

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of the Arbitration Between: *

TOWN OF MILLBURY *

-and- *

MILLBURY POLICE ASSOCIATION *

MCOP, LOCAL 128 *

ARB-15-4265

Arbitrator:

Timothy Hatfield, Esq.

Appearances:

Sharon P. Siegel, Esq. - Representing Town of Millbury

Leigh Panettiere, Esq. - Representing Millbury Police

Jennifer N. Smith, Esq. Association, MCOP, Local 128

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 procedurally arbitrable. The Town has violated the collective bargaining agreement by changing from weekly to biweekly payroll. The Town is ordered to revert to a weekly payroll system consistent with this decision.

Timothy Hatfield, Esq.
Arbitrator
June 14, 2016

INTRODUCTION

The Millbury Police Association, MCOP, Local 128 (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 Millbury Public Library on January 14, 2016.

The parties filed briefs on March 28, 2016.

THE ISSUES

(1) Is the grievance procedurally arbitrable?

(2) Did the Town violate any of the following articles of the collective bargaining agreement when it changed from weekly to biweekly payroll? Article IV, Article X(3)(E), Article XI(2)(B), Article XV(6)(A), Article XVIII(1)(A), Article XVIII(11), Article XVIII(13)(5), Article XIX (Paragraph 1), Article XXIII (Paragraph 4), Article XXIV (Paragraph 2), Article XXVII (Paragraph 2).

(3) If so what shall be the remedy?

RELEVANT CONTRACT LANGUAGE

The parties' Collective Bargaining Agreement (Agreement) contains the following pertinent provisions:

ARTICLE IV PAYROLL DEDUCTIONS - DUES AND FEES

For each employee covered by this agreement who has executed a check off authorization, the Town Treasurer, pursuant to Chapter 180, Section 17A and 17G, shall deduct weekly from the employee's wages the employee's union dues or agency fee. At the end of each month the Town Treasurer shall remit to the treasurer of the union the total dues and agency fees deducted during that month. All the requirements of Sections 17A and 17G

shall be satisfied as a condition precedent to the Town's obligations under this article.

ARTICLE IX GRIEVANCE PROCEDURE

Any dispute with respect to wages, fringe benefits, hours of work, conditions of employment, workload or standards of performance shall be subject to the grievance procedure.

Step 1. Within thirty (30) days of the event giving rise to the grievance, the union or aggrieved police officer shall file the grievance in writing with the chief, with a copy to the town manager. The grievance shall contain a statement of the facts, a citation of applicable contract language, and a statement of the remedy requested. The chief shall meet with the union and respond in writing to the grievance within seven (7) days of the filing of the grievance.

Step 2. Within seven (7) days measured from the date which the chief's response is due, the union may file the grievance with the town manager. The town manager shall meet with the union and respond in writing within forty (40) calendar days from the date the grievance was filed with the town manager.

Step 3. Within thirty (30) days of the time in which the town manager response is due, the union may file the grievance for arbitration by notifying the town manager in writing.

The parties, or either party, may file a demand with the Massachusetts Board of Conciliation and Arbitration.

The Arbitrator shall have no power to add to, subtract from, or modify this agreement, and may only interpret such items and determine such issues as may be submitted to him or her by agreement of the parties, or by order of a court.

The results of the arbitration shall be final and binding upon the parties with respect to all issues submitted, including matters of interpretation of statutes, unless reallocated by the arbitrator.

The union's failure to initiate step "1" within the appropriate time shall result in a default of the grievance. The chief's failure to respond to the grievance within the appropriate time shall be considered a denial of the grievance. The town manager's failure to respond to the grievance within the appropriate time shall be considered a forfeit and a granting of the remedy

requested. The parties may agree to extend any time limit set forth in this article. The town may also process grievances under this procedure.

