

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS

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In the Matter of the Arbitration Between: \*

TOWN OF ACUSHNET \*

-and- \*

MASSACHUSETTS LABORERS' \*

DISTRICT COUNCIL \*

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ARB-16-5155

Arbitrator:

Timothy Hatfield, Esq.

Appearances:

Darren R. Klein, Esq.

- Representing Town of Acushnet

Salvatore Romano

- Representing Massachusetts Laborers' District Council

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 Town did not violate the provisions of Article VII, Section (b) when it failed to pay the four-hour call back minimum to employees who were called in prior to the beginning of their shifts during February 2016, and the grievance is denied.



Timothy Hatfield, Esq.

Arbitrator

November 29, 2016

### **INTRODUCTION**

The Massachusetts Laborers' District Council (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 Department's Boston office on June 7, 2016.

The parties filed briefs on September 19, 2016.

### **THE ISSUE**

Did the Town violate the provisions of Article VII, Section (b) of the parties' collective bargaining agreement when it failed to pay the four-hour call back minimum to employees who were called in prior to the beginning of their shifts during February 2016? If so, what shall be the remedy?

### **RELEVANT CONTRACT LANGUAGE**

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

#### **ARTICLE VII – OVERTIME (In Part)**

(a) Employees covered by this Agreement shall be paid overtime at the rate of one and one-half times his regular rate of pay for work in excess of eight (8) hours in one day and forty (40) hours in one week.

(b) Any employee called back to work on the same day after having completed his assigned work and having left his place of employment shall be paid at the rate of time and one-half for all hours worked on recall. He will be guaranteed a minimum of four (4) hours work at time and one-half. All such time worked shall be substantiated by time cards, whenever possible. ...

(e) Overtime work shall be voluntary, except in case of emergency. There shall be no discrimination against any employee who declines to work overtime.

(f) In emergency conditions, overtime work shall be mandatory. For the purpose of this Agreement, emergency shall be defined as an unforeseen happening or state of affairs requiring prompt action. The superintendent shall make the decision as to what constitutes emergency conditions. For the purpose of this Agreement, water main breaks and extreme weather conditions shall be considered as such emergencies. ...

(i) Non-Essential Rate will be time and a half, equivalent to the number of hours the Non-Essentials missed. If the Board of Selectmen close Town Hall to Non-Essential personnel under emergency situations, Essential DPW workers will be paid time and a half starting at time of closing.

## **ARTICLE XV MISCELLANEOUS PROVISIONS & SEVERABILITY (In Part)**

### Section 2. Severability

Should any provisions of this Agreement be found to be in violation of any Federal or State Law or Civil Service Rule by a court of competent jurisdiction, all other provisions of this Agreement shall remain in full force and effect for the duration of this Agreement.

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

## **ARTICLE XVI GRIEVANCE PROCEDURE (In Part)**

### Step 4.

... The arbitrator shall have no power to alter, amend, modify, add to, or subtract from the express terms of the collective bargaining agreement in his/her decision.

## **FACTS**

The Town of Acushnet (Town) and the Union are parties to a collective bargaining agreement that was in effect at all relevant times to this arbitration.

On February 25, 2016, DPW employees worked their regularly scheduled shift from 7:30 AM until 4:00 PM. The following morning, February 26, 2016, the Town declared a snow emergency and closed Town Hall. The Town called DPW workers into work thirty minutes early at 7:00 AM. As per the collective bargaining agreement, DPW employees were paid time and one-half for the thirty minutes they were required to work overtime before their shift, and for their remaining hours worked, as Town Hall was closed.

The Union filed a grievance over the Town's refusal to pay a four-hour minimum call back under Article VII, Section (b), for the thirty minute overtime shift they worked prior to the commencement of their regular shift. The Town denied the grievance at all steps of the grievance procedure, resulting in the instant grievance.

### **POSITIONS OF THE PARTIES**

#### **THE UNION**

The facts in this case are not in contention, however, the Town's past practice, as well as their rationale on when a "new day" commences is at the center of the dispute. The uncontested evidence shows that the employees in question begin their work day at 7:30 AM and conclude their day at 4:00 PM. On February 26, 2016, the Town called each of these employees back to work after they completed their assigned shift, and had left their place of employment.

This dispute involves the interpretation of the meaning of "any employee being called back to work in the same day." Joe McArdle (McArdle), the Union's field representative, testified that the past practice was that the Town calculated

a "snow day" based on when an employee punched his time card to begin his work day. This interpretation is consistent with the plain meaning of the language of the collective bargaining agreement. Under this interpretation, a new day begins at 7:30 AM and ends at 7:29 AM, which is some twenty-three hours and fifty-nine minutes after the commencement of the workday. The Town's interpretation of the phrase "same day" defies logic and has never been the practice. McArdle's argument is the only argument that makes sense and has been the practice followed by the Town in the past.

