COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of the Arbitration Between:	*	
	*	
CITY OF LOWELL	*	
	*	ARB-19-7216
-and-	*	
	*	
LOWELL POLICE ASSOCIATION	*	

Arbitrator:

Timothy Hatfield, Esq.

Appearances:

Stacie Moeser, Esq. - Representing City of Lowell

Jordan Burke, Esq. - Representing Lowell Police Association

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 allowed, the City exceeded the number of specialty positions as set by the collective bargaining agreement, following the enactment of M.G.L. c. 71, §37P in the appointment of school resource officers. The City is ordered to remedy the violation in a manner consistent with this decision.

Timothy Hatfield, Esq.
Arbitrator
July 16, 2020

INTRODUCTION

On March 14, 2019, the Lowell Police Association (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 30, 2019.

The parties filed briefs on October 23, 2019.

THE ISSUE

Whether the City exceeded the number of specialty positions as set by the collective bargaining agreement, following the enactment of M.G.L. c. 71, §37P in the appointment of school resource officers? If so, what shall be the remedy?

RELEVANT CONTRACT LANGUAGE

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

Article III – Seniority (In Part)

Section 6:

… When a permanent opening occurs within any "specialty position" enumerated below, any regular member desiring, may apply, in writing, to the Superintendent for consideration of said position. The final decision, with respect to assignment of such position, shall, however, be that of the Superintendent after evaluation of the qualifications of all applicants for such position. Such opening shall be posted, as set forth in section 6 above. A "specialty position shall include assignment to the following bureaus:

1) Criminal Bureau;
2) Juvenile Bureau;
3) Vice Bureau;

4) Narcotics Bureau;
5) Arson Bureau; and
6) Any new bureau; which shall, however, be negotiated with the Union with respect to their impact. …

It is agreed that in the event that a vacancy/opening occurs in a herein defined "Specialty Unit", said positions shall be posted. The Superintendent shall give appropriate consideration to all officers who submit a written request for the respective assignment

(6) Specialty Positions
1. Professional Development
2. Traffic Unit
3. Community Services
4. Investigative Services
5. Administrative Services
6. Support Services
7. Special Services

Section 7

The position of School Resource Officer is a biddable position.

Section 8

The number of specialty position assignments that are not covered by the seniority bidding procedure shall be frozen at 63. All other positions shall be available for seniority bidding.

Article XX – Grievances and Arbitration Procedure (In Part)

Section 1: Matters Covered

Only matters involving the question of whether the Employer is complying with the express provisions of this Agreement shall constitute grievances under this Article. …

Section 4: Arbitration

… The arbitrator hereunder shall be without power to alter, add to, or detract from the language of this Agreement. …

Article XXVIII – Minimum Manning Level

The minimum manning level for each shift of the Lowell Police Department shall be a management decision of the Employer, having in mind the

consideration of protection of the health and safety of the general public, varying conditions affecting the crime rate, budgetary considerations and the number of personnel available for duty.

Article XXXVII – Miscellaneous Provisions (In Part)

Section 1:

Should any provisions of this Agreement be found to be in violation of any Federal or State Law, Civil Service Rule or Charter, Ordinance or Code of the City of Lowell, by a court of competent jurisdiction, such particular provisions shall be null and void, but all other provisions of this Agreement shall remain in full force and effect for the duration of this Agreement. …

RELEVANT STATE STATUTE

M.G.L. c.71 § 37P (In Part)

(b) … In assigning a school resource officer, hereinafter referred to as "SRO", the chief of police shall assign an officer that the chief believes would strive to foster an optimal learning environment and educational community. The chief of police shall give preference to candidates who demonstrate the requisite personality and character to work with children and educators in a school environment and who have received specialized training relating to working with adolescents and children, including cognitive development, de-escalation techniques, and alternatives to arrest and diversion strategies. The appointment shall not be based solely on seniority. The performance of an SRO shall be reviewed annually by the superintendent and the chief of police.

