COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of the Arbitration Between:	*	
	*	
CITY OF WORCESTER	*	
	*	ARB-19-7231
-and-	*	
	*	
NAGE, LOCAL 495	*	

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 did not violate the parties' collective bargaining agreement when it did not call Todd Wader for overtime opportunities on April 15, 2018 and April 16, 2018, and the grievance is denied.

Timothy Hatfield, Esq.
Arbitrator
August 21, 2020

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 Department's Boston office on September 27, 2019.

The parties filed briefs on November 8, 2019.

THE ISSUE

Did the City violate the parties' collective bargaining agreement when it did not call Todd Wader for overtime opportunities on April 15, 2018 and April 16, 2018? If so, what shall the remedy be?

RELEVANT CONTRACT LANGUAGE

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

ARTICLE 4 MANAGEMENT RIGHTS (In Part)

> In the interpretation of this Agreement, the City shall not be deemed to have been limited in any way in the exercise of the regular and customary functions of municipal management or governmental authority and shall be deemed to have retained and reserved unto itself all the powers, authority and prerogatives of municipal management or governmental authority including, but not limited to, the following examples: the operation and direction of the affairs of the departments; … the scheduling and enforcement of working hours; the assignment of overtime; the determination of whether employees (if any) in a classification are to be called in for work at times other than their regularly scheduled hours and the determination of the classification to be so called; … the making, implementation, amendment, and enforcement of such rules, regulations, operating and administrative procedures from time to time as the City deems necessary; … except to the extent abridged by a specific provision of this Agreement or law.

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 19 ASSIGNMENT OF OVERTIME (In Part)

1. Insofar as practicable in the assignment of overtime service, department heads and bureau heads will apply the following standards, consistent with efficient performance of the work involved and the best interests of the operation of the department:

   (a) Overtime will be awarded on an equal opportunity basis. (It is the intent of this standard that each employee shall be afforded an equal number of opportunities to serve with no obligation on the part of the City to equalize actual overtime hours.)

   (b) To be eligible for overtime service employees must, in the option of their department head or bureau head, be capable of performing the particular overtime task.

   (c) A roster will be kept by each bureau head of overtime calls and overtime service by name, by date, and by hour. In case of a grievance involving such records, they shall be subject to examination by the Union … in the presence of the department head or his representative. After four (4) consecutive refusals to perform overtime service, an employee's name shall be dropped from the overtime roster for six (6) months.

   (d) There shall be no discrimination or personal partiality in the assignment of overtime service.

RELEVANT MEMORANDUM OF UNDERSTANDING (In Part)

… WHEREAS, the City and the Union held an Exchange of Views meeting on February 6, 2002 for the purpose of discussing the variations of policies, procedures and practices within different divisions of the Department of Public Works as they effect the temporary reassignment of employees from their current division to another division of the Department of Public Works;

WHEREAS, the City and the Union have reached an understanding regarding the temporary reassignment of employees from their current division of the Department of Public Works;

> Now, THEREFORE, the parties wish to memorialize their understanding, as follows:
>
> 1. The Union acknowledges that the Department of Public Works is comprised of several different divisions that have diverse operational responsibilities and as a result, some of the policies, procedures and practices differ to a degree so as to be unique to each specific division. …
>
> 4. The City acknowledges its obligation to adhere to the provisions of the Collective Bargaining Agreement.
>
> _____
> fn.1 The City and the Union acknowledge that many of these unique divisional policies, procedures and practices are not in writing, but have been in place for many years.

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 grievant, Todd Wader (Wader) worked for the City as a Motor Equipment Repairman (MER) in the Central Garage in the Department of Public Works & Parks.

In 2002, the Union and the City entered into a MOA that in relevant part states that:

> [T]he Union acknowledges that the Department of Public Works is comprised of several different divisions that have diverse operational responsibilities and as a result, some of the policies, procedures and practices differ to a degree so as to be unique to each specific division …
>
> _____
> fn.1 The City and the Union acknowledge that many of these unique divisional policies, procedures and practices are not in writing, but have been in place for many years.