For all the reasons stated above, the Union requests that the grievance be allowed and the grievants made whole.

## **THE EMPLOYER**

### **The Contract Language is Clear and Unambiguous**

All language in a collective bargaining agreement is used for a specific reason or purpose. Therefore all words in an agreement should be given meaning and effect. When contract language is clear and unambiguous, arbitrators will apply its plain meaning and will not look outside the four corners of the document to ascertain the intentions of the parties. In the instant case, the applicable contract language is clear and unambiguous, and thus the arbitrator must apply its plain meaning as written.

Article VII, Section (b) specifically states that the only circumstance under which an employee is guaranteed a minimum of four hours of pay is when an employee is called back to work on the same day after having completed his assigned work. There is no dispute that the Town did not call employees back to

work after they completed their February 25<sup>th</sup> shift. Instead, the Town called them into work prior to the start of their next shift on February 26, 2016. The employees reported to work at 7:00 AM, which was thirty minutes before the regular start of their shift. The Town did not pay the minimum call back pay of four hours for the thirty minutes that they worked, because they did not qualify for the minimum under Article VII, Section (b) as articulated above.

#### Potential Windfall

A ruling that provides the employees with a four hour call back minimum would result in a windfall to the employees. As a result of Town Hall being closed on the day in question, the Town paid DPW employees time and one half for all hours worked under Article VII Section (i). An award of an additional three and one half hours of overtime pay, which was never negotiated by the parties, would result in a windfall to the employees that would be inconsistent with the mutually negotiated provisions of the parties' agreement.

#### No Past Practice

For a binding past practice to exist, the practice needs to occur over a sufficient period of time so that it is reasonable to expect that the practice will continue. It is clear in the present case that there was not any practice that was clearly stated and understood, maintained over a reasonable time, and accepted by both parties. In fact, the testimony on this issue at the hearing clearly shows that there was no past practice at all. At the hearing, the Union produced no evidence of any past practice that would support paying the employees for four

hours when they were called in to work less than four hours prior to their regular shift.

### Arbitrator's Authority

The arbitrator's authority arises from the bargained-for agreement and, as such, is limited by its terms. Here, if the arbitrator determines that employees are entitled to four hours of call back pay for work performed on a subsequent day, the arbitrator will effectively alter, amend and modify the Agreement, because such a decision would render meaningless the contractual process that the parties had agreed to follow when they signed the Agreement. Specifically, employees are only entitled to a four hour minimum when they are called back the same day after completing their assignments. This is simply not what occurred in this instance when employees were called into work the next day, thirty minutes prior to their shift. As such, the arbitrator must rule that the grievance be denied.

### Conclusion

Based on the foregoing, the Town requests that this grievance be dismissed.

### OPINION

The issue before me is: Did the Town violate the provisions of Article VII, Section (b) of the parties' collective bargaining agreement when it failed to pay the four-hour call back minimum to employees who were called in prior to the beginning of their shifts during February 2016? If so, what shall be the remedy?

For the reasons stated below, the Town did not violate the provisions of Article VII, Section (b) when it failed to pay the four-hour call back minimum to employees who were called in prior to the beginning of their shifts during February 2016, and the grievance is denied.

The language of Article VII, Section (b) concerning call backs, while excessively restrictive in limiting the call back minimum to calls received by employees on the same day, is however, clear and unambiguous. To be eligible for the four-hour minimum, an employee must have been called back "on the same day after having completed his assigned work and having left his place of employment." Here, not only were the employees not called back on the same day, they were not called back at all. Instead, the employees were called into work thirty minutes prior to their next shift on February 26, 2016, and continued uninterrupted into their scheduled shift. A call in for an early start to an employee's shift, which moves seamlessly into the employee's regular shift, is not the same as a call back, and does not trigger the call back minimum in the collective bargaining agreement.

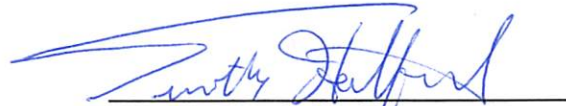
Additionally, even if I was to find the language of Article VII, Section (b) to be ambiguous, which I do not, the Union's argument that a past practice existed is unpersuasive. The Union offered no evidence to show that the Town previously paid employees a call back minimum when it required employees to begin their shift early on a particular day, and the Town vehemently denied that any such practice existed.



Having found Article VII, Section (b) to be clear and unambiguous in its requirement that employees need to be called back on the same day to be eligible for the call back minimum, and having found no evidence of a past practice, I am unable to find that the Town violated the collective bargaining agreement when it failed to pay employees for the call back minimum when it required them to begin their shift thirty minutes early during a snow emergency.

**AWARD**

The Town did not violate the provisions of Article VII, Section (b) when it failed to pay the four-hour call back minimum to employees who were called in prior to the beginning of their shifts during February 2016, and the grievance is denied.



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Timothy Hatfield, Esq.  
Arbitrator  
November 29, 2016