

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of the Arbitration Between: *

TOWN OF MILLBURY *

-and- *

ARB-19-7241 *

MILLBURY POLICE ASSOCIATION, *
LOCAL 128 *

Arbitrator:

Timothy Hatfield, Esq.

Appearances:

James Hoban, Esq. - Representing Town of Millbury

Jennifer Smith, Esq. - Representing Millbury Police Association,
Local 128

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 Town did not violate Article XI of the collective bargaining agreement when it failed to compensate bargaining unit members with Holiday Pay for December 24, 2018, and the grievance is denied



Timothy Hatfield, Esq.

Arbitrator

July 7, 2020

INTRODUCTION

On March 27, 2019, the Millbury Police Association, Local 128 (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 in Millbury, Massachusetts on July 30, 2019. The Respondent filed a brief on December 9, 2019; the Union filed a brief on December 16, 2019.

THE ISSUE

Did the Town violate Article XI of the collective bargaining agreement when it failed to compensate bargaining unit members with Holiday Pay for December 24, 2018? If so, what shall the remedy be?

RELEVANT CONTRACT LANGUAGE

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

ARTICLE V MANAGEMENT RIGHTS (In Part)

SECTION 1. The Town will not be limited in any way in the exercise of the functions of management, and will have retained and reserved unto itself the right to exercise, without bargaining with the union, all the powers, authority and prerogatives of management including but not limited to, the following items:

...

N. The creation, assignment and change of shifts, including establishment [of] a change from time to time of shift times and the determination of the number of shifts and the changing of the number of shifts;

...

Q. The scheduling and enforcement of working hours;

R. (1) The requirement of overtime; and
(2) The assignment of overtime;

...

The Town will also have the right to invoke these rights and make such changes in these items as the Town, in its sole discretion may deem appropriate without negotiation with the union, except to the extent expressly abridged by a specific provision of this agreement.

ARTICLE IX GRIEVANCE PROCEDURE (In Part)

Any dispute with respect to wages, fringe benefits, hours of work, conditions of employment, workload or standards of performance shall be subject to the grievance procedure...

[T]he union may file the grievance for arbitration by notifying the town manager in writing.

The parties, or either party, may file a demand with the Massachusetts Board of Conciliation and Arbitration. The Arbitrator shall have no power to add to, subtract from, or modify this agreement, and may only interpret such items and determine such issues as be submitted to him or her by agreement of the parties, or by order of a court. The results of the arbitration shall be final and binding on the parties with respect to all issues submitted, including matters of interpretation of statutes, unless reallocated by the arbitrator.

ARTICLE XI HOLIDAYS (In Part)

Section 1. Recognized & Observed

New Year's Day
Martin Luther King Day
Washington's Birthday
Patriots Day
Memorial Day
Independence Day
Labor Day
Columbus Day
Veteran's Day
Thanksgiving Day

Christmas Day and
the Officer's Birthday

Or the day of celebration thereof, and any other day declared a holiday by the state or federal government and required to be observed by this municipality.

For purposes of this article, a holiday is a twenty-four (24) hour period commencing at 12:01 a.m. of each day listed above. There will be twelve (12) paid holidays, whether worked or not.

RELEVANT EXECUTIVE ORDER

EXECUTIVE ORDER 13854 OF DECEMBER 18, 2018 (IN PART)

Section 1. All executive departments and agencies of the Federal Government shall be closed and their employees excused from duty on Monday, December 24, 2018, the day before Christmas Day.

Sec. 2. The heads of executive departments and agencies may determine that certain offices and installations of their organizations, or parts thereof, must remain open and that certain employees must report for duty on December 24, 2018, for reasons of national security, defense, or other public need. ...

FACTS

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

On occasion, Presidents have issued Executive Orders closing executive departments and agencies of the Federal Government on specified dates. In June 2004, President George W. Bush declared a national day of mourning upon former President Ronald Reagan's death. According to President Bush's Executive Order, all executive branch departments and agencies of the Federal Government were closed for the day, except those dealing with national security or essential services. In response to the national day of mourning for President Reagan, the Town gave employees of Town Hall and other departments the day

off with pay. The Town provided police officers and dispatchers with eight hours of lieu of pay (LOP) instead of the day off.

On all other occasions when Presidents have issued executive orders closing executive departments and agencies of the Federal Government, all Town offices have remained open. For instance, on December 1, 2018, President Donald Trump issued an Executive Order closing federal executive branch departments and agencies on December 5, 2018 upon the death of former President George H.W. Bush. All Town offices remained open on December 5, 2018, and no employees were given a holiday or LOP for that day.