FACTS

The City of Lowell (City) and the Union were parties to a collective bargaining agreement that was in effect at all relevant times to this arbitration. During the negotiations for the 2015 – 2018 collective bargaining agreement, the parties agreed upon in an increase from 60 to 63 jobs that were not subject to the seniority bidding procedure under Article III, Section 8.

On April 13, 2018, Massachusetts Governor Charlie Baker signed the Act Relative to Criminal Justice Reform (ACT), which became effective on July 12,

2018. Section 27 of the ACT amended M.G.L. c. 71, § 37P making all SRO positions in the Commonwealth no longer subject to seniority bidding procedures in collective bargaining agreements. This amendment rendered Article 3, Section 7 of the parties' collective bargaining agreement[1] null and void and under the terms of Article XXVII, Section 1, unenforceable.

Once mandated by the Commonwealth to make SRO positions not subject to seniority bidding, the City was left with 69 non-biddable positions instead of the mandated cap of 63 positions not subject to the bidding procedure. The parties attempted to resolve the matter but were unable. The Union filed a grievance that was denied at all steps by the City, resulting in the instant arbitration.

POSITIONS OF THE PARTIES

THE UNION

This case presents a clear example of contractual language interpretation. Article III, Section 8 is unequivocal in its mandate that "the number of specialty position assignments that are not covered by the seniority bidding procedure shall be frozen at 63. All other positions shall be available for seniority bidding."

Based on foundational contractual principles, there is no alternate meaning to be found or path for the City to circumvent the intent of the parties;

> Plain and unambiguous words are undisputed facts … An arbitrator's function is not to rewrite the Parties' contract. His function is limited to finding out what the parties intended under a particular clause. The intent of the Parties is to be found in the words which they, themselves, employed to express their intent. When the language is clear and explicit, the arbitrator is constrained to give effect to the

[1] Article III, Section 7 states: The position of School Resource Officer is a biddable position.

> thought expressed by the words used. (excerpt from How Arbitration Works, Elkouri and Elkouri, 6th Edition, page 627.)

According to the language of Article III, Section 8, if a position is not a specialty assignment, said position shall be available for seniority bidding. In other words, Article III, Section 8 delineates that two categories of assignments exist; those that are biddable by seniority, and those are not. Despite the City's efforts to now manufacture a third category, no such category exists. By assigning more than 63 non-biddable positions, the City has violated the contract. The clear intent of the parties is to limit the amount of specialty positions to 63.

The City has the ability to both comply with the SRO law and comply with the collective bargaining agreement. It is incumbent upon the City to make any necessary adjustments in order to not violate the collective bargaining agreement. Instead, the City has forced the Union and its members to bear the brunt of this change.

The City has referenced Article XXXVII (Miscellaneous Provisions) in an effort to avoid complying with the plain language of Article III, Section 8. The City is entirely capable of adhering to both Article III, Section 8 and M.G.L. c.71 s. 37P. There is nothing in Article III, Section 8 that violates M.G.L. c.71 s. 37P. The two provisions are not mutually exclusive and do not present a conflict with compliance.

The City insinuates that an obligation to bargain mid-term would mean the Union would need to capitulate and raise the number above 63. Assuming, *arguendo*, that a duty to bargain mid-term actually exists, the Union should not be forced to raise the number of specialty positions just because the City would prefer to transfer all burden on this issue. Moreover, the parties are currently in ongoing

contract negotiations at the Joint Labor Management Committee and the City has failed to propose an increase in the specialty positions through this process. The City should not be rewarded for a unilateral implementation that violates the current collective bargaining agreement and circumvents the process already in place.

Conclusion

Based on the above, the Union requests a finding that the City has violated the collective bargaining agreement and shall be required to remain within the cap of 63 non-biddable positions.

THE EMPLOYER

The Union has failed to demonstrate that the City violated the collective bargaining agreement in the appointment of SROs as required by M.G.L. c. 71, §37P. It is the City's position that beyond SROs becoming ineligible for seniority bidding, negotiations are required to incorporate the statute into the collective bargaining agreement. The Union is unwilling to negotiate a position that is contrary not only to the terms of the collective bargaining agreement but also to the language of the statute, legislative intent, and public policy.