ARTICLE X HOURS OF WORK (In Part)

Section 3. Work Shift

E) To compensate for working a five (5) day workweek, the detective(s), court officer(s) and administrative sergeants shall be allowed seventeen (17) administrative days off each year; or, at the discretion of the detective(s) and court officer(s), receive pay in the amount equivalent to the seventeen (17) administrative days to be figured as part of his/her salary. The administrative days off are to be taken at the discretion of the Chief of Police. The detective shall also receive a stipend of two-thousand dollars (\$2,000.00) per year. This shall not be used to calculate his/her overtime rate and shall not be included in his/her base salary. The stipend shall be remitted to the detective in two (2) equal installments, with the first payment in the first week of September, and the second payment in the first week of March. ...

ARTICLE XI HOLIDAYS (In Part)

Section 2. Holiday Payments

B) Effective July 1, 2011, holiday pay shall be added directly to the employee's regular yearly base salary and shall be considered part of the employee's regular base salary for retirement and will be dispensed equally into the employee's weekly salary, as outlined in Chart "A" & "B". (Amended on July 1, 2011) ...

ARTICLE XV OCCUPATIONAL INJURY LEAVE (In Part)

6. Officers approved for injured-on-duty status will be compensated in the following manner:

A) Officer will receive one hundred percent (100%) of their weekly gross pay, including educational incentive, but if arranged by the employee, without deduction of state and federal taxes. ...

ARTICLE XVIII WAGES (In Part)

Section 1. Definition of Employee Regular Yearly Base Salary for Charts "A" & "B":

A) All employees shall be compensated in accordance with the wage schedule and salary charts "A" & "B" attached to this agreement in Article XXV, as well as Appendix "B". The attached wage schedule shall be considered a part of this agreement. The base salary charts "A" & "B" depicted in Article XXV describe the methodology used in the calculating of the employee's base salary. The formula in calculating an employee's regular yearly base compensation salary is based on the sum of the following factors: The Starting Salary, The Educational Incentive Program (Quinn Bill) payments, College Degree (non-Quinn Bill employees) payments, Holiday Compensation payments, the Department Quarterly Physical Fitness Program payments, and the Personnel Retention Base Salary payments are all considered to be part of the employee's regular yearly base salary for retirement purposes and shall be evenly dispersed into the employee's weekly salary. The determination of the employee's regular yearly compensatory salary is the sum of all the cited programs mentioned in this paragraph, which are salary and not bonuses. ...

Section 11. Personnel Retention Base Salary Raises:

All regular, full time officers and sergeants covered by the provisions of this agreement shall receive a level increase raise each year beginning on and after they attain their tenth year (10th year) within the department that will be added into his/her regular base salary, as outlined and depicted in Article XXV, Charts "A & B". This level raise will be dispersed equally into the member's weekly pay, beginning the start of the fiscal year to the end of the fiscal year. This level raise will be added into the individual officers and sergeants regular yearly base salary after his/her educational incentive program percentage, holiday raise, and Physical Fitness Program raises are calculated into their regular yearly base salary. ...

Section 13. Wage Schedule Appendix "B" (Amended July 1, 2011)

5. A new wage scale was introduced and accepted into this collective bargaining agreement commencing July 1, 2011. It incorporates into the regular yearly base salary of all employees a number of payments that were previously dispersed throughout the fiscal year to all employees. These new payments are considered part of the employee's yearly regular base salary compensation for retirement purposes and will be added into and dispersed equally into the employee's weekly salary. In addition CHART "B" changes the starting salary for new hires and current employees not covered by the Educational Incentive Program, known as the "Quinn Bill".

When other municipal unions agree the Town may at its sole discretion move to a bi-weekly payroll cycle (every two weeks). ...

ARTICLE XIX PERSONNEL RETENTION BASE SALARY RAISE (In Part)

Effective July 1, 2013, all regular, full-time officers and sergeants covered by the provisions of this agreement shall receive personnel retention base salary raises based upon the following schedule, as outlined in Chart "A" & "B". Payment shall be made every fiscal year and it shall be added directly to the employee's yearly regular base salary and shall be considered part of the employee's regular base salary for retirement purposes. This regular salary raise will be dispensed equally into the employee's regular weekly salary. For the purpose of this article, the provisions of Article XII shall apply; departmental seniority. (Amended July 1, 2011) ...

