

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS

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In the Matter of the Arbitration Between: \*  
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CITY OF ATTLEBORO \*  
\*  
-and- \*  
\*  
MASSACHUSETTS LABORERS' \*  
DISTRICT COUNCIL \*  
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ARB-17-5907

Arbitrator:

Timothy Hatfield, Esq.

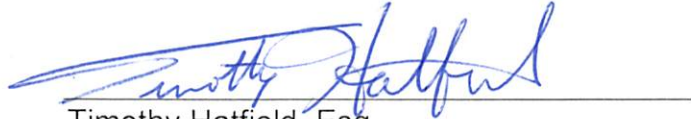
Appearances:

- Daniel Brown, Esq. - Representing City of Attleboro
- 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 City did not violate the collective bargaining agreement when it: 1) implemented a shift change for the two grievants, and 2) when it failed to compensate the grievants for working a certain amount of consecutive shifts.



Timothy Hatfield, Esq.  
Arbitrator  
June 14, 2019

### INTRODUCTION

On March 31, 2017, 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 September 7, 2017.

The parties filed briefs on April 5, 2019.

### THE ISSUE

Did the City violate the collective bargaining agreement when it implemented a shift change for the two grievants and/or when it failed to compensate the grievants for working a certain amount of consecutive shifts? If so, what shall be the remedy?

### RELEVANT CONTRACT LANGUAGE

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

#### Article II – Management Rights (In Part)

1. Both parties recognize that under the laws of the Commonwealth of Massachusetts, that the Mayor and the Department Heads have the exclusive rights, responsibility, and final authority for establishing the policies for the control, direction and management of the City. Therefore, it is understood and agreed that this Agreement concerns those matters of wages, hours, and conditions of employment which have been expressly bargained for and are included herein and expressly reserves those powers, prerogatives and authority not expressly abridged or modified by the Agreement to the City. ...

3. Both parties recognize that the Mayor and the Department Heads shall at all times retain the right to direct employees, to hire, promote, transfer, assign and retain employees within the department, to suspend, demote, discharge or take other disciplinary action against employees for just cause, to relieve employees from duties because of lack of work or for other legitimate reasons to maintain the efficiency of the operations entrusted to them, to determine the methods, means, and personnel by which such operations are to be conducted, to determine the mission of the City, and the taking of all necessary actions to carry out its mission in emergencies.

#### Article IV – Hours of Duty (In Part)

Section 1. The administrative workweek for the employees covered by this Agreement shall be Sunday through Saturday. The regular workweek for employees in the bargaining unit, except employees of the Water and Wastewater Departments shall consist of forty (40) hours, scheduled over five (5) consecutive eight (8) hour workdays within said administrative workweek. The regular work week of employees in the Water and Wastewater Departments shall consist of forty (40) hours scheduled over five (5) 8 hour shifts during the course of said administrative work week. The starting and ending times of the daily work schedules of said employees shall be determined by the Superintendent of each Department. The regular hours of work each day shall be consecutive, except for interruptions for lunch periods.

#### Article V – Overtime (In Part)

Section 1. If any employee shall be required to be on duty in an administrative workweek in excess of his regular workday of eight (8) hours or in excess of his regular workweek of forty (40) hours established in accordance with the provisions of Article IV of this Agreement, he shall be paid for such period of overtime duty at the rate of one and one-half (1-1/2) times his regular rate of pay. ...

#### Article XXXII – Miscellaneous Provisions (In Part)

Section 1. Employees shall receive a “courtesy call” notifying them of a change in assignment at least one week prior to said change except in the event of an emergency.

### FACTS

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

The grievants, Michael Eiben (Eiben) and Matthew Crotty (Crotty), work as operators in the City's Water Department. The Water Department is staffed by nine operators and is run on a twenty-four hour a day, seven day a week basis, with three shifts each day. The first shift runs from 8 AM to 4 PM; the second shift runs from 4 PM to midnight; and the third shift runs from midnight to 8 AM. The administrative workweek for operators in the Water Department is Sunday through Saturday. The regular workweek for operators consists of five eight hour shifts scheduled any time during the administrative workweek.

On Friday December 2, 2016, Water Department operator Tim Cronin (Cronin) telephoned Water Superintendent Paul Kennedy (Kennedy) and advised him that he was very ill, was going to be out for the foreseeable future and may retire. Cronin was scheduled to work the next day, and with only eight operators available, Kennedy determined that an emergency existed. Kennedy filled the Saturday shift with an overtime opportunity and prepared shift changes for the grievants that were effective on Sunday, the beginning of the next administrative workweek. Kennedy did not provide a "courtesy week" notice of a shift change as would be required under the collective bargaining agreement in a non-emergency situation.<sup>1</sup> Other gaps in the weekly coverage, created by the schedule changes, and only eight operators, were covered with overtime opportunities. As a result of the schedule changes, Eiben worked six

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<sup>1</sup> Evidence presented at the arbitration hearing showed instances of shift changes with the "courtesy week" notification and instances of shift changes done without the "courtesy week" notification. There was no evidence presented to show that the Union had previously grieved the shift changes done without the "courtesy week" notification.

consecutive days and Crotty worked seven consecutive days over the course of two administrative workweeks.