According to Article XXXVII, §1 of the collective bargaining agreement:

> [s]hould any provisions of this Agreement be found to be in violation of any federal or state law … such particular provision shall be null and void, but all other provisions of this Agreement shall remain in full force and effect for the duration of this Agreement.

The Union and the City agree that the amendments to M.G.L. c. 71, §37P, results in the invalidation of Article III, §7. The legislation requires that when appointing SROs, "[t]he appointment shall not be based solely on seniority." This directly contradicts Article III, §7 which states that "[t]he position of School Resource

Officer is a biddable position," since according to the terms of the collective bargaining agreement biddable positions are assigned by seniority."

Article III, §8 is also partially invalidated by the amendments to M.G.L. c.71, §37P. The Union relies on §8 to conclude that SROs become not just non-biddable positions, but automatically morph into specialty positions. The Union's logic is backwards. Section 8 states that "[t]he number of specialty position assignments that are not covered by the seniority bidding procedure shall be frozen at 63. All other positions shall be available for seniority bidding." The first sentence of §8 sets a cap on the number of specialty positions, as specifically enumerated in §6. The second sentence of §8 then forces every other position to be biddable. As such, the collective bargaining agreement envisions and permits only two types of positions, specialty and biddable, and fails to contemplate positions that cannot fit into either category. Therefore, the second clause of §8 requiring that "[a]ll other positions shall be available for seniority bidding" is also invalidated by the statute which mandates the creation of a third category of non-conforming positions.

According to the terms of the statute and the collective bargaining agreement, SROs are neither biddable positions nor specialty positions. Biddable positions are based solely on seniority. Pursuant to the statute, SROs can no longer be biddable positions. Specialty positions are also expressly listed and described in Article III. Officers are selected, assigned and supervised under the sole discretion of the Police Superintendent. SROs are not listed in the collective bargaining agreement as specialty positions. SROs are a product of continual cooperation between the police department and the schools. Their selection is

administered according to the criteria and with the direct involvement of the School Superintendent and school staff and administration. Neither biddable positions nor specialty positions operate like SROs under the control of an outside agency. Instead SROs compromise a unique third category, the impact of which must be negotiated and agreed by the parties for incorporation into the collective bargaining agreement.

In order to achieve the position advanced by the Union, the parties would have to negotiate and execute a written agreement. These requirements are expressly stated in the collective bargaining agreement in Article XXII and XXXIX, §2. Specialty positions are specifically designated in the collective bargaining agreement and it is required that "any new bureau … shall be negotiated with the Union with respect to [its] impact." SROs are not included as specialty positions and could not automatically become specialty positions without this negotiation and written agreement. Furthermore, in negotiating the collective bargaining agreement in 2015, the Union and City did not and could not possibly anticipate the impact of legislation that would arise in 2018 and require an additional category of positions to be incorporated into the collective bargaining agreement.

According to Article XXVIII, the required allocation of staff "shall be a management decision of the Employer, having in mind the consideration of protection of the health and safety of the general public, varying conditions affecting the crime rate, budgetary considerations and number of personnel available for duty." These considerations are certainly central to the Police Superintendent in staffing specialty positions. It would not be in the public's best

interest for the Police Superintendent to have to decide that he could no longer appoint officers to the Vice Bureau. The positions would either become based solely on seniority, disregarding the advanced training and experience required in such a technical and specialized bureau, or would have to be eliminated in their entirety.

Conclusion

For all the foregoing reasons, the City requests that the arbitrator rule in its favor by concluding that the City did not violate the collective bargaining agreement in appointing the SRO positions as required by statute.

OPINION

The issue before me is: Whether the City exceeded the number of specialty positions as set by the collective bargaining agreement, following the enactment of M.G.L. c. 71, §37P in the appointment of school resource officers? If so, what shall be the remedy? For all the reasons stated below, the City exceeded the number of specialty positions as set by the collective bargaining agreement, following the enactment of M.G.L. c. 71, §37P in the appointment of school resource officers.

