COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of the Arbitration Between:	
CITY OF LOWELL -and- LOWELL FIREFIGHTERS' UNION, LOCAL 853	ARB-22-9609

Arbitrator:

Timothy Hatfield, Esq.

Appearances:

Ann Marie Noonan, Esq. - Representing City of Lowell

Paul Hynes, Esq. - Representing Lowell Firefighters' Union Local 853

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 matter is procedurally and substantively arbitrable, and the City did not violate the parties' collective bargaining agreement when it calculated employees' Emergency Medical Technician and Education Incentive stipends using the Deputy Chief weekly base pay. The grievance is denied.

Timothy Hatfield, Esq.
Arbitrator
March 15, 2024

INTRODUCTION

On October 6, 2022, the Lowell Firefighters Union, Local 853 (Union) filed a unilateral petition for Arbitration. Under the provisions of M.G.L. Chapter 23, Section 9P, the 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 January 12, 2023.

The parties filed briefs on March 6, 2023.

THE ISSUES

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

The Union proposed:

Did the City violate the collective bargaining agreement with respect to the calculation of wages? If so, what shall the remedy be?

The City proposed:

1) Is the matter procedurally and substantively arbitrable?

2) If so, did the City of Lowell violate Articles XIX, XXI, and XXII of the parties collective bargaining agreement when it calculated employees' Emergency Medical Technician and Education Incentive stipends using the Deputy Chief weekly base pay? 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:

1) Is the matter procedurally and substantively arbitrable?

2) If so, did the City of Lowell violate the parties' collective bargaining agreement when it calculated employees' Emergency Medical Technician and Education Incentive stipends using the Deputy Chief weekly base pay? If so, what shall be the remedy?

RELEVANT CONTRACT LANGUAGE

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

ARTICLE XIX
WAGES

Section 1.

A. Firefighter Rank Weekly Wage

The weekly wages of firefighters shall be reflected in the attached salary grid marked as Appendix B.

Officer Differential and Weekly Salaries
The weekly salaries of officers of the Fire Department, other than the Chief, shall be computed as follows:

Fire Lieutenant: eighteen percent (18%) above the Firefighter rank weekly maximum rate;

Fire Captains: ten percent (10%) above the Lieutenant rate;

Fire Assistant Chief: ten percent (10%) above the Captain rate;
Fire Deputy Chief: ten percent (10%) above the Fire Assistant Chief rate.

B. Additional Compensation

The foregoing weekly wage rates do not include the base pay amounts attributable to Sections 4 and 5 of the Article, which amounts are added to the foregoing weekly rates and are considered part of base pay for all fringe computation, pension and earning purposes. Any employee possessing the credentials for Hazardous Material Technician from the Fire Training Council shall receive a weekly stipend, in recognition of their on-call status. All such employees shall be on weekly rotation in terms of on-call status so that, in each week, one such employee shall be on-call status; such rotation

shall not affect all such employees' entitlement to the stipend every week. The weekly stipend for hazardous materials investigators shall be 4.35% per cent per year for all employees based on Deputy Fire Chief weekly base pay.
HazMat Pay shall be treated as base pay for all purposes retroactive to the beginning of the contract period. …

Section 4 – Night Tour Differential.

For each night tour of duty on which an employee's group is scheduled to work, each employee shall receive two point one zero five percent (2.105%) of the Fire Deputy Chief rank weekly wage. Night tour differential shall be paid weekly and shall be considered part of base pay for all fringe computation, pension, and earning purposes.

Section 5 – Weekend Differential

For each weekend tour of duty, as herein defined, on which an employee's group is scheduled to work, each employee shall receive two point one zero five percent (2.105%) of the Fire Deputy Chief rank weekly wage. Weekend tours of duty for purposes of this Section, shall include the night tours commencing on Friday and Saturday and Sunday, and the day tours commencing on Saturday and Sunday, inclusive of the period from 6:00 PM Friday through 8:00 AM on the following Monday. Weekend differential shall be paid weekly and shall be considered part of base pay for all fringe computation, pension and earnings purposes. …

ARTICLE XXI
EMERGENCY MEDICAL TECHNICIAN

Upon an employee's acquiring certification as an Emergency Medical Technician and during such employee's maintaining such certification, such employee's annual base compensation shall be increased two and ninety-one hundredths per cent (2.91%) per year for all employees based on Deputy Fire Chief weekly base pay for purposes of calculating and applying such employee's regular weekly compensation, his/her overtime rate and holiday pay rate, and pension contributions on his/her behalf and his/her pension benefit levels; provided, however, that such base compensation increase of two and ninety-one hundredths per cent (2.91%) per year for all employees based on Deputy Fire Chief weekly base pay shall not be used to calculate such employee's night differential and weekend differential compensation. …

ARTICLE XXII
EDUCATIONAL INCENTIVE

> Upon an employee's attaining an Associate's Degree in Fire Science, Public Administration or Emergency Management, that employee's annual base compensation then and thereafter shall be increased three and six hundredths (3.06%) per cent per year, for a Bachelor's Degree in same an increase of six and twelve hundredths (6.12%) per cent per year, and for a Master's Degree in same an increase of nine and eighteen hundredths (9.18%) per cent per year, based on Deputy Fire Chief Weekly base pay for purposes of calculating and applying such employee's regular weekly compensation, his/her overtime rate and holiday pay rate, and pension contributions on his/her behalf and his/her pension benefit levels; provided, however, that such base compensation increases shall not be used to calculate such employee's night differential and weekend differential compensation. An employee having more than one degree will receive only the percentage increase for the most advanced degree.
>
> The City agrees to pay an educational incentive of $10.00 per credit with a maximum yearly reimbursement of $600.00.

FACTS

The City of Lowell (City) and the Union are parties to a collective bargaining agreement that was in effect at all relevant times to this arbitration. The Union is the exclusive bargaining representative for all employees in the rank of firefighter, sergeant, lieutenant, captain, and deputy chief.

In 1994, the parties agreed to the establishment of a Hazardous Material Technician (HazMat) stipend. At the time, the employees eligible for the stipend received fifty dollars per week.

The parties have included a weekend differential and a night differential in the collective bargaining agreement. These differentials are calculated using the Fire Deputy Chief rank weekly wage and are considered part of base pay for all fringe computations, pension and earnings purposes. To calculate these differentials, the Department takes the Deputy Fire Chief base weekly wage and

multiplies it by the relevant percentage provided for in the collective bargaining agreement. Each employee's weekly base wages are then increased by adding the night shift and weekend differential stipend to their weekly base wages. This increased amount is used to calculate the employee's overtime rate and is pensionable.

In 1999, the parties added an Emergency Medical Technician (EMT) stipend to the collective bargaining agreement. All eligible employees who acquired and maintained such certification shall have their annual base increased by five hundred dollars for purposes of calculating and applying such employee's regular compensation, overtime rate, holiday pay rate and pension contribution. This stipend is not used to calculate the employees' night or weekend differential.

In 1999, the parties also established an education incentive that provided a flat amount of one thousand dollars that increases the employee's annual base for purposes of calculating and applying such employee's regular weekly compensation, overtime rate, holiday pay, and pension contributions. This payment is not used to calculate the employee's night and weekend differential compensation.