On December 18, 2018, President Trump issued Executive Order 13854 giving federal employees of executive departments and agencies the day off on December 24, 2018. In relevant part, the Executive Order provided:

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. All executive departments and agencies of the Federal Government shall be closed and their employees excused from duty on Monday, December 24, 2018, the day before Christmas Day...

Sec. 3. December 24, 2018, shall be considered as falling within the scope of Executive Order 11582 of February 11, 1972, and of 5 U.S.C. 5546 and 6103(b) and other similar statutes insofar as they relate to pay and leave of employees of the United States...

Sec. 5. General Provisions...

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

The Town Manager and James Kelley (Kelley), Director of Human Resources, were unaware of Executive Order 13854. On December 24, 2018, the Town held a holiday party for employees. On that day, the Town Manager spoke with the Kelley about allowing Town employees to leave early. Kelley suggested each Department Head make their own determination about early release. The Town Manager agreed, and Kelley and his administrative assistant called the Department heads about this decision. The Town released most Town Hall employees at 1:00 p.m., after the holiday party. The employees were compensated with their full day pay, thereby giving these employees a half-day off with pay. Other Departments, such as the Council on Aging, did not release employees early. Employees of the Police Department were also not released early on December 24, 2018, other than the secretary for the Chief of Police.¹ No Police Union member received any holiday pay or compensatory time in lieu of the half-day off.

Subsequently, Police Chief Donald Desorcy (Chief Desorcy) granted holiday pay to the three emergency dispatchers, Lori Prue (Prue), Sheryll Davis (Davis), and Susan Dalton (Dalton), who worked on December 24, 2018. The Government Employees Union, Local 5, International Union of Public Employees (Dispatcher Union) represents the emergency civilian dispatchers. The Dispatcher Union has a collective bargaining agreement with the Town

¹ Chief Desorcy testified that his Administrative Assistant was permitted to leave early, after working for 3 or 4 hours on Sunday, December 23, 2018 on payroll issues.

(Dispatcher CBA). Article 10 of the Dispatcher CBA provides for certain enumerated holidays, not including Christmas Eve. Employees hired before July 1, 2012 have an additional floating holiday, receiving holiday pay for a half day on December 24 and December 31. The Dispatcher CBA also provides that “Employees ... will be paid for the following holidays as well as any other day declared a holiday by the state or federal government and required to be observed by the Town.”

Prue and Davis were hired prior to 2012 and were therefore entitled to receive a half-day holiday pay for December 24. Dalton, who became a full-time dispatcher in 2015, was not entitled to a half-day holiday pay for December 24, 2018. The Town paid Prue and Davis for 8 hours of holiday pay for December 24, 2018 and paid Dalton 3 hours of holiday pay for the day.²

On January 7, 2019, Union President Keith Gasco (Gasco) sent a letter to Chief Desorcy, requesting that the Town compensate police officers with four hours compensatory time or equivalent pay for the Christmas Eve holiday, pursuant to Article XI, Section 1 of the CBA. On January 9, 2019, Chief Desorcy denied the request, treating it as a grievance. On January 10, 2019, Gasco clarified to Chief Desorcy that the Union's January 7, 2019 letter was not a grievance, and that no violation of the collective bargaining agreement had occurred until the Town denied the Union's request.

² Chief Desorcy testified that he knew Dalton was not entitled to holiday pay but granted her three hours anyway. He also says he was unaware that Prue and Davis were paid for more than the four hours of holiday pay they were entitled to under the provisions of the Dispatcher CBA.

On January 10, 2019, the Union filed a grievance alleging that Chief Desorcy's denial of the Union's request for holiday pay violated Article XI of the collective bargaining agreement.

POSITIONS OF THE PARTIES

THE UNION

The Union argues that the terms of the collective bargaining agreement, the past practice of the parties, and the Town's other actions on December 24, 2018, taken together, establish that the bargaining unit employees were entitled to four hours of holiday pay for December 24, 2018.

President Trump Declared December 24, 2018 a Federal Holiday

The collective bargaining agreement, in Article XI, Section 1, entitles employees to holiday pay for twelve specified holidays and for "any other day declared a holiday by the state or federal government, and required to be observed by this municipality." The Union asserts that Executive Order 13854 created a holiday on December 24, 2018 even if the word holiday was not specifically used. The Executive Order specifically notes that December 24, 2018 shall be considered as falling within the scope of Executive Order 11582, which deals with the observance of holidays by government agencies. By issuing Executive Order 13854, which closed federal offices and released federal employees on December 24, 2018 under the authority and scope of Executive Order 11582 and the relevant holiday pay statutes, President Trump declared a holiday on December 24, 2018. The lack of the word "holiday" or some sort of

more explicit declaration in the Executive Order is irrelevant. A federal holiday is simply when executive departments and agencies are closed.