Article III, Section 8 states:

> [t]he number of specialty position assignments that are not covered by the seniority bidding procedure shall be frozen at 63. All other positions shall be available for seniority bidding.

Under the unambiguous and plain language of the parties' collective bargaining agreement, there are two types of positions recognized by the parties, specialty position assignments that are not subject to the seniority bidding procedure, and

all others, which are specifically required to be available for seniority bidding. The parties have abided by this language for many years and even negotiated an increase in the number of specialty position assignments raising the maximum number to the current 63. There is no dispute that the parties were aware of this requirement and operated under its restrictions. As such, I find this language to be clear and unambiguous. For all the positions covered by this collective bargaining agreement, 63 may be filled without regard to seniority, and the remainder must be subject to seniority bidding.

The City, through no fault of its own, found itself with a decision to make upon the passage of M.G.L. c. 71, §37P. This statute, amongst a host of other things not related to the instant matter, removed SRO positions from seniority bidding on a statewide basis. This act, rendered Article III, Section 7 of the collective bargaining agreement illegal and under the terms of Article XXXVII, Section 1, unenforceable.[2] The City was now faced with the issue of having more than the maximum allowed 63 positions not subject to bidding. Instead of complying with the requirements of Article III, Section 8 by making an equal number of previously non biddable positions biddable to match the number of SRO positions now no longer subject to bid, the City refused to adjust its stance and kept the 63 non biddable positions plus the added SRO positions that are now not subject to bid. In effect the City is now attempting to add a third class of positions that does not currently exist in the collective bargaining agreement. Under the City's logic the parties would now have biddable positions, non-biddable positions,

[2] The parties agree that Article III, Section 7 is no longer enforceable.

and SRO positions that are somehow separate and distinct from the other positions.

The problem with this theory floated by the City is that Article III, Section 8 is clear, unambiguous and not subject to any other reasonable interpretation. The parties have agreed to two types of positions, and the fact that the Commonwealth imposed new restrictions on SROs does not change that requirement.

Additionally, Article XX, Section 4 states in part: [t]he arbitrator hereunder shall be without power to alter, add to, or detract from the language of this Agreement. What the City is arguing is that notwithstanding the fact that nowhere in the collective bargaining agreement does a third type of position exist, I should find that the new SRO restrictions create such a new type of position. Just like the parties are subject to the clear and unambiguous language of the collective bargaining agreement, so too am I restricted in my authority as arbitrator under the clear and unambiguous terms of the collective bargaining agreement. The parties have agreed that I do not have the power to add to the collective bargaining agreement. If I were to find for the City, I would be adding a new type of position that the parties have not previously agreed to. In so doing, I would be exceeding the authority granted to me by the parties. As such, I find that the parties continue to be governed by the restrictions so clearly laid out in Article III, Section 8.

Finally, the City, in its post-hearing brief, raises for the first time an argument that the language of Article XXVIII, Minimum Manning Level somehow allows for the SRO positions to not count against the cap of 63 non-biddable positions. First, the City presented no evidence or argument at the hearing about Article XXVIII.

The post-hearing brief is the first and only time this issue has been raised. As such, having provided no evidence or argument during the hearing to support its position, I decline to consider this belated argument in rendering my decision. Parenthetically, even if I were to consider the argument made by the City, which I do not, I note that the article of the collective bargaining agreement cited by the City specifically refers to Minimum Manning Levels, a fact that the City omitted in its brief while attempting to unconvincingly parlay that language to fit its narrative of why it should not be bound by the cap of 63 non-biddable positions.

AWARD

The grievance is allowed, the City exceeded the number of specialty positions as set by the collective bargaining agreement, following the enactment of M.G.L. c. 71, §37P in the appointment of school resource officers. The City is ordered to remedy the violation in a manner consistent with this decision.

REMEDY

The City is hereby ordered to abide by Article III, Section 8 of the collective bargaining agreement which caps the total number of non-biddable positions, including the SRO positions, at 63. All other positions shall be subject to the seniority bidding procedure currently in place between the parties.

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Timothy Hatfield, Esq.
Arbitrator
July 16, 2020