John Rugg (Rugg) has been the Director of Equipment Maintenance for the Central Garage since 2004. In 2005, Rugg implemented a new policy in the

Central Garage. Moving forward, any employee who was absent from work for any reason (illness, injury, vacation, administrative leave etc.) on a given day, would not be called for overtime until the employee returned to work a full shift. Subsequently, this policy was explained to all new employees at their orientation session / walkthrough. This policy has gone unchallenged by bargaining unit members since at least 2010.

In 2007, Wader was hired by the City and attended his orientation session at the Central Garage. Wader was unable to remember whether he was informed of the policy in question. The Union was unable to provide any further evidence to disprove the City's claim that the policy is provided to all new employees of the Central Garage, including Wader. James Ducharme (Ducharme), Service Manager of the Central Garage, is responsible for arranging overtime in person or by phone.

On Friday April 13, 2018, Wader was working his usual 7:30 a.m.– 4:00 p.m. shift in the Central Garage. Wader requested to use 4 hours of vacation time prior to the end of his shift. Rugg approved the request and ultimately charged Wader with 4 hours of Administrative time that Wader had available to him instead of vacation time. The Central Garage was closed on Saturday April 14, 2018 and scheduled to be closed on Sunday April 15, 2018. However, on Sunday April 15, 2018, a 4-hour overtime opportunity arose due to a snow event. Ducharme made the calls to fill the overtime and did not call three of the twelve names on the list. Wader, who was available and able to work, was not called as he was marked unavailable due to his use of Administrative time on Friday.

Monday April 16, 2018 was Patriots Day, a state holiday, and as such, the Central Garage was slated to be closed. Two overtime opportunities were available that day for 8 hours and 9 hours respectively due to a continuing snow event. Again, Wader, who was available and able to work, was not called as he was marked unavailable due to his use of Administrative time on Friday. Finally, Wader returned for his regularly scheduled shift on Tuesday April 17, 2018.

The Union filed a grievance on the City's failure to call Wader for the overtime opportunities. The grievance was denied at all steps by the City and resulted in the instant arbitration.

POSITIONS OF THE PARTIES

THE UNION

The language of Article 19 is clear and unambiguous, "overtime will be awarded on an equal opportunity basis. (It is the intent of this standard that each employee shall be afforded an equal number of opportunities to serve …)" Rugg's policy accomplishes the exact opposite and creates two classes of employees, those who have used approved time on a particular shift being ineligible, and those that have not used approved time on a particular shift being eligible for overtime. Wader took four hours of approved time at the end of a shift on April 13,th and under Rugg's policy, became ineligible for overtime until he completed his regular shift on April 17th.

Article 19 (d) also states: "there will be no discrimination or personal partiality in the assignment of overtime service." Rugg's policy clearly discriminates against employees who utilize accrued time, a benefit for employees

as codified in the collective bargaining agreement. Rugg's policy discriminates against employees for simply using accrued time and makes them chose between the potential loss of overtime opportunities, or the loss of accrued time. More senior employees are also being discriminated against as they have earned more accrued time under the collective bargaining agreement, time which is earned on a "use or lose it" basis. The more senior employees are thus left with the choice of losing time or using the accrued time so as to not potentially lose it but in so doing, potentially miss overtime hours as happened here. Less senior employees who have less accrued time will have more overtime opportunities.

Furthermore, the policy discriminates against those who wish to take accrued time in the winter months rather than in the summer. The winter months with snow emergencies offer many overtime opportunities, and thus employees who wish to use accrued time in the winter will face less overtime opportunities under this discriminatory policy.

Article 19 contains a number of clear exceptions and exclusions to the overtime policy. Here, the parties clearly provided for the exceptions to overtime eligibility and use of the overtime roster that were mutually acceptable and codified in the collective bargaining agreement. Rugg's policy is not listed as an exception.

No Past Practice

In the absence of a written agreement, for a past practice to be binding on both parties, it must be: (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties.

Rugg's vague, unwritten policy at issue here does not pass this test. When asked to enunciate the policy at the hearing, both Rugg and Ducharme struggled to do so in a clear and consistent fashion, including using different words and phrases each time they stated the policy.

