

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of the Arbitration Between: *
*
CITY OF WORCESTER *
*
-and- *
*
NAGE, LOCAL 495 *

ARB-16-5515

Arbitrator:

Timothy Hatfield, Esq.

Appearances:

William Bagley, Esq. - Representing City of Worcester
Timothy McGoldrick, Esq. - Representing NAGE, Local 495

The parties received a full opportunity to present testimony, exhibits and arguments, and to examine and cross-examine witnesses at a hearing. I have considered the issues, and, having studied and weighed the evidence presented, conclude as follows:

AWARD

The City violated the parties' collective bargaining agreement when it did not pay employees for four hours of work for trainings they attended on or about 2/16/16 and 2/22/16.



Timothy Hatfield, Esq.
Arbitrator
June 9, 2017

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 January 24, 2017.

The parties filed briefs on March 17, 2017.

THE ISSUE

Whether the City violated the parties' collective bargaining agreement when it did not pay employees for four hours of work for trainings they attended on or about 2/16/16 and 2/22/16? If so, what shall the remedy be?

RELEVANT CONTRACT LANGUAGE

The parties' collective bargaining agreement (Agreement) contains the following pertinent provisions:

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 21 RECALL TO DUTY

In accordance with the overtime rules and regulations, any employee recalled to duty shall be credited with not less than four (4) hours for such recalled duty.

ARTICLE 35 HOLIDAYS (In Part)

6. If an employee is on a day off and is recalled to duty for an emergency by the City on a holiday and actually works less than four (4) hours on said holiday, he/she shall be guaranteed a minimum of four hours of straight time pay. If the employee actually works on said holiday he/she shall be entitled to an additional two (2) hours of holiday pay. ...

SPECIAL ARTICLE 14 SPECIAL 4 and 2 SCHEDULE – DISPATCHERS (In Part)

Effective January 1, 2002, the City shall establish a four (4) days on and two (2) days off work schedule for employees in the classification of dispatcher and Senior Dispatcher in the Communications Department, provided, they are assigned to dispatching and not administrative or clerical duties. ...

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 grievants all work in the City's Emergency Communications Department.

During February 2016, all seven grievants were scheduled by the City to attend a mandatory CPR recertification course at an offsite location during their off duty time. The training was scheduled for either February 16th or February 22nd beginning at 7AM. All of the grievants, regardless of the specific training attended, were paid three hours of overtime pay.

The seven grievances filed were denied by the City at all steps of the grievance procedure and resulted in the instant arbitration.

POSITIONS OF THE PARTIES**THE UNION****Article 21 is Clear and Unambiguous**

The language of Article 21 is clear and unambiguous and the arbitrator should give the words their plain meaning. It is undisputed that the dispatchers were ordered to attend these mandatory trainings on their time off as part of their jobs. "Attendance is Mandatory" was highlighted in the City's email notices to dispatchers. The dispatchers took the training on their day off, or time off. It makes no difference whether they had three weeks notice or three hours notice; they were recalled to work on their time off as part of their job duties.

The City asserts that a recall to duty under Article 21 is meant to apply to dispatchers: 1) when there is a last minute emergency, 2) only when they perform their function of dispatching 911 calls, and 3) not when the employee has received advanced notice of the recall to duty. The City seems to rely heavily on the fact that the dispatchers were given advanced notice of the training course, and thus the work was scheduled, and therefore it could not be a recall. The Union disputes this faulty logic, while noting that the City's monthly schedule reports do not back up the City's claim that the time was actually scheduled, rather it shows that the dispatchers in question were listed as off and further notes that they were paid three hours of overtime.

The City's ultra-narrow reading is not supported by any actual qualifying language in Article 21. The City's flawed interpretation first ignores that Article 21 applies to other members of the Union, not just dispatchers. These

employees have numerous job titles, duties and functions, many of which do not necessarily involve emergency matters. As such, a recall to duty for those employees may not involve an actual emergency. The City's argument also completely ignores basic and accepted definitions of the words used in Article 21.

At the hearing, the City cited City of Worcester v. NAGE, Local 495, ARB-12-2485 (Bowler, December 17, 2014) as being dispositive of this case in the City's favor. The exact opposite is true however, as the case is dispositive in the Union's favor. That case involved Article 35 (Holidays), not Article 21. The issue was not whether the employees were entitled to the minimum of four hours under Article 21, but rather whether they were entitled to an additional two hours of premium pay under Article 35 for being recalled to work on holidays. The arbitrator found that under the specific language of Article 35, the employees didn't meet the clearly stated qualifiers to be entitled to the additional two hours of premium pay. The decision specifically addressed the actual qualifying language contained in Article 35, Section 6: "While it may be inconvenient for employees assigned to work on a holiday, if known in advance, it cannot be considered an emergency." The arbitrator referred to the specific emergency language in Article 35, and gave that language its plain meaning.

The City attempts to distort that ruling by taking specific qualifying language in Article 35, and injecting it into Article 21, which does not involve holiday premium pay. Article 21 contains no qualifiers and does not limit its minimum pay provisions to recalls for emergencies. Contrary to the City's arguments in the present case, the arbitrator clearly had not found that a recall to

duty under Article 21 had to be without prior notice and based on an emergency for the minimum pay to be applicable. Unfortunately for the City, the arbitrator defined an emergency under Article 35, and not a recall to duty under Article 21.

Even if the Language of Article 21 is Ambiguous, the Union Should Still Prevail

The contract language in the present case is clear and unambiguous, and does not contain the limitations which the City attempts to infer. Had the City wished to qualify the language in Article 21, as was done in Article 35, it should have done so.