On January 13, 2017, the grievants filed separate grievances with the City over the lack of a "courtesy week" notification prior to a shift change, missed overtime opportunities created by the shift change, and the total number of days worked in a row. The grievance was denied at all steps by the City and resulted in the instant arbitration.

### **POSITIONS OF THE PARTIES**

#### **THE UNION**

This is a simple dispute. The City violated Article 32, Section 1 of the collective bargaining agreement by failing to give a courtesy one-week notification before changing the grievants' work assignment shifts. The relevant contract language which precisely controls this issue simply states, without ambiguity that:

Employees shall receive a "courtesy call" notifying them of a change in assignment at least one week prior to said change except in the event of an emergency.

The language is clear, plain and simple. Ambiguity does not exist. There is no confusion in the application of this Article, and there can be no plausible contentions allowing for conflicting interpretations. The City cannot claim, nor did they prove that they have the unilateral right to determine what constitutes an emergency. Article 32 establishes the intent of the parties. There is no language which could possibly have a variant meaning. Ambiguity in a contract is

generally referred to as the failure to express the intentions of the parties' mutual intention. The language of Article 32 eliminates the lack of mutual understanding.

The essence of an emergency must be unexpected or unforeseen. The City cannot advance the claim of unexpectedness or unforeseeability because the collective bargaining agreement has specific conditions for sick leave in Article 9, as well as overtime protections in Article 5. Stated in its most simple terms, Kennedy was required to give the grievants a seven day courtesy notice as required under Article 32.

During the pendency of that courtesy week period, the shifts should have been filled with overtime coverage. Kennedy, who spends little time overseeing the Water Department either was unfamiliar with the provisions of Article 32 or he just wanted to save the City from paying overtime as a result of Cronin's call for sick leave. Either scenario is improper and violates Article 32.

Common sense dictates that, because the collective bargaining agreement has overtime provisions, the City was obligated to follow these requirements, therefore, eliminating any sense of urgency or the reasonable possibility of damage to City property. Additionally, the City failed to provide any evidence of a past practice where a sick call was considered an emergency. Crotty testified that in sixteen years he has experienced countless shift assignments without any contract violations. A one-week courtesy notice was provided unless it was precluded by urgent circumstances or a true emergency.

Conclusion

Since the City clearly violated the negotiated provisions of Article 32 by failing to provide the grievants with the courtesy one-week notice of shift assignments, they collectively pray that their respective remedies as outlined in Joint Exhibits 2(a) and 2(b) be granted.

**THE EMPLOYER**

The key terminology in this case is 1) "administrative workweek," which is defined as Sunday through Saturday; 2) "regular workweek," which is defined as 40 hours of work scheduled over 5 shifts (non-consecutive) during the administrative workweek; and 3) "emergency." The key contractual provision is: "the starting and ending times of the daily work schedules of said employees shall be determined by the Superintendent."

Clearly, the Superintendent has the sole contractual authority to determine daily shift assignments of employees. Consistent with the "courtesy call" provisions of the contract, the Superintendent has always tried to provide a week's notice to employees whose shift assignment would be changed. This however, is irrelevant in this case, because the Superintendent considered an unexpected long-term absence to be an emergency situation, given the 24/7 operation with a total complement of only nine employees. In such a situation, the "courtesy" of a week's notice does not, and never has, applied. Superintendent Kennedy explained that a typical non-emergency shift change would take place in the event of an anticipated long or short term absence, or even an unexpected short-term absence. In such a case, he would provide

overtime to cover the gap in coverage or implement a shift change with the "courtesy notice."

As the Superintendent testified, and consistent with this rationale and practice, he had never, and would never, provide coverage for an unexpected absence with overtime for seven consecutive days during an administrative workweek. Such an emergency situation would necessitate notification of a change in shift assignment at any point during the previous administrative workweek and likely with less than 7 days' notice. The Superintendent's testimony plus Employer exhibits number 1 and 3 clearly show that such situations have occurred without grievances being filed.