ARTICLE XXIII OVERTIME (In Part)

Pay for overtime service shall be in addition to, and not in lieu of, holiday or vacation pay (where such service is performed on a holiday or during vacation), and shall be remitted to the officer within seven (7) days after the end of the week such overtime service is performed. ...

ARTICLE XXIV COURT TIME (In Part)

Court time compensation for each month shall be remitted to the officers no later than the second Friday of the following month. ...

ARTICLE XXVII CLOTHING ALLOWANCE (In Part)

The allowance shall be remitted to the officer in two (2) equal installments, with the first payment in the first week of September, and the second payment in the first week of March. ...

FACTS

The Town of Millbury (Town) and the Union are parties to a collective bargaining agreement. During the negotiations for the 2010 – 2013 collective bargaining agreement, the parties agreed that biweekly payroll would be implemented if the other Town unions agreed. Due to a drafting error, this

language was not incorporated into the final version of the 2010 – 2013 collective bargaining agreement.

During the parties' negotiations for the 2013 – 2016 collective bargaining agreement, the issue of the missing biweekly payroll language was discussed and the parties agreed that the language had been omitted in error and needed to be added to the updated collective bargaining agreement. The following language was added to Article XVIII(13)(5): "When other municipal unions agree the Town may at its sole discretion move to a bi-weekly payroll cycle (every two weeks)." The Union ratified and the Town implemented the agreed upon 2013 – 2016 collective bargaining agreement with this language.

Subsequently, the Town reached agreement with its two other municipal unions on successor collective bargaining agreements that contained identical language concerning biweekly pay.

On September 30, 2014, Town Treasurer/Collector Denise Marlborough (Marlborough) notified all Town employees that effective January 2, 2015, the Town intended to change to a biweekly payroll. On October 28, 2014, the Union filed a grievance based on Marlborough's notice of the Town's intent to implement biweekly pay.

Chief Kenny A. Howell's (Chief Howell) Step 1 response to the grievance was due on November 4, 2014. Prior to that date, Union President Andrea Warpula (Warpula / Union President Warpula) asked Chief Howell about the Step 1 response which she had yet to receive. Warpula's unrebutted testimony at the arbitration about this conversation was:

I said to him, "Chief I am still not in receipt of your response to my grievance. Are you planning to respond?" He said, "Yes I am going to respond." I said, "Okay. I will wait for that response."

Warpula also testified that prior agreements to extend grievance filing deadlines between the Union and the Town, while usually in writing, also have been made orally.

On November 3, 2014, Chief Howell responded in writing denying the Step 1 grievance. Chief Howell placed the response in the Union's mailbox. Warpula's un rebutted testimony was that all prior correspondences with Chief Howell, including grievance responses, were placed in her own mailbox at the police station. On November 13, 2014, Warpula inquired about the response to the grievance and Chief Howell told her it was in the mailbox. Warpula checked her mailbox and informed the Chief that it was not there. Chief Howell then went to the Union mailbox and handed the response to Warpula. Warpula filed the Step 2 grievance with the Town Manager the next day, November 14, 2014.

On November 20, 2014, Marlborough sent a reminder notice, which included frequently asked questions and announced an effective date of January 16, 2015 for the implementation of biweekly pay.

On December 8, 2014, Town Manager Robert Spain (Spain) denied the Step 2 grievance, and the Union filed for arbitration. On January 16, 2015, the Town implemented the biweekly payroll. Subsequently, the Union continued to file multiple grievances based on the alleged continuing violation of the collective bargaining agreement. At the Town's request, the Union stopped filing grievances

over the same alleged violation and the parties agreed to have the matter addressed by the instant arbitration.

POSITIONS OF THE PARTIES

Procedural Arbitrability

THE EMPLOYER

An arbitrator's jurisdictional authority only extends to those matters properly grieved pursuant to the grievance and arbitration procedures established by the parties. In this instance, the Union's Step 2 grievance was not properly grieved pursuant to the grievance and arbitration procedure established by the parties.