The Town Observed the Christmas Eve Holiday

The second requirement set out in Section 1 of Article XI is that the holiday in question must be "required to be observed by this municipality" in order for it to be considered a holiday and for bargaining unit members to be compensated accordingly.

The Union maintains that the Federal Government need not declare that states or municipalities must observe a particular holiday. In fact, federal holidays are never required to be observed by the Town. To interpret the CBA provision as requiring that the Federal Government require the Town to observe a federal holiday would render the provision a nullity because, based on the concept of federalism, the Federal Government cannot require any state or municipality to do so. It is axiomatic in contract construction that an interpretation that tends to nullify or render meaningless any part of the contract should be avoided because of the general presumption that the parties do not carefully write into a solemnly negotiated agreement words intended to have no effect. An arbitrator generally chooses an interpretation that would give effect to all provisions. Accordingly, the Union suggests that the arbitrator may interpret the phrase "and is required to be observed by this municipality," in the context of federalist principles, as providing that municipalities may choose to observe or not observe federal holidays, but once they make the choice to do so, they are required to do so consistently.

The Union therefore suggests that the pertinent question is whether the Town observed a holiday on December 24, 2018. If so, the Town must observe it in every department. The Union asserts that the Town did observe a holiday on December 24, 2018. The Town closed Town Hall early and let most Town employees leave work at 1:00 p.m. The Town also gave holiday pay to an emergency dispatcher who worked that day, even though the Dispatcher CBA contains language identical to the provision at issue here. Accordingly, the bargaining unit employees at issue here were also entitled to this holiday benefit. Employees who cannot be given the half-day off because they are essential for public safety must receive concomitant benefit, which would be four hours of pay or LOP time.

The Union maintains that the Town's argument that it was not aware of the federal holiday and did not intent to observe the holiday is not pertinent. Neither knowledge nor intent are required by the pertinent contractual language. Here, the President's Executive Order declared a holiday on December 24, 2018, and the Town observed the holiday by closing Town Hall early, giving most employees a half day off and paying holiday pay to Dalton.

The Past Practice Supports the Union's Grievance

The Union maintains that past practice may be used: (a) to clarify ambiguous contract language; (b) to implement general contract language; (c) or to create a separate, enforceable condition of employment. The Union argues that the language of the pertinent CBA provision is arguably latently ambiguous, because, given the principles of federalism and dual sovereignty, it is not exactly

clear how to give meaning to the phrase "and required to be observed by this municipality."

The past practice is that the Town chooses whether to observe a declared federal holiday. In the past, sometimes the Town chooses not to observe a declared holiday and therefore all offices remain open. However, when the Town has adopted the observation of a federal holiday, such as in June 2004, then all bargaining unit members receive a benefit, either in the form of time off or other appropriate compensation.

The Union asserts that the language of the Dispatcher CBA and the Town's practice under that agreement are also relevant to the facts here. Under the Dispatcher's agreement, dispatchers hired prior to July 1, 2012 are automatically eligible for a half day holiday on Christmas Eve and New Year's Eve. The Town, therefore, was well aware of a Christmas Eve holiday. Additionally, Dalton, who was not grandfathered in, was also paid for half a day's pay for December 24, 2018. The Union asserts this demonstrates that the Town was treating December 24, 2018 as a holiday for all dispatchers. The Town failed to provide a rational explanation for why December 24, 2018 was a holiday for the dispatchers but not for the police.

Conclusion

The Union argues that the grievance must be sustained. The Union requests that the Arbitrator issue an award ordering the Town to compensate all bargaining unit members with four hours of compensatory time off or equivalent

pay, for December 24, 2018 consistent with the practice of the parties and the language of the collective bargaining agreement.

THE EMPLOYER

The Employer maintains that it did not violate Article XI and asserts that December 24, 2018 was not a holiday, and that the past practice does not require the Town to give its employees a holiday when an Executive Order closes executive departments and agencies of the Federal Government.

The Collective Bargaining Agreement Does Not Include December 24, 2018 as a Paid Holiday and the Executive Order Did Not Mandate the Town to Close.

The Employer argues that the terms of Article XI of the collective bargaining agreement are clear; they are not ambiguous. December 24 is clearly not listed as one of the twelve paid holidays recognized by the collective bargaining agreement. December 24, 2018 was also not a day "declared a holiday by the state or federal government and required to be observed by this municipality." Although Executive Order closed executive departments and agencies of the Federal Government, it did not affect the operations of the other two branches of the Federal Government, and it did not declare a federal holiday. The Town was not required to comply with the Executive Order. Accordingly, December 24, 2018 was not a holiday pursuant to Article XI.

There Is No Past Practice Establishing a Violation of Article XI of the Collective Bargaining Agreement.

First, the Town argues that past practice may not be used to circumvent a clear and unambiguous contractual provision. The Executive Order expressly

provides that it does not "create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against ... any other person."

Secondly, the single instance of the Town providing a holiday after an Executive Order declared a National Day of Mourning after the death of President Reagan does not establish a past practice. The Town did not close on other occasions when Executive Orders closed executive branch departments and agencies, including when President Trump issued an Executive Order following the death of President Bush just a few weeks prior to the Executive Order at issue here. Accordingly, there has been no unequivocal, fixed and established practice accepted by both parties over a reasonable period of time that has been consistently followed which requires the Town to close in these circumstances.

Conclusion

The Town maintains that it did not violate Article XI of the collective bargaining agreement and accordingly, the Union's grievance must be dismissed in its entirety.

OPINION

The issue before me is: [d]id the Town violate Article XI of the collective bargaining agreement when it failed to compensate bargaining unit members with Holiday Pay for December 24, 2018? For all the reasons stated below, the Town did not violate the Article XI of the collective bargaining agreement when it failed to compensate bargaining unit members with Holiday Pay for December 24, 2018, and the grievance is denied.

Article XI, Section 1 of the collective bargaining agreement clearly and unambiguously lists the twelve paid holidays which bargaining unit members are entitled to.³ December 24th / Christmas Eve is not enumerated as one of the paid holidays. Section 1 continues with a caveat however that states:

Or the day of celebration thereof, and any other day declared a holiday by the state or federal government and required to be observed by this municipality.

It is the phrase “and any other day declared a holiday by the state or federal government and required to be observed by this municipality” that is in dispute.

Executive Order 13854, states in relevant part:

All executive departments and agencies of the Federal Government shall be closed and their employees excused from duty on Monday, December 24, 2018, the day before Christmas Day.

It is the Union’s argument that this order created a Federal Holiday on December 24, 2018. This argument is unpersuasive because of what the order specifically addresses and more importantly what the order fails to address. First and foremost, this order applies only to federal employees employed within the executive department. The remaining federal employees of the legislative and judicial branches of the federal government are excluded from, and not entitled to, the order’s benefit (being excused from duty on December 24th). Additionally, the order never defines the day as a holiday, but instead decrees that a limited number of executive branch employees are excused from duties on a specific

³ New Year's Day, Martin Luther King Day, Washington’s Birthday, Patriots Day, Memorial Day, Independence Day, Labor Day, Columbus Day, Veteran's Day, Thanksgiving Day, Christmas Day and the Officer’s Birthday.

day. This order is not attempting to create a new federal holiday as argued by the Union, and thus the first prong of Article XI, Section 1 has not been satisfied.

In addition to failing to satisfy the first prong of having a day declared a holiday by the federal government, nothing in the order compels the Town to observe December 24, 2018 as a federal holiday as required by the collective bargaining agreement. The Union is unable to effectively point to a section of the order that mandates the Commonwealth or the Town to observe December 24, 2018 as a paid holiday. The Union, failing to satisfy either prong of the language of the collective bargaining agreement is unable to prevail based on the language of the collective bargaining agreement.

The Union also argues a past practice exists in recognizing national days of mourning as paid holidays. While the Union is correct that the Town has, on one occasion, granted employees paid time off or compensatory time, the overwhelming evidence presented shows that this was a one-time instance some fifteen years ago. There have been at least five other instances of national days of mourning that have not been observed by the Town, nor grieved by the Union, the latest being on December 5, 2018 after the death of President George H. W. Bush. Based on the evidence presented, I am unable to find a past practice that is unequivocal, clearly enunciated and acted upon by both parties, and readily ascertainable over a reasonable period of time. As such, I am unpersuaded that a valid past practice exists between the parties.

For all the reasons stated above, the Town did not violate Article XI of the collective bargaining agreement when it failed to compensate bargaining unit members with Holiday Pay for December 24, 2018 and the grievance is denied.



Timothy Hatfield, Esq.
Arbitrator
July 7, 2020