

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of the Arbitration Between: *

TOWN OF AUBURN *

-and- * ARB-20-8251

AUBURN PATROLMEN'S UNION, MCOP, *

LOCAL 388A *

Arbitrator:

Timothy Hatfield, Esq.

Appearances:

D.M. Moschos, Esq. - Representing Town of Auburn

Jennifer Smith, Esq. - Representing Auburn Dispatchers Union,
MCOP, Local 388A

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 the collective bargaining agreement when it failed to pay officers the holiday rate of pay when the officers were working overtime shifts on a holiday. The grievance is denied.

Timothy Hatfield, Esq.
Arbitrator
February 14, 2022

INTRODUCTION

On October 20, 2020, the Auburn Patrolmen's Union, MCOP, Local 388 (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 virtual hearing via Web Ex on June 15, 2021.

The parties filed briefs on August 10, 2021.

THE ISSUE

The Parties were unable to agree on a stipulated issue. The proposed issue before the arbitrator is:

The Union proposed:

Did the Town violate Article 4, Conditions of Employment, when it failed to pay officers the holiday rate of pay when the officers were working overtime shifts on a holiday? If so, what shall be the remedy?

The Town proposed:

Did the Town violate Article 4, Conditions of Employment, by paying Officers Donahue and Gustafson for an overtime shift in accordance with Item 2 of Article 4, Overtime? If so, what shall be the remedy?

Issue:

As the parties were unable to agree on a stipulated issue, I find the appropriate issue to be:

Did the Town violate Article 4 of the collective bargaining agreement when it failed to pay officers the holiday rate of pay when the officers were working overtime shifts on a holiday?

If so, what shall be the remedy?

RELEVANT CONTRACT LANGUAGE

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

ARTICLE 4 CONDITIONS OF EMPLOYMENT (In Part)

Item 1 - Work Week

The regular work week shall be a four (4) and two (2) work week, to be worked as five (5) consecutive days of eight (8) consecutive hours, and two (2) consecutive days off and five (5) consecutive days of eight (8) consecutive hours, and three (3) consecutive days off. Any change in shift assignment to be made only by the Chief. In case of emergency such change to be made by the Chief or a sergeant.

...

Item 2 – Overtime

All overtime shall be paid at the overtime rate of pay. The Chief shall see that overtime is awarded on an equal basis by seniority.

This item shall not apply to those members of the bargaining unit who have not satisfactorily completed the prescribed course of study at a regional or municipal police training school approved by the Massachusetts Criminal Justice Training Council.

Officers may convert a maximum of 30 hours of overtime in a given fiscal year to compensatory time in lieu of pay. There will be no carry over and no cash out at the end of the fiscal year. No conversion will be allowed on Friday or Saturdays and conversion will not be allowed whenever it creates overtime, except at the discretion of the chief. ...

Item 5 – Holidays

Police officers will receive holiday pay for the following holidays:

New Year's Day

Martin Luther King Day

Labor Day

Columbus Day

Washington's Birthday
Patriots' Day
Memorial Day
Fourth of July

Veteran's Day
Thanksgiving Day
Christmas Day

Effective July 1, 2020, employees will be compensated at time and one-half (1.5) the regular hourly rate for all hours worked on a holiday, in addition to their regular holiday pay.

Article 7 GRIEVANCE PROCEDURE (In Part)

For purposes of this Article, a grievance shall be defined as an actual dispute arising as a result of the application or interpretation of one or more express terms of this Agreement.

The employee shall have seven days after the occurrence of the incident or event giving rise to the grievance in which to file the grievance; the Union Steward shall have fourteen days from the date of the occurrence of the incident or event giving rise to the grievance in which to file the grievance; and the Union shall have twenty-one days from the date of the occurrence of the incident or event giving rise to the grievance in which to file a grievance. The Union Steward, with or without the police officer, shall take up the grievance with the Sergeant in charge of the shift in accordance with the above. The Sergeant shall attempt to resolve the matter. Failure by the Sergeant to respond within two (2) working days shall be the equivalent of a denial.

If the grievance has not been settled, it may be forwarded by the Steward or the police officer to the Chief of Police, in writing, within two (2) working days of the Sergeant's denial or failure to respond. The Chief will attempt to settle the matter. Failure by the Chief to respond within three (3) working days shall be the equivalent of a denial.

