

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of Arbitration between: *
* ARB-18-6894
TOWN OF BILLERICA *
*
and *
*
INTERNATIONAL UNION OF PUBLIC *
EMPLOYEES, LOCAL 140 *

Arbitrator:

James Sunkenberg, Esq.

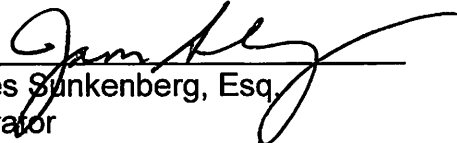
Appearances:

Kevin Feeley, Esq. - Representing Town of Billerica
Thomas Horgan, Esq. - Representing IUPE, Local 140

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 issue, and, having studied and weighed the evidence presented, conclude as follows:

AWARD

The grievance is arbitrable. The Union did not establish that the Town violated the parties' collective bargaining agreement. Accordingly, I deny the grievance.


James Sunkenberg, Esq.
Arbitrator
August 16, 2019

INTRODUCTION

On or around September 18, 2018, the IUPE, Local 140 (Union) filed a petition for arbitration with the Department of Labor Relations (DLR). Pursuant to M.G.L. Chapter 23, Section 9P, the DLR appointed James Sunkenberg, Esq. to act as a single, neutral arbitrator with the full authority of the DLR. On May 31, 2019, the undersigned Arbitrator conducted a hearing in Boston, Massachusetts. On June 26, 2019, the Union filed its post-hearing brief; and on July 22, 2019, the Town of Billerica (Town) filed its post-hearing brief.

ISSUE

The parties could not agree on the issue. The Union proposes:

Did the Town violate Article 13 Section [7] of the parties' Collective Bargaining Agreement when they failed to award and/or respond to the Grievant's July 5, 2018 request for an upgrade? If so, what shall be the remedy?

Did the Town violate Article 2, Sections 5 and 6 of the Parties' Collective Bargaining Agreement when they unilaterally changed the Grievant's job responsibilities in violation of M.G.L. c. 150E, Section 10? If so, what shall be the remedy?

The Town proposes:

Is the grievance arbitrable?

Did the Town violate Article 13, Section [7] of the Collective Bargaining Agreement when the Grievant's request for an upgrade was denied in July 2018? If so, what shall be the remedy?

Accordingly, pursuant to the parties' request at the hearing, I frame the issue as:

- 1) Is the grievance arbitrable?
- 2) Did the Town violate Article 13, Section 7 of the parties' collective bargaining agreement when it denied the Grievant's July 5, 2018 request for an upgrade?

- 3) Did the Town violate Article 2, Sections 5 and 6 of the parties' collective bargaining agreement by unilaterally changing the Grievant's job responsibilities?
- 4) If so, what shall be the remedy?

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 2 MANAGEMENT RIGHTS

The listing of the following rights of management in this Article is not intended to be a waiver of any of the rights of the Town or department heads not listed herein. Such inherent management rights shall remain with the Town.

The employer shall have exclusive rights consistent with applicable laws and regulation:

....

5. To establish continued policies, practices and procedures for the conduct of Town business and, from time to time, to change and abolish policies, practices or procedures. Subject to the provisions of collective bargaining.
6. To prescribe and enforce reasonable rules and regulations for the maintenance of discipline and for the performance of work in accordance with the requirements of the Town. Subject to the provisions of collective bargaining.

ARTICLE 4 GRIEVANCE PROCEDURES

Section 1: The purpose of this grievance procedure is to establish effective machinery for the fair, expeditious and orderly adjustment of grievances. A grievance is defined as any dispute, claim or complaint involving the interpretation, application or alleged violation or any provision of this Agreement or disciplinary purposes of any employee represented by the Union. [sic]

ARTICLE 13 MISCELLANEOUS

Section 7: Department Heads shall submit recommendations for upgrades and/or reclassifications to the Town Manager on the basis of merit, and/or increase in responsibility, work load or vacancies. Upon submission of proper documentation to the Town Manager containing justification by his determination for said upgrading or reclassification, approval or rejection of said request shall be made within thirty (30) days of its submission.