Step 2 of the grievance procedure, as set forth in the parties' collective bargaining agreement, clearly states that the Union may file a grievance with the Town Manager within seven days measured from the date which the Chief's response is due. Here, the Chief's response was due November 4, 2014 and, therefore, the Union was bound to submit its Step 2 grievance to the Town Manager by November 11, 2014, to meet the seven-day time frame agreed to by the parties. Instead, the Union submitted it on November 14, 2014, which is fully ten days after the Chief's response was due, thereby making it untimely filed.

The Union attempts to divert attention from the issue of untimely filing by claiming that it had an agreement with the Chief to extend the Step 2 grievance deadline and was waiting for the Chief's Step 1 response. This claim must fail for several reasons. First, the Union President is well aware of the filing timelines for grievances and is intimately familiar with the grievance process. She knew that Step 2 was due on November 11, 2014. In order to calculate that due date, she

must have also known that the Step 2 response was not dependent upon receipt of the Chief's Step 1 response, but rather the due date for it. She knew that she did not need to wait for a response from the Chief at Step 1 before filing at Step 2, she simply had to file the Step 2 grievance by November 11, 2014. It should be noted that under the collective bargaining agreement, the Chief's failure to timely respond is deemed a denial of the grievance, and the Union is permitted to then move the grievance to Step 2 of the process.

Second, the Union President simply asked the Chief while within the seven-day timeframe whether he was going to respond to her grievance. He said "yes", and she said, "I will wait for it". That was the conversation that in her opinion constitutes an agreement to extend. It is hard to fathom how such an exchange could have risen to the level of an agreement to extend, but even if the conversation took place as alleged, the Chief's Step 1 response, dated November 3, 2014, was submitted the day before it was due and, therefore would have no impact on the due date for the Step 2 grievance.

Third, even if an agreement to extend had been reached, it was never verified in writing, as is customary between the parties. Finally, the fact is that the Chief's Step 1 response, dated November 3, 2014, was in the Union's mailbox, and the Union President simply did not think to look for it there. The Union's Step 2 grievance was submitted late because the Union President failed to check the Union's mailbox for correspondence about Union business.

For the Union's grievance to be valid and procedurally arbitrable under the collective bargaining agreement, the Union had to meet the Step 2 seven-day filing

deadline stated in the contract, which it failed to do. Accordingly, the Union's grievance was not timely filed at Step 2, and the grievance must be dismissed in its entirety.

THE UNION

The Town contends that the grievance ought to be dismissed because the Step 2 grievance was not filed in compliance with the collective bargaining agreement. Step 2 of the grievance procedure requires that the Union, within seven days measured from the date when the Chief's response is due, file the grievance with the Town Manager. The Union did not file the Step 2 until November 14, 2014. However, while the contract specifies that the Union's failure to initiate Step 1 within the appropriate time shall result in a default of the grievance and the Chief's failure to respond to the grievance within the appropriate time shall be considered a denial of the grievance, the contract also allows the parties to agree to extend any time limits set forth in Article IX. Here, it was the uncontroverted testimony of Union President Warpula that she and former Millbury Police Chief Howell had verbally agreed to allow Chief Howell additional time to respond to Step 1.

Warpula, relying on the parties' agreement to allow Chief Howell additional time to answer the grievance, waited for the answer. On November 13, 2014, Warpula inquired as to the status of the response, and Chief Howell responded that the answer was in the mailbox. Warpula discovered that Chief Howell had mistakenly put the answer in the wrong interoffice mailbox. Chief Howell handed

the answer to her on November 13, 2014, and the Union filed at Step 2 on November 14, 2014.

When Warpula and Chief Howell mutually agreed to allow Chief Howell an open-ended extension of the time limit to answer the Step 1 grievance, it clearly changed the date the answer was due. Chief Howell did not fail to respond, thereby denying the grievance, instead, he got an extension. As the date certain that the Step 1 answer was due was eliminated by agreement, the Union cannot reasonably be expected to appeal until it has received the Step 1 answer. Warpula received the Step 1 answer and filed the Step 2 grievance the next day, well within the time limit of the collective bargaining agreement. Based on the foregoing, the grievance is procedurally arbitrable.