The City did not violate the Contract when it implemented the shift assignment changes. Superintendent Kennedy decided that an emergency situation existed when he received word on Friday that an employee would have to take an immediate long-term absence. He informed the two grievants of their changed shift assignments beginning with the next administration workweek (Sunday) and filled the remaining day in the instant administrative workweek (Saturday) with an overtime shift. His actions were consistent with the collective bargaining agreement and his usual practice.

The City did not violate the collective bargaining agreement when it did not pay the grievants overtime compensation for working seven and six days consecutively.

It is undisputed that as a result of the shift change assignments, Crotty worked seven consecutive shifts and Eiben worked six consecutive shifts. Their



claim for overtime however, is meritless. The collective bargaining agreement clearly states that overtime is paid when an employee:

Is required to be on duty in an administrative workweek in excess of his regular workday of eight (8) hours or in excess of his regular workweek of forty (40) hours established in accordance with the provisions of Article IV of this Agreement.

Eiben's six consecutive work days took place over the course of two administrative workweeks and did not result in him working over forty hours in either of the two administrative workweeks. Additionally, Crotty's seven consecutive workdays also took place over the course of two administrative workweeks and did not result in him working over forty hours in either administrative workweek. Given the staffing and scheduling, it would be impossible for an employee to work seven consecutive regularly-scheduled workdays within one administrative workweek.

### Conclusion

For all of the foregoing reasons, the City of Attleboro respectfully requests that the Arbitrator deny the grievance.

### OPINION

The issue before me is: Did the City violate the collective bargaining agreement when it implemented a shift change for the two grievants and/or when it failed to compensate the grievants for working a certain amount of consecutive shifts? If so, what shall be the remedy?

For all the reasons stated below, the City did not violate the collective bargaining agreement and the grievances are denied. There is no dispute about the language of the collective bargaining agreement. Absent an emergency

situation, shift changes must be accompanied by a "courtesy week" notification. There is also no dispute that Kennedy did not provide the notification and changed the grievants' shifts with approximately forty-eight hours notice, coinciding with the start of the next administrative workweek on Sunday. The outcome of this matter rests solely on the issue of the appropriateness of the declaration of an emergency by Kennedy.

Cronin called in on Friday and notified the City that he was going to be out sick indefinitely and might need to ultimately retire. Kennedy, faced with operating the Water Department with only eight operators, decided that Cronin's indefinite, and potentially permanent leave constituted an emergency situation. Kennedy testified that, as was his practice with other unexpected long-term absences, he would fill with overtime opportunities for the remainder of the administrative workweek and begin shift changes with the beginning of the next administrative workweek. In this instance, that meant overtime for Cronin's shift on Saturday and shift changes effective Sunday.

The Union provided no evidence to refute Kennedy's claim that his practice, in situations of unexpected long-term absences, is to fill the remainder of the workweek with overtime opportunities, and then make schedule changes coinciding with the beginning of the next administrative workweek. Documentation submitted at the arbitration hearing shows schedule changes made with and without the "courtesy week" notification depending on the circumstances surrounding the need for the change. Additionally, the contract is silent on what constitutes an emergency situation that obviates the need for the

"courtesy week" notice. Here again, the Union failed to provide any evidence that Kennedy's declaration of an emergency was inappropriate or in violation of the collective bargaining agreement. Notwithstanding the Union's argument that Cronin's absence was nothing more than the normal use of sick leave, and did not constitute an emergency, I find that Cronin's sudden, unexpected leave and potential permanent retirement,<sup>2</sup> combined with the need to run the Department on a continuous basis with only the remaining eight operators constituted an emergency situation that released Kennedy of the need to provide the grievants with a "courtesy week" notice before a shift change.

#### Consecutive Shifts

The Union's argument that the City violated the collective bargaining agreement when Kennedy's shift changes required Eiben to work six consecutive shifts and Crotty to work seven consecutive shifts, is unpersuasive because the shifts were worked over the course of two administrative workweeks, not one. The grievants received two days off in both administrative workweeks. Water Department employees' shifts, unlike other bargaining unit members' shifts, need not be consecutive days, but must simply be five eight-hour shifts within an administrative workweek, resulting in two days off in every administrative workweek. Kennedy's shift changes did result in the grievants working six and seven shifts consecutively, but the shifts carried from one administrative

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<sup>2</sup> The fact that Cronin ultimately returned to work and did not retire does not change the facts that Kennedy faced at the time of his decision to declare an emergency. It would be inappropriate to label Kennedy's declaration of an emergency inappropriate simply because Cronin's condition improved to the point that he was able to return to work.

workweek to the next and did not constitute a violation of the collective bargaining agreement.

For the reasons stated above, I find that the City did not violate the collective bargaining agreement, and the grievances are denied.



Timothy Hatfield, Esq.  
Arbitrator  
June 14, 2019