Employees may submit requests for upgrades and/or reclassifications to their respective Department Head. Such request shall be accompanied by

appropriate documentation substantiating the request. The Department Head shall submit the request to the Town Manager within fifteen (15) days of its submission with a recommendation to either approve or reject said request. Approval or rejection of the request shall be made within thirty (30) days of its submission to the Town Manager.

An employee covered under this agreement must remain in the hired grade a minimum of one (1) year from their initial date of employment before being promoted to a higher classification.

FACTS

General Background

The grievant, Mary Ann Rafferty (Rafferty or Grievant), has worked for the Town since 2001, and she has been a Principal Clerk in the Department of Public Works (DPW) since July 2014. Rafferty reports to Abdul Alkhatib (Alkhatib), the DPW Director. The Union's current President, Nancy Higgins (Higgins), works as a Head Clerk in the Town's Police Department. John Curran (Curran) is the Town Manager and Cathleen O'Dea (O'Dea) is the Assistant Town Manager. The Town does not have a human resources officer, so O'Dea handles issues related to human resources in coordination with Curran.

Eight divisions currently comprise the DPW: Administration; Water Billing; Engineering; Highways; Sewers; Cemeteries; Parks and Trees; and Water Treatment. Prior to July 1, 2018, Cemeteries and Parks and Trees comprised one division. On July 1, 2018, the Town separated this division into two divisions.

Prior to July 1, 2018, Rafferty's job duties included administrative tasks related to Cemeteries/Parks and Trees, and Water Billing. After the Town separated Cemeteries and Parks and Trees, Rafferty's job duties related to Cemeteries, Parks and Trees, and Water Billing. As a result of the separation, Rafferty now manages two separate accounts instead of one account for certain tasks such as invoicing and payroll, and she

now has data entry responsibilities for approximately eleven or twelve Town employees instead of the seven for whom she previously had responsibility. Additionally, the volume of calls Rafferty has handled from the public has increased, which she attributes to the public being more aware of Parks and Trees. Rafferty's workload has increased since July 1, 2018, but her job duties have remained essentially unchanged, and she remains able to complete her work in a timely manner without working overtime.

Upgrade Request

By letter to Alkhatib, dated July 5, 2018, Rafferty requested, pursuant to the parties' collective bargaining agreement (CBA), an upgrade to her position. This letter included a document that Rafferty prepared to substantiate her request. She wrote:

In accordance to Article 13, Section 7 of the I.U.P.E., Local 140 Clerical Workers Chapter, I respectfully request an upgrade in my job title from Principal Clerk, to Head Clerk. I have attached my job responsibilities that I currently handle on a daily basis with regards to DPW Administration, Water Billing and Cemetery Tree and Parks. With the Cemetery Tree and Parks Division separated into two (2) Divisions, there will now be two (2) separate budgets to take care of. I will have to keep track of spending, purchase orders, payroll, employee time sheets, overtime sheets for two (2) Divisions. There are more personnel to keep track of sick, vacation and personal time. There are now two (2) separate accounts for invoice processing in MUNIS, two (2) separate accounts for payroll in MUNIS. The Tree and Parks will now be taking over the School fields which will result in a higher volume of calls for mowing, brush clearing, field maintenance, trash pick-up, that was not part of the Cemetery Tree and Parks Division. These added job duties will be on top of everything else that was not part of the original job posting for Principal Clerk in DPW Administration.

I feel these added job responsibilities warrant an increase in job title.

By letter to Curran, dated July 16, 2018, Alkhatib wrote:

I am requesting a position upgrade for Mary Ann Rafferty, from Principle Clerk to Head Clerk. Mary Ann currently is the Clerk for Cemetery Division as well as the Parks and Tree Division. In addition, Mary Ann provides support to the Billing Supervisor and act[s] in her capacity when the Billing Supervisor is out of the office. It is my opinion that Mary Ann deserves an upgrade in her title due to the increased duties caused by the split of the Cemetery, Parks and Trees Division.

As public works is taking on all town fields including school fields which create more demand form tracking payments, follow up with more contractors and vendors, to dealing with the public on fields' related matters and keeping up with budgets for both divisions [sic]. I believe the upgrade in her position will be well deserved.