Notwithstanding this fact, Michael McCann (McCann) testified that there was a past practice to pay employees a minimum of four hours for attendance at CPR trainings pursuant to Article 21. McCann's firsthand knowledge dates back to twenty-one years of service in the Emergency Communications Department as a Dispatcher, Deputy Director, Training Coordinator, and then a Dispatcher again. When the City did not comply with Article 21 in 2016, he filed a grievance along with his co-workers.

Contrast this with the testimony of Richard Fiske (Fiske), who only began implementing his own pay procedures regarding the CPR training in August 2014, when he became Director. It is possible that the 2016 CPR training was his first opportunity to not pay the minimum four hours. The grievances were filed in February 2016, approximately eighteen months after Fiske became Director. It was hardly a sufficient time period to establish a clear past practice on behalf of the City, particularly when the trainings only occurred two days a year.

Conclusion

For all the foregoing reasons, the Union asserts that the grievances should be upheld and the Union respectfully requests that the dispatchers be made whole for all losses.

THE EMPLOYER

The Union's argument that employees are entitled to be paid for four hours for prescheduled trainings, such as the CPR training at issue here, arises out of Article 21 of the collective bargaining agreement. However, giving the Union the relief that it seeks would render Article 21 meaningless.

The Union acknowledges that dispatchers, as a condition of employment, must maintain a CPR certification and that in order to do so, they must attend a training once every two years. On these occasions, the prescheduled trainings are not a day off, and they are not recalled to duty. As McCann acknowledged during his testimony, the work in question is planned work that must be performed as a condition of employment. Although the training obligation does not require frequent attendance, McCann nevertheless understands that it is a regular and mandatory part of his obligations as a dispatcher.

Notwithstanding McCann's admissions, the Union seeks to obtain pay for its members that is not contemplated by the collective bargaining agreement. The Union is asking the arbitrator to ignore the plain language of Article 21. If it was the intent of the parties to pay a minimum of four hours to employees any time that they report to work, Article 21 would be unnecessary, or in the alternative would be entitled "Report For Duty", but that clearly is not the case.

The Union's argument in this case is similar to its argument in ARB-12-2485, where it argued that any employee who reported to work on a holiday was entitled to two hours of holiday pay above and beyond the hours worked. Rejecting that argument, the arbitrator stated that "there would be no need" for qualifying language in the agreement, "if the parties intended to pay all workers working on a holiday an additional two hours holiday pay." Similarly, in the instant case, if the parties intended to pay all who report to work, whether scheduled in advance, or if they receive a call at home in the middle of the night, there would be no need for Article 21.

Finally, the Union attempted to argue that Special Article 14 of the collective bargaining agreement was somehow supportive of its argument. Read in its entirety, Special Article 14 states that:

Effective January 1, 2002, the City shall establish a four (4) days on and two (2) days off work schedule for employees in the classification of dispatcher and senior dispatcher in the communications department, provided that they are assigned to dispatching and not administrative or clerical duties.

It is clear that the four days on and two days off applies only when dispatchers are performing dispatching duties, and not when they are assigned to administrative duties, which McCann acknowledges includes training.

For all the foregoing reasons, the grievances should be denied, and the matter dismissed.

OPINION

The issue before me is:

Whether the City violated the parties' collective bargaining agreement when it did not pay employees for four hours of work for trainings they attended on or about 2/16/16 and 2/22/16? If so, what shall the remedy be?

For all the reasons stated below, the City did violate the collective bargaining agreement when it did not pay employees for four hours of work for trainings they attended on or about 2/16/16 and 2/22/16.

The City was well within its rights to require its dispatchers to be recertified in CPR. The City, however, was solely responsible for the scheduling of the CPR trainings and made the decision to hold the trainings at such times as the most employees possible were on non-work time. The City could have chosen to hold the trainings during the employees' regular work week, but that would have required additional coverage for the employees' dispatching duties. It was the City's decision to require the employees to work an overtime shift to attend training. As such, with that decision, the City became bound by the overtime requirements of the collective bargaining agreement, including Article 21.

Article 21 of the parties' collective bargaining agreement is clear and unambiguous and contains no qualifiers, or restrictions.¹ Any employee recalled to duty shall be credited with not less than four hours for such recalled duty. There is no mention of an emergency being required, or that prior notice of the

¹ As I have found the language of Article 21 to be clear and unambiguous, I need not address the parties' arguments concerning the existence of a binding past practice.

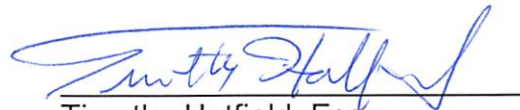
recall obviates the need to pay the four hour minimum. The City's attempt to read into the language such restrictions is unfounded and unsupported. As the parties highlighted in their post hearing briefs (albeit for differing reasons), Article 35, Section 6 does contain such a restriction. In that subsection it states "If an employee is on a day off and is recalled to duty for an emergency". Article 35, Section 6 is only triggered if an employee is recalled for an emergency on a holiday. Clearly, the parties understood how, if they so desired, to craft language to restrict a benefit to certain specific situations. Because the plain language of Article 21 contains no additional restrictions or qualifiers, the grievants are entitled to receive the four hour minimum to attend CPR training.

REMEDY

The City is ordered to make the grievants whole for all lost monies that resulted from its decision not to pay the four hour minimum required under Article 21 for attendance at the CPR trainings in February 2016.

AWARD

The City violated the parties' collective bargaining agreement when it did not pay employees for four hours of work for trainings they attended on or about 2/16/16 and 2/22/16.



Timothy Hatfield, Esq.
Arbitrator
June 9, 2017