Merits

THE UNION

Article XVIII(13)(5)

The Town bargained the following language into the collective bargaining agreements with its three municipal unions. “When other municipal unions agree the Town may at its sole discretion move to a bi-weekly payroll cycle (every two weeks).” The first clause of this language (when other municipal unions agree) is a condition precedent. A condition precedent is an event or a state of affairs that is required before another event may occur. Here, the other unions must agree. However, as the Town manager testified, beyond including that language in the agreements, the Town took no steps to secure the affirmative agreement of any of the municipal unions. Without an affirmative agreement from at least one

municipal union, the condition precedent was not met. Based on the foregoing, and the admission of the Town Manager, the Town did not secure the actual affirmative agreement of any of the municipal unions prior to implementing biweekly payroll, and therefore, biweekly payroll was implemented in violation of the agreement.

Even assuming *arguendo* that the Town has met the condition precedent of securing the agreement of the other municipal unions, the move to biweekly payroll has violated numerous other portions of the parties' collective bargaining agreement.

Article IV

Article IV (Payroll Deductions – Dues and Fees) requires that dues be remitted to the Union on a weekly basis. Spain testified that since the conversion to biweekly payroll, dues have been deducted on a biweekly basis.

Article XI(2)(B)

Article XI(2)(B) (Holidays) specifies that holidays are paid as part of a bargaining unit member's weekly salary. Following the implementation of biweekly payroll, bargaining unit members are not paid weekly for holidays.

Article XV(6)(A)

Article XV(6)(A) (Occupational Injury Leave) specifies that bargaining unit members on approved injured on duty status will receive 100% of their weekly gross pay. Since the implementation of biweekly pay, bargaining unit members on approved injured on duty leave have been paid biweekly.

Article XVIII(1)(A)

Article XVIII(1)(A) (Wages-Definition of Employee Regular Yearly Base Salary for Charts “A” and “B”) incorporates, the Starting Salary, the Educational Incentive Program (Quinn Bill) payments, College Degree (non-Quinn Bill employees) payments, Holiday Compensation payments, the Department Quarterly Physical Fitness Program payments, and the Personnel Retention Base Salary payments, into an employee’s base salary and describes how the base salary shall be paid in weekly installments. Since the implementation of biweekly payroll, base salary has been paid biweekly.

Article XVIII(11)

Article XVIII(11) (Wages-Personnel Retention Base Salary Raises) describes how a personnel retention payment will be dispersed equally in the bargaining unit member’s weekly pay. Since the implementation of biweekly payroll, the personnel retention payment has been biweekly.

Article XIX (Paragraph 1)

Article XIX (Paragraph 1 – Longevity) specifies that longevity payments will be made weekly. Since the implementation of biweekly payroll, longevity payments have been paid biweekly.

Article XXIII (Paragraph 4)

Article XXIII (Paragraph 4 – Overtime) specifies that overtime payments will be made within seven days after the end of the week that the overtime service is performed. Following the implementation of biweekly pay, overtime payments have been made bi-weekly.

The Town may argue, erroneously, that the language in Article XVIII(13)(5), supersedes all other language in the collective bargaining agreement. This argument must be disregarded. The arbitrator must be guided by the arbitral principles of reading the contract as a whole and giving effect to all clauses and words. If one interpretation of a clause renders another clause of the contract meaningless or ineffective, the inclination is to choose the interpretation that would give effect to all provisions. Therefore, even if the contract does not require an affirmative agreement from another municipal union before implementing the biweekly payroll, the parties' agreement still requires the aforementioned payments to be made weekly, not biweekly. By deducting dues, and making these other payments biweekly, the Town has violated the agreement.

Finally, in some instances the Town has recognized that the move to biweekly payroll would violate the parties' collective bargaining agreement and the Town has made adjustments to avoid a violation. According to Spain, Court Time and the Clothing Allowance are both paid in advance during February and August to avoid violating the agreement. Clearly, if the Town recognizes these potential violations, it cannot ignore the other enumerated violations. The contract binds the parties at all times, not only at the Town's convenience.