Rugg developed the policy on his own, was clear that he consulted no one else, and then implemented it under the radar through two successive service managers over several years. By its very nature, the policy is one where the employee is unaware of its implementation as they are being skipped on a phone call sheet and not alerted to an overtime opportunity.

The policy was allegedly shared verbally at one meeting fourteen years ago which predated Wader's date of hire. The City contends the policy was then shared via word of mouth thereafter during employee orientation, but witnesses couldn't point to any specific instance of this being done. Ducharme admitted the orientation process lasted a short period of time and employees digested a lot of materials. He could not recall being told of this policy at his own orientation. Neither Rugg nor Ducharme could say whether Wader was told of the policy during his orientation and could not point to any other instance where the policy was discussed with Wader prior to the incident at issue. Anecdotal testimony that other employees must have known about a policy by word of mouth does not equal clear notice or knowledge.

Wader, a twelve-year employee was not aware of the policy. It was never written down or posted on an employee bulletin board. Furthermore, the overtime roster and call sheets are not posted, but kept in a private office. There is no

degree of mutuality with respect to the present policy. It was an edict developed and implanted by Rugg, is at odds with all the other divisions in Local 495 and the collective bargaining agreement and was never accepted by the Union.

Policy is Unreasonable and Overly Broad

Arbitrators typically recognize the implicitly retained right or contractually enumerated management right to promulgate rules. But management's right to issue rules is limited to what is reasonable. Rugg's policy is not reasonably related to a legitimate objective of management, rather he testified that he had a "clerical nightmare" in the garage. This testimony is unsupported and not credible. In the present case, Rugg admitted that making a call to an employee took only a matter of seconds. Twelve people were initially eligible for overtime on this list. If we look at the overtime opportunities at issue, his "clerical nightmare" could have been cured by making three additional calls. When questioned how making three additional calls caused a "clerical nightmare" he was unable to give a clear answer other than to state that he just did not want to deal with the issue.

There is no credible justification for this policy, rather it was created for Rugg's idiosyncratic personal preference to solve a nonexistent "clerical nightmare" by simplifying the calls he had to make under the collective bargaining agreement. In the process, employees were being denied overtime opportunities for simply using approved accrued time that they would otherwise lose at the end of the year.

The policy is also overly broad. In Wader's case, Rugg and Ducharme agree that Wader was, other than Rugg's policy, fit for duty and otherwise available

for overtime. Wader used four hours of accrued time on Friday afternoon. He was off duty on Saturday and Sunday, and Monday was a holiday. He was scheduled to return to work on Tuesday. For those four hours of approved accrued time he lost three overtime opportunities totaling twenty-one hours despite being ready willing and otherwise able to work. Rugg's policy avoided three phone calls each day which would have taken a mere minute of time and as a result, Wader lost many hours of overtime. Rugg could have simply called the three employees and let them decide the issue for themselves, either by not answering the call, saying yes, saying no, or asking for a do not call designation, all of which are present options in the Central Garage. Many employees who use accrued time are actually available and willing to perform overtime, but are caught up in Rugg's overbroad, unnecessary policy and miss overtime opportunities as a result. This is not only plainly wrong, but also violates the collective bargaining agreement.

Conclusion

For all of the foregoing reasons, the grievance should be upheld, and Wader should be made whole for all loses associated with the grievance.

THE EMPLOYER

The Union seeks an Order from the Department of Labor Relations invalidating an overtime policy that had been in place for approximately thirteen years as of April 2018. Article 4 of the collective bargaining agreement reserves to management "the making, implementation, amendment, and enforcement of such rules, regulations, operating and administrative procedures from time to time as the City deems necessary." Moreover, the Union has expressly acknowledged

that each division within the Department of Public Works & Parks has "diverse operational responsibilities and as a result, some of the policies, procedures and practices differ to a degree so as to be unique to each specific division."

It is clear from evidence presented at the hearing that Rugg implemented the overtime policy back in 2005, and that the policy was initially conveyed to employees in a meeting. Since then, the policy has been conveyed to newly hired Central Garage employees during their orientation. It is also clear that the policy has been applied to Wader and his coworkers without issue.