I will be available to discuss this matter with you anytime you wish to discuss.

On an unidentified date after Rafferty requested the upgrade, O'Dea spoke to Curran about Rafferty's request. According to O'Dea, Curran did not support the upgrade because although Rafferty's workload had slightly increased, her job duties remained unchanged. By email to Higgins on August 6, 2018, with the subject heading "Upgrade Response," O'Dea wrote:

I talked with John last week and he is not supportive of the upgrade for MaryAnne [sic].

I am in the process of writing a response.

I will give you a call when I am done.

I think you may be able to grieve this but I'm not certain.

Grievance History

On August 23, 2018, the Union filed a grievance (Grievance) on behalf of Rafferty at Step 1 with Alkhatib. The Grievance states:

The Union on behalf of Ms. Rafferty is filing this grievance based on management[']s violations of MGL 150E. Sect 10 (added duties/responsibilities, based on a creation of a second department), and a denial for upgrade, Article 13 section 7.

Also included are any other relevant violations.

The Grievance seeks the following resolution: "Immediately upgrade to Head Clerk (next step), retroactive to July 1, 2018, the date the additional duties were added."

By letter to Higgins, dated August 28, 2018, Alkhatib wrote in response to the Grievance at Step 1: "I'm advancing this grievance to John Curran, Town Manager, as I

don't have the legal authority to approve or deny your request." This arbitration followed.¹

ARGUMENT

The Union

The Union argues that the Town failed to provide a written or verbal response to the July 5, 2018 upgrade request in violation of the CBA. The language in Article 13, Section 7 of the CBA clearly and unambiguously requires the Town Manager to provide a response to an upgrade request within thirty (30) days of receipt, in this case on or before August 15, 2018. It is undisputed that neither the Town Manager nor a designee on his behalf responded either verbally or in writing to the July 5, 2018 upgrade request. Given that the Town did not reject or approve the upgrade request in accordance with the CBA, the Town has waived its right to object to said request, and the Town's silence on the request constituted an acceptance of the upgrade.

Additionally, the Town failed to bargain with the Union in good faith over the Grievant's increased work duties and responsibilities in accordance with its obligations under Article 2, Paragraphs 5 and 6 of the CBA and M.G.L. c. 150E, s.10. Based upon the express language of Article 2, Paragraphs 5 and 6, M.G.L. c. 150E limits the Town's authority to change practices and policies, including but not limited to separating the various departments within the DPW. Even if the Town only increased the Grievant's workload, such a change implicates M.G.L. c. 150E. Higgins did not file an unfair labor

¹ In January 2019, the Town retained an outside firm to conduct a wage study (Study) that included the divisions within the DPW. The Study concluded that Rafferty's position was not entitled to an upgrade and resulted in the creation of a revised job description for this position. Neither the Study nor the revised job description, however, are relevant to the issue before me, which is whether the Town violated the CBA in July and August 2018.

practice in this matter because she believed the language in Article 2, Paragraphs 5 and 6 gave the Union standing to assert such claims through the CBA.

As a remedy, the Union requests that the Town be ordered to upgrade the Grievant from Principal Clerk to Head Clerk, award the Grievant backpay, and bargain with the Union in good faith in accordance with the parties' CBA and M.G.L. c. 150E.

The Town

The Town argues that the CBA does not obligate the Town to upgrade or reclassify any position. Article 13, Section 7 allows an employee to request an upgrade with proper documentation. Once a request is submitted to the Town Manager, however, the CBA requires only that the Town Manager shall approve or reject the request within thirty (30) days. The CBA does not require the Town Manager to grant upgrade requests, but instead leaves the decision to approve or deny the request to the Town Manager's discretion. Additionally, the Union seeks a remedy that the CBA does not authorize, and the Grievance is therefore non-arbitrable. Moreover, the Town notified the Union on August 6, 2018, that the upgrade would not be approved. The Town has fully complied with its obligations under the CBA.