Illegal Parity Provision

It is well established that an employer cannot bargain a provision that conditions an action on the agreement by another union. The rationale for that prohibition is that it requires one union to bargain for another union without its consent. The remedy in these cases is to invalidate the agreement. Here, the

other unions must agree to biweekly pay for it to be implemented. This is a parity provision because the language puts pressure on the other unions to resist agreeing to parity to keep it from applying to all the other unions. Based on the foregoing, the language must be invalidated.

Conclusion

For all the foregoing reasons, the grievance must be sustained, and the Town should be ordered to cease from its implementation of bi-weekly pay.

THE EMPLOYER

This is a contractual interpretation case and, therefore, the Union has the burden of proving a contract violation occurred. In this case, the Union has provided no evidence whatsoever to support a finding that the Town violated Article XVIII(13)(5), or any other article of the collective bargaining agreement, when it converted from a weekly payroll schedule to a biweekly payroll schedule.

Article XVIII(13)(5)

Article XVIII(13)(5) states in pertinent part: When other municipal unions agree the Town may at its sole discretion move to a bi-weekly payroll cycle (every two weeks). The Union agreed during contract negotiations to include that language in the collective bargaining agreement. The collective bargaining agreement was subsequently ratified and executed by both the Union and the Town.

The remaining two municipal unions representing a unit of clerical employees and a unit of DPW employees both accepted the Town's proposal to change to a biweekly payroll cycle during their 2012-2015 contract negotiations.

Accordingly, the condition precedent that had to occur before the Town could implement a biweekly payroll cycle was satisfied. All of the municipal unions agreed the Town could move to a biweekly payroll cycle at its sole discretion. Therefore the Town did not violate Article XVIII(13)(5) of the collective bargaining agreement when it converted from a weekly to a biweekly payroll cycle.

Remaining Contractual Provisions

Article XVIII(13)(5), Wages, establishes the Town's payroll cycle, and it requires that the Town pay compensation on a biweekly basis. None of the other contractual provisions the Union cites as having been violated by the Town as a result of the payroll conversion establish or define the payroll cycle; they simply reflect the Town's current payroll practice.

When the parties agreed during collective bargaining that the Town could convert at some future time to a biweekly payroll schedule, the parties did not go through the entire collective bargaining agreement and change the language in every one of the articles that the Union cites to reflect a potentially new payroll cycle. They did not do it because all the provisions the Union cites are merely procedural and not substantive in nature. They do not define the payroll cycle; they merely reflect the payroll cycle that is established elsewhere in the contract (specifically, Article XVIII(13)(5)). When the biweekly payroll language was agreed upon, the parties did not update the procedural payroll provisions of the contract because, at the time, they did not know whether the other unions would agree to change to a biweekly payroll schedule. If the other unions eventually did agree to

a change to a biweekly payroll schedule, the procedural payroll provisions in the contract would be updated as housekeeping items.

Since the implementation of the biweekly payroll cycle, the Town has paid all forms of compensation (including base wages, holiday pay, injured-on-duty pay, personnel retention bonuses, and overtime compensation), and made any deductions from payroll (including union dues and agency service fees), on a biweekly basis in accordance with Article XVIII(13)(5). Further, the Town has not violated Article X(3)(E) because it has paid the Detective stipend during the last week of August and the last week of February, in advance of the pay periods required under Article X(3)(E). Neither has the Town violated Article XXIV (Paragraph 2) because it has paid Court Time compensation no later than the second Friday of the following month, consistent with Article XXIV (Paragraph 2). Finally, the Town has not violated Article XXVII (Paragraph 2) because it has paid the Clothing Allowance during the last week of August and the last week of February, in advance of the pay periods required under Article XXVII (Paragraph 2).

Therefore, the Town did not violate Article IV, Article X(3)(E), Article XI(2)(B), Article XV(6)(A), Article XVIII(1)(A), Article XVIII(11), Article XVIII(13)(5), Article XIX (Paragraph 1), Article XXIII (Paragraph 4), Article XXIV (Paragraph 2), or Article XXVII (Paragraph 2) of the collective bargaining agreement when it converted to a biweekly payroll.

All Compensation Included

Black's Online Law Dictionary defines payroll as "the total amount of money [an employer] needs to pay its employees." When the parties negotiated the language allowing biweekly payroll, they did not agree that the Town could pay only base wages on a biweekly basis. Neither the Town nor the Union proposed excluding any form of compensation from the biweekly payroll schedule. The parties agreed that all payroll would be paid biweekly, and payroll includes all compensation paid to employees for whatever reason.

Further, the driving force behind the Town's proposal to convert from a weekly to a biweekly payroll cycle was to save money. If only base wages were going to be paid on a biweekly payroll cycle, the Town would not have pursued the proposal as the whole purpose of such a conversion would have been defeated.

Biweekly Payroll Language is not an Illegal Parity Clause

The Massachusetts Department of Labor Relations defines an illegal parity provision as follows:

All illegal "parity" provision is a clause in a contract that directly links wages and/or other benefits of one bargaining unit to those of another. The Commission consistently has invalidated parity clauses when they force one union to bargain for wages or benefits in an expanded unit by directly linking a second unit's contractual terms to the provisions of the first unit's contract. Town of Andover, 18 MLC 1311, 1313 (1992); citing Town of Shrewsbury, 15 MLC 1230, 1232-1233 (1988); City of Gardner, 12 MLC 1682, 1686 (1986).

The provision at issue in the instant case is neither a wage nor a benefit; it is an administrative matter. As such, it is not a parity clause as alleged by the Union.

Notwithstanding the above, the arbitrator does not have the jurisdiction to decide whether the language in question is a parity clause for the following

reasons. First, the collective bargaining agreement states that the arbitrator may only interpret such items and determine such issues as may be submitted to him or her by agreement of the parties, or by order of the court. The issue of whether the biweekly payroll provision is a parity clause was never submitted to the arbitrator for determination. It was merely a sundry argument made by Union counsel for the first time at the arbitration hearing. Secondly, under law, it is the Department of Labor Relations, not an arbitrator, that has jurisdiction to determine whether a contract provision had any impact on the bargaining process between the Town and the Union.

No Further Agreement was Required Prior to Implementation

The Union alleges that, in spite of the clear and unambiguous language of the collective bargaining agreement authorizing the Town, in its sole discretion, to convert to a biweekly payroll cycle, once the other Town bargaining units agreed, the Town then was required to obtain yet further agreement from each of the Unions, including the Police Union, prior to implementing a biweekly payroll. Such an allegation is simply illogical and unsupported by the evidence and the clear contract language.

When the parties negotiated the biweekly payroll language, the understanding was that the Town could not change only the police bargaining unit members to a biweekly payroll cycle, the other bargaining units had to agree to the conversion as well. That was the only condition precedent that had to be satisfied, and the fact that it was satisfied is evidenced by the language in the clerical and DPW collective bargaining agreements.

For all the foregoing reasons, the Town requests that the arbitrator find that it did not violate the collective bargaining agreement when it changed from a weekly to a biweekly payroll schedule, and deny the grievance in its entirety.

OPINION

The issues before me are:

(1) Is the grievance procedurally arbitrable?

(2) Did the Town violate any of the following articles of the collective bargaining agreement when it changed from weekly to biweekly payroll? Article IV, Article X(3)(E), Article XI(2)(B), Article XV(6)(A), Article XVIII(1)(A), Article XVIII(11), Article XVIII(13)(5), Article XIX (Paragraph 1), Article XXIII (Paragraph 4), Article XXIV (Paragraph 2), Article XXVII (Paragraph 2).

(3) If so what shall be the remedy?

For the reasons stated below, I find the grievance to be procedurally arbitrable. Additionally, I find that the Town did violate the collective bargaining agreement when it changed from weekly to biweekly payroll.

Procedural Arbitrability

By agreement between the parties and the arbitrator, the issue of procedural arbitrability was argued first during the arbitration hearing and addressed first in the parties' post-hearing briefs. Also by agreement, the issue of procedural arbitrability will be addressed first in this ruling prior to a decision on the merits of the case.

There is no dispute that the Union's Step 2 grievance was not filed within the required seven days from when the Chief's Step 1 response was due. What

is in dispute is whether the parties had reached an agreement to extend the grievance timelines. The unrebutted testimony of Union President Warpula is that she had a conversation with then Chief Howell that granted him an extension to answer Step 1 of the Union grievance. Warpula indicated to the Chief that she would wait for his response before forwarding the grievance to Step 2. Ultimately, the Chief responded within the timelines outlined in the collective bargaining agreement. However, according to Warpula's unrebutted testimony, he placed the answer, not in her mailbox, as all previous correspondences between the two had been, but in the Union mailbox that had previously been used only for financial statements and letters addressed specifically to the Union. It should be noted that the Step 1 response was addressed to "Officer Andrea Warpula" and not to the Union directly. Having not received the response, Warpula inquired of Chief Howell and the mailbox issue was discovered. Upon being handed the Chief's response, the Union filed the Step 2 grievance the next day.

The Town provides no first hand testimony regarding the conversation between Warpula and Chief Howell and instead, tries to simply argue that the conversation didn't rise to the level of an agreement to extend the timelines. The Town also argues that the agreement wasn't in writing, but again the unrebutted testimony of Warpula was that not all agreements to extend timelines had been in writing in the past. Based on the conversation between Warpula and Chief Howell, and the parties' history of orally waiving timelines in certain instances, I find the grievance to be procedurally arbitrable.

Merits

As both sides have acknowledged, there was a condition precedent that needed to be completed prior to the Town implementing a biweekly payroll. The disagreement between the parties centers on exactly what that condition precedent entails. The Town argues that the condition precedent was that all three municipal unions agree to the following language: “When other municipal unions agree the Town may at its sole discretion move to a bi-weekly payroll cycle (every two weeks)”. The Union objects to this theory claiming instead that the condition precedent is “when other municipal unions agree”. The Union argues that no other municipal union has agreed to biweekly pay simply because they agreed to insert the contested language in their collective bargaining agreements. In the Union’s view, the Town has not met the condition precedent necessary to enact the change to biweekly pay.

I concur with the Union, and find that the Town has not met the condition precedent, specifically that other municipal unions have agreed to biweekly pay. I find the Town’s argument that the condition precedent has been satisfied by the insertion of the exact same language in all three collective bargaining agreements unpersuasive. In effect, by having all three bargaining units agree that when the other municipal unions agree, the Town may move to biweekly pay, no bargaining unit has affirmatively agreed to be the first to begin biweekly pay. In addition, under a plain reading of the language agreed to by the Union, both of the other municipal unions would have to affirmatively agree to biweekly pay before the Town could begin biweekly pay for this bargaining unit.

Having found the move to biweekly pay to be a violation of the collective bargaining agreement in and of itself, it follows then that the Town has also violated all of the provisions of the collective bargaining agreement listed in the stipulated issue by changing to biweekly pay. This includes Article X (3)(E) (Detective Stipend), and Article XXVII (Clothing Allowance).

The detective stipend language and the clothing allowance language of the collective bargaining agreement calls for payments to be made “in the first week of September, and the second payment in the first week of March.” The Town, in an attempt to be in compliance with those sections of the collective bargaining agreement, has taken to making both of these payments in the last pay period of August and February. In so doing, however, the Town has ignored the plain language of these articles that calls for payments to be made during the first week of September and the first week of March. For the Town’s change to be in compliance, the language would have to say payments no later than the first week of September and no later than the first week of March, which is not the case here. In this instance, the payment schedule is specifically outlined and must be followed.

REMEDY

Having found the Town to be in violation of the collective bargaining agreement, I now order the Town to revert to a weekly payroll schedule for this bargaining unit. Additionally, the Town shall revert to paying benefits and deducting Union dues from employees in the manner prescribed by the collective bargaining agreement.

AWARD

The grievance is procedurally arbitrable. The Town has violated the collective bargaining agreement by changing from weekly to biweekly payroll. The Town is ordered to revert to a weekly payroll system consistent with this decision.

Timothy Hatfield, Esq.
Arbitrator
June 14, 2016