The Union argued at the hearing that Wader may have been nervous and not retained all of the information provided to him at orientation. The Union however failed to provide any evidence demonstrating that the information was not provided. That Wader may not have been able to recall at the hearing in 2019 everything that was said to him during his orientation in 2007 cannot be sufficient to overcome the testimony of Rugg and Ducharme, who testified as to both the policy's establishment and implementation, as well as its rationale and application, which is supported by the overtime records presented at the hearing. Clearly this was not a policy that Ducharme invented on April 17, 2018.

The Union also appeared to argue that it would have been better to have the policy in writing. Even assuming that was true, the Union expressly acknowledged in the 2005 agreement that many of the unique policies, procedures and practices within the various divisions of the Department of Public Works & Parks are not in writing, as is the case with the Central Garage policy. Thus, it cannot now argue that this particular policy must be in writing in order to be valid.

The Union further appeared to argue that Article 19 restricts the City from not offering overtime to employees when they are absent from work. This argument is without merit. Both Union President Maher and Wader acknowledged during their testimony that there are occasions on which an employee will not be called for overtime, i.e., that employees will not be called for overtime when they are absent because of an illness or injury. Thus, the Union understands that it is permissible to bypass someone who is absent from work. Clearly, Wader was unhappy that the longstanding overtime policy affected him on April 15 and 16, 2018, and rather than seeking to make a change through bargaining, the Union has instead sought to use the grievance procedure to invalidate the policy.

Conclusion

Based on the foregoing, it is clear that on April 15 and 16, 2018, Ducharme applied a longstanding and uniformly applied policy of the Central Garage to Wader and as such, the grievance should be denied.

OPINION

The issue before me is:

Did the City violate the parties' collective bargaining agreement when it did not call Todd Wader for overtime opportunities on April 15, 2018 and April 16, 2018? If so, what shall the remedy be?

For all the reasons stated below, the City did not violate the parties' collective bargaining agreement when it did not call Todd Wader for overtime opportunities on April 15, 2018 and April 16, 2018, and the grievance is denied.

The evidence presented conclusively proves that the overtime rule in dispute in this case was consistently applied in the City's Central Garage since 2005. It is also apparent that the bargaining unit members working in the Central Garage were aware of the rule and worked under its restrictions for over a decade without a formal complaint.

The circumstances surrounding Wader's missed overtime on April 15th and April 16th due to his use of approved leave time on the previous Friday afternoon, however, clearly show the disproportional harm this rule has the potential to cause. The City was able to save three phone calls each day, preserving an estimated nine minutes and in turn Wader, who was ready willing and able to work, missed out on twenty-one hours of overtime pay. Unfortunately for Wader and the Union however, the rule's lopsided benefit to harm ratio is not the controlling factor in deciding a violation of the collective bargaining agreement.

Contrary to the Union's argument, this rule fits the standard definition of a past practice. As the Union states, for a past practice to exist, it must be: (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties. Here, there is no dispute that the rule was enacted in 2005 at the Central Garage and disseminated to the then working bargaining unit members. The rule is then disseminated verbally to all new employees at their orientation walk-through. The Union, while attempting to question whether Wader was in fact told of the rule at his orientation, was unable to provide any substantial evidence to dispute the City's testimony that the rule is discussed with all new employees

(including Wader) during each orientation session. Additionally, the rule has gone unchallenged by bargaining unit members in the Central Garage for over a decade.

Finally, the parties' 2002 MOA agreement states:

> [T]he Union acknowledges that the Department of Public Works is comprised of several different divisions that have diverse operational responsibilities and as a result, some of the policies, procedures and practices differ to a degree so as to be unique to each specific division …
>
> _____
>
> fn.1 The City and the Union acknowledge that many of these unique divisional policies, procedures and practices are not in writing, but have been in place for many years.

Based on the facts presented during the hearing, I find that the overtime eligibility rule in the Central Garage, which disproportionally impacts employees in relation to the City's time-saving benefit, is a valid past practice binding upon the parties until such time as it is addressed during successor collective bargaining negotiations.

AWARD

The City did not violate the parties' collective bargaining agreement when it did not call Todd Wader for overtime opportunities on April 15, 2018 and April 16, 2018, and the grievance is denied.

Timothy Hatfield, Esq.
Arbitrator
August 21, 2020