Even if the CBA included an upgrade standard, the subject grievance must be denied. Generally, additional work will never justify an upgrade or reclassification. Rather, upgrades or reclassifications are appropriate when the level of the work increases. Although Rafferty's workload increased, her job duties remained the same. Rafferty is a valued Town employee, but the circumstances do not support an upgrade. There is no language in the CBA that supports the Union's request that Rafferty's

position be upgraded, and there are no facts outside of the CBA that justify the position being reclassified.

OPINION

Arbitrability

Article 4, Section 1 of the parties' CBA broadly defines a grievance as "any dispute, claim or complaint involving the interpretation, application or alleged violation of[f] this Agreement." The Grievance expressly alleges a violation of Article 13, Section 7, and implicitly alleges a violation of Article 2, which in certain circumstances imposes collective bargaining obligations. The parties' CBA does not exempt Articles 13 and 2 from the grievance procedure contained in Article 4. Accordingly, the Grievance, which deals with the application of Articles 13 and 2, is arbitrable.

Article 13 Request for Upgrade

Article 13, Section 7 provides two mechanisms for initiating an upgrade request with the Town Manager. Either the department head "shall submit recommendations for upgrades...to the Town Manager on the basis of merit, and/or increase in responsibility, work load or vacancies," or employees may initiate the process by submitting a request to their department head, who then forwards the request to the Town Manager. In either scenario, the CBA requires that approval or rejection of the request "shall be made" within thirty days of its submission to the Town Manager. Although, contrary to the Town's position, an increase in workload is a valid basis for requesting an upgrade under Section 7, this provision leaves the decision to approve or reject a request to the Town Manager's discretion.

The Union argues that the Town violated the Section 7 timing requirement by not responding to the Grievant's request, and that the failure to respond should be treated as an approval of the request. The facts do not support this position.

On July 5, 2018, the Grievant submitted a request for an upgrade with supporting documentation to Alkhatib. On July 16, 2018, within the timing requirements of Section 7, Alkhatib forwarded the request to Curran along with his recommendation to approve the request. The hearing established that O'Dea and Curran subsequently discussed the request. On August 6, 2018, within the thirty-day timing requirement, O'Dea informed the Union's President in an email with the heading, "Upgrade Response," that Curran "is not supportive of the upgrade" and the Union "may be able to grieve this but I'm not certain." Accordingly, even if the Town should have responded more formally to the request, it nevertheless responded in a manner that conveyed to the Union the Town's rejection of the upgrade request. The Grievance itself, which describes a "denial for upgrade," confirms that the Union understood that Curran had denied the request. Accordingly, the Town did not violate Article 13, Section 7, and I need not consider the Union's argument that a failure to timely respond amounts to tacit approval of the request.²

Article 2, Paragraphs 5 and 6

The Union argues that increasing the Grievant's workload without prior notice and an opportunity to bargain violates Article 2, Paragraphs 5 and 6. Article 2, Paragraph 5 gives the Town the right to establish "policies, practices, and procedures for the conduct of Town business." Paragraph 6 gives the Town the right to prescribe

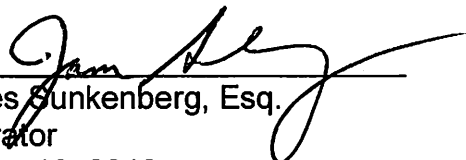
² I also note that the Union did not produce any evidence to establish that the Grievant is actually performing the job duties of a Head Clerk rather than a Principal Clerk.

and enforce "reasonable rules and regulations for the maintenance of discipline and for the performance of work." Both paragraphs expressly include language that makes these management rights "[s]ubject to the provisions of collective bargaining." Neither provision, however, applies to the facts underlying the Grievance, which challenges the Grievant's added job responsibilities.

Although the Town increased Rafferty's workload, Paragraph 5 does not apply because the Town did not establish "policies, practices, or procedures." Similarly, Paragraph 6 does not apply because the Town did not prescribe "reasonable rules and regulations." Accordingly, the Union's reliance on these provisions is misplaced, and the Town did not violate Article 2, Paragraphs 5 and 6 of the CBA.

AWARD

The grievance is arbitrable. The Union did not establish that the Town violated the parties' collective bargaining agreement. Accordingly, I deny the grievance.



James Sunkenberg, Esq.
Arbitrator
August 16, 2019