If the grievance is still not settled, the Union and the Town may submit the issue to the State Board of Conciliation and Arbitration for arbitration. The decision of the arbitrator will be binding on both parties and will be limited exclusively to the interpretation of the terms of this contract. The arbitrator shall have no power to add to, subtract from, or modify this Agreement.

Grievances may be settled without precedent at any stage of this procedure until the issuance of a final award by the Arbitrator. The Arbitrator shall not render any decision contrary to state or federal law. In disciplinary cases before an arbitrator, the Town shall have

the burden to prove by a preponderance of the evidence that there was just cause for the disciplinary action.

STIPULATED FACTS

1. The hourly rate for a police officer at step 7 maximum of the rate schedule as of 7/1/2019 was \$33.7239 per hour.
2. The overtime rate of pay 1.5 times hourly rate in step 7 maximum of the rate schedule as of 7/1/2019 is \$50.5859 per hour.
3. The Union alleges that the rate of pay for an officer working on an overtime shift on a holiday is 75.8790 per hour.

FACTS

The Town of Auburn (Town) and the Union are parties to a collective bargaining agreement that was in effect at all relevant times to this arbitration. Prior to the July 1, 2019 – June 30, 2022 collective bargaining agreement, all members of the bargaining unit received eight hours of holiday pay for each designated holiday irrespective of whether the bargaining unit member worked on the holiday or not. Beginning on July 1, 2020, the parties negotiated a new “holiday worked” provision into the collective bargaining agreement. This provision stated:

Effective July 1, 2020, employees will be compensated at time and one-half (1.5) the regular hourly rate for all hours worked on a holiday, in addition to their regular holiday pay.

The Union’s articulated reason for making this proposal during successor contract negotiations was so that officers working on the holiday would no longer be earning the same rate as officers not working on the holiday. During negotiations, the Town costed out the proposal based on eleven officers working

per holiday.¹ The situation at issue in this arbitration, the appropriate rate of pay for an officer working an overtime shift on a holiday, was never broached by the parties prior to reaching an agreement on the proposal or subsequently when they reached an agreement on the collective bargaining agreement itself.

Officer Adam Gustafson (Gustafson) and Officer Anthony Donahue (Donahue) worked overtime shifts on Labor Day 2020. The Town compensated the officers at the overtime rate of time and a half of their regular rate for the hours worked that day. The Town refused to additionally compensate the officers for the new “holiday worked” rate.

The Union filed a grievance over the Town’s refusal to compensate officers working an overtime shift on a holiday with “holiday worked” pay. The Town denied the grievance at all steps of the grievance procedure resulting in the instant arbitration.²

POSITIONS OF THE PARTIES

THE UNION

The collective bargaining agreement provides overtime pay at a rate of time and one half, and the collective bargaining agreement also provides the new

¹ The eleven officers per holiday was based on a nine-officer minimum manning (three officers per shift three shifts per day) and potentially two other officers who could be called in, including a court officer and a school resource officer.

² At the arbitration hearing, the Union sought to add another instance of the Town refusing to pay officers who are working an overtime shift on a holiday “holiday worked” pay in addition to their overtime pay. Officer Luis Santos (Santos) worked an overtime shift on Patriots’ Day 2021 and was denied “holiday worked” pay. Based on my finding in this matter, I need not decide if the Santos holiday pay issue was appropriate to include in this arbitration hearing.

holiday-worked pay where bargaining unit members who work on a holiday are compensated at time and one half of their hourly rate. The plain language of the collective bargaining agreement demands that if an officer is working an overtime shift on a designated holiday, that officer should be paid both for the overtime and the holiday worked compensation.

The parties and the arbitrator are obligated to read the collective bargaining agreement broadly, so that it makes sense, not narrowly or selectively to save the Town money. Under the language bargained by the parties and drafted by the Town, a bargaining unit member who works an overtime shift on a holiday is entitled to both holiday-worked pay and overtime pay. Paying an employee working an overtime shift on a holiday anything less than 16 hours of pay violates the collective bargaining agreement. The Town's interpretation of the contract would require the arbitrator to subtract language from the collective bargaining agreement or add new limitations to the language of the Agreement. This is impermissible as Article 7 states that the arbitrator shall have no power to add to, subtract from, or modify this Agreement. There is only one plausible interpretation of the plain meaning of the language of the Agreement.

Any Ambiguity Must be Interpreted in Favor of the Union

While the Union believes that the collective bargaining agreement is best understood by reflecting on its plain meaning, any ambiguity found in the language must be interpreted in favor of the Union. The principal of *contra proferentem* states that "if the language supplied by one party is reasonably susceptible to two interpretations ... the one that is less favorable to the party that supplied the

language is preferred.”³ Arbitrators enforce this principal to promote both careful drafting and full forthright disclosure about the drafter’s intentions. Here, the Town drafted the new holiday-worked language to include in the MOA and the collective bargaining agreement. When the Union accepted the language that the Town drafted, the Union had no reason to know that the Town intended to limit the benefits beyond the explicit language of the Agreement.

At the hearing, the Town attempted to argue that the benefit was only intended to pay officers who were regularly scheduled to work the holiday. If that was what the Town wanted to bargain, it could have proposed that language, or drafted language that effectuated that intention. The Town, however, included no such limitation in the Agreement. The Town is not permitted to implement the collective bargaining agreement it wishes it had bargained. Rather, it is required to comply with the terms of the agreement it struck with the Union.

Meeting of the Minds

The Town may argue that it did not agree to pay both the overtime rate and the holiday-worked rate for employees who worked overtime shifts on a holiday, and thus the grievance should be denied because there was no meeting of the minds. This argument must fail. Although the idea of paying bargaining unit members who were working overtime shifts on a holiday for holiday-worked pay and overtime pay was not discussed at the bargaining table, it was entirely foreseeable that, on occasion members of the bargaining unit would work overtime

³ Elkouri & Elkouri, How Arbitration Works, 9-48 (7th ed. 2012) (citing Farnsworth, Contracts §7.11, at 473 (3rd ed. 1999)).

shifts on holidays and be entitled to both rates. The Town reasonably should have known this issue would arise and cannot attempt to evade honoring the terms of the Agreement because what was reasonably foreseeable might not have occurred to the Town at bargaining.

Officer Santos' Claim

While this arbitration was pending, Officer Santos worked an overtime shift on Patriots' Day 2021 and was paid overtime but was denied holiday-worked pay. Although the Town objects to the consideration of Officer Santos' claim, the arbitrator should consider it as part of this hearing and provide relief to Officer Santos if he sustains the other grievances. Officer Santos' claim is identical to the other claims. Including Officer Santos's claim would promote labor harmony and conserves the resources of the parties and the Department of Labor Relations.

Conclusion

For all of the foregoing reasons, the Arbitrator must sustain the Union's grievance, and direct the Town to comply with the terms of the collective bargaining agreement in the future and award the grievants make-whole relief for lost wages.

THE EMPLOYER

The Union Did Not Meet Its Burden of Proof

Since this is a language case, the burden of proof is on the Union to establish that Article 4 requires pyramiding of overtime. As set forth below, the Union produced no evidence in support of its position.

Relevant Contract Language

Item 2, Overtime, of Article 4, Conditions of Employment, was not discussed or changed in any way from the prior contract to the current contract. Item 5, Holidays, was changed in connection with the officers regularly scheduled to work. In the parties' negotiations, the Union stated that there was an inequity that officers with the day off received the same compensation as officers regularly scheduled to work on a day which was a holiday. To rectify that situation, the Union and the Town agreed to provide officers regularly scheduled to work on a holiday with time and one-half of their base rate.

Bargaining History

The Union introduced testimony of Officer McCarthy and Officer Gustafson, who were present for the negotiations and ultimately, the mediation in connection with the 2020-2023 successor collective bargaining agreement. Officer McCarthy stated that the intent of the Union's proposal in terms of the holiday pay benefit was to increase pay for officers physically working on the holiday. He also admitted that there were no discussions at the bargaining table about officers working overtime on the holiday. Officer McCarthy did not recall any discussion of how the Town would budget the benefit or the cost but did recall that the parties discussed that the proposal would apply to the three different shifts with a minimum of three officers per shift for safety.

Past Practice

Prior to the implementation of the 2019-2022 MOA, when an officer worked overtime on a holiday, the officer was paid at the overtime rate of pay. The Union

did not provide any evidence to show that there was a proposal made or that any discussions took place changing the payment for working a shift on a holiday on an overtime basis. There was no change in the language of Article 4, Item 2, Overtime, and as a result, consistent with the past practice, an officer continues to receive payment at the regular overtime rate of pay, and there is no distinction if that overtime occurs on a holiday, or any other day.

Adding Language to the Collective Bargaining Agreement

The Union is attempting to make a unilateral change to the collective bargaining agreement by seeking payment of two premiums under the different provisions of the collective bargaining agreement. The grievants were paid their overtime rate for the eight hours they worked overtime. They are not entitled to pyramid their time and one-half for working on Labor Day. That would constitute the duplication of overtime payments for the same hours worked. The Union failed to introduce any evidence to support that the parties intended an officer working overtime on a holiday would be eligible for overtime pay under Item 2 and time and one-half under Item 5. Moreover, the Union's witnesses, Officer McCarthy and Officer Gustafson, both testified that the issue of working overtime on a holiday was never discussed.

Calculation of Cost Based on the Union's Claim

The Town Manager testified that the Town prepared calculations of the cost items to the Union during negotiations. The cost of the Union's holiday proposal was always calculated based on eleven officers at time and on-half, and that the cost of an officer working overtime was never factored into that calculation.

The Union questioned the Town Manager regarding budgeting by the Town for overtime and the budget for holiday-worked pay at time and one-half, as there are two separate accounts. Whether or not there is money in the Town's budget as the Union may believe is irrelevant. This is not an ability to pay issue, rather the issue is that the collective bargaining agreement does not provide for payment of two premiums for the same hours worked when an officer works overtime on a holiday.

Patriots' Day Holiday

The Town objects to the inclusion of the issue of the Patriots' Day holiday as the issue was not contained in the Union's grievance or Petition to Initiate Grievance Arbitration. In order to arbitrate over Patriots' Day, the Union needs to file a new grievance, which it did not. The Town, therefore, objects to the inclusion of Patriots' Day as it is not relevant to this proceeding, and respectfully requests that any testimony or exhibits regarding Patriots' Day be disregarded.

Conclusion

Accordingly, there has been no violation of Article 4 of the collective bargaining agreement by the Town, and the Union's arbitration should be dismissed.

OPINION

The issue before me is: Did the Town violate Article 4 of the collective bargaining agreement when it failed to pay officers the holiday rate of pay when the officers were working overtime shifts on a holiday? If so, what shall be the remedy? For all the reasons stated below, the Town did not violate the collective

bargaining agreement when it failed to pay officers the holiday rate of pay when the officers were working overtime shifts on a holiday.

Beginning on July 1, 2020, the parties agreed to a new holiday rate of pay for officers who were physically working on a holiday. This pay was in addition to the already existing holiday pay language which provided officers with eleven days of holiday pay per year whether the officers worked on the holiday or not. The language agreed to states that:

Effective July 1, 2020, employees will be compensated at time and one-half (1.5) the regular hourly rate for all hours worked on a holiday, in addition to their regular holiday pay.

The Union argues that this language entitles officers working an overtime shift on a holiday, at the overtime rate of pay, an additional premium payment. I disagree as the contract language clearly and unambiguously states, “employees will be compensated at time and one-half (1.5) the regular hourly rate.” In this case, the officers in question were already making time and one-half their regular hourly rate under the overtime provision of the collective bargaining agreement. “Regular hourly rate” does not include payment to an officer already earning a premium overtime rate of pay.

Even if I were to find that the term “regular rate of pay” was not clear and unambiguous, the Union’s argument would still not prevail as the facts of this case clearly show that the issue of this language applying to officers working an overtime shift on a holiday was never broached by the parties in negotiations. The Union submitted its proposal and articulated that the reasoning behind the proposal was to provide the officers who were actually working more compensation

than the officers who were off on the holiday. Additionally, the Town's costing out of the Union's proposal, which was shared with the Union during negotiations, was based on the concept of eleven officers working on a holiday at their regular rate of pay. The facts simply do not support the idea that holiday time and one half of the officer's regular hourly rate was supposed to include officers already earning the overtime rate for working on the holiday.

Under either the plain meaning rule, or by expanding the scope of the review to look at the parties' bargaining history, it is clear that the new holiday language that the parties agreed to was not meant to apply to officers working an overtime shift on a holiday. The new rate of pay was instead meant to provide an extra benefit for officers working on a holiday during their regular shift to provide them an increased payment in comparison to officers who were not scheduled to work on the holiday but were making the same amount of money.

For all the reasons stated above, the Town did not violate the collective bargaining agreement when it failed to pay officers the holiday rate of pay when the officers were working overtime shifts on a holiday. The grievance is denied.

AWARD

The Town did not violate the collective bargaining agreement when it failed to pay officers the holiday rate of pay when the officers were working overtime shifts on a holiday. The grievance is denied.



Timothy Hatfield, Esq.
Arbitrator
February 14, 2022