms and provisions herein contained shall bind the parties unless made and executed in writing by the parties hereto." There was no evidence presented that the 2009 Directive was made and executed as called for in Article 23 of the collective bargaining agreement. Thus, the terms of the 2009 Directive do not govern whether Coles was eligible to receive the overtime opportunities.

Conclusion

The Union argues that the grievance should be sustained and that Coles be made whole for the lost overtime opportunities on November 25, 2013, November 27, 2013, and November 30, 2013.

THE EMPLOYER

Arbitrability

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 showing that the collective bargaining agreement compelled that the City offer Coles overtime on November 25, 2013,

November 27, 2013, or November 30, 2013. To the contrary, the evidence demonstrates that the City's decision to refrain from offering Coles overtime on those dates is not arbitrable, because the "making, implementation, amendment, and enforcement of such rules and regulations, operating and administrative procedures" is a right reserved to management pursuant to Article 4 of the parties' collective bargaining agreement, which also excludes the exercise of such rights from the grievance procedure.

Pursuant to Article 4, the City implemented rules governing eligibility for overtime when employees utilize sick leave to ensure the efficient administration of the overtime roster. Because the City's Article 4 rights are not subject to the arbitration procedure as described in Article 11, this case should be dismissed.

Merits

The parties do not dispute that the 2009 Directive which requires employees to return to work from an illness or injury prior to being offered an overtime opportunity, has been in place since January 1, 2009. Also, neither Coles nor the Union asserted that this policy had been enforced sporadically. To the contrary, it is clear that this policy was uniformly enforced, with the exception of the one example offered by the Union, which was a mistake, not a change in policy.

On November 23, 2013, Coles called in sick to work and did not return to work until after her vacation on December 1, 2013. Pursuant to the longstanding and uniformly enforced 2009 Directive, Coles was not eligible to work overtime until she returned to work and worked a regular shift.

Because the Union has failed to carry its burden of showing that the City was obligated to offer Coles the overtime opportunities during the timeframe that she was absent from work after utilizing sick leave, the grievance should be denied.

OPINION

The issues before me are:

1) Is the matter arbitrable?
2) Did the City violate the collective bargaining agreement when Ms. Coles was not called for overtime opportunities on November 25, 2013, November 27, 2013, and November 30, 2013?
3) If so, what shall the remedy be?

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 substantively arbitrable, but that the City did not violate the collective bargaining agreement when it did not call Coles for overtime opportunities on November 25, 2013, November 27, 2013, and November 30, 2013, and the grievance is denied.

Substantive Arbitrability

The Union argues that this matter is substantively arbitrable because it deals with the potential violation of Article 19 of the collective bargaining agreement concerning the assignment of overtime, and Article 23 of the

collective bargaining agreement concerning the stability of the agreement. To the extent that the Union's arguments present a question of the interpretation of the interplay between Article 19, Article 23, and the inherent rights that the City has reserved upon itself, I find the grievance to be substantively arbitrable.

Merits

Having found the grievance substantively arbitrable, I now turn to the factual dispute raised by the grievance. In its argument, the grievant and the Union are asking the arbitrator to find that the City's failure to call the grievant for three overtime opportunities while she was on vacation was a violation of the collective bargaining agreement's requirement that overtime be offered on an equal opportunity basis. Alternately, the grievant and the Union are asking the arbitrator to find that the 2009 Directive, which denies overtime opportunities to employees who are on sick leave, is invalid and a violation of Article 23 of the collective bargaining agreement.

The unrebutted testimony presented at the arbitration hearing was that the 2009 Directive has been in effect since January 1, 2009, and the Union has never challenged the 2009 Directive's restriction of overtime opportunities. Here, Coles utilized sick leave on November 23, 2013 and then utilized vacation leave for the remainder of her work week before returning to work on December 1, 2013. During her vacation leave, three overtime opportunities became available, but Coles was not offered them. The City cited the long-standing 2009 Directive's restriction as the reason she was not offered the overtime.

Previously in ARB-14-3759 between the parties, I found the 2009 Directive to be a permissible restriction that does not violate the collective bargaining agreement. Furthermore, Article 23 (Stability of Agreement) references the requirement that amendments to the collective bargaining agreement need to be made and executed in writing by the parties. However, the Union has failed to establish here that the 2009 Directive is an amendment to the collective bargaining agreement for which the provisions of Article 23 would need to be satisfied.

Additionally, I am unpersuaded by the Union's argument that because the Department mistakenly offered an overtime shift to an employee who had utilized sick leave and had not returned to work a regular shift, Coles should have been offered the three shifts in question, and the 2009 Directive must be found to be invalid. The City presented unrebutted testimony that since its inception, the 2009 Directive has been uniformly enforced, except for the one example cited by the Union, which the City admits was a mistake. The City's failure to correctly follow the 2009 Directive on one occasion does not invalidate the Directive, nor does it require the Department to offer the overtime shifts in question to Coles in violation of that Directive.

For the reasons stated above, the grievance, while substantively arbitrable, is denied.

AWARD

The grievance is substantively arbitrable, but the City did not violate the collective bargaining agreement when Ms. Coles was not called for overtime

opportunities on November 25, 2013, November 27, 2013, and November 30, 2013. The grievance is denied.

Timothy Hatfield, Esq.
Arbitrator
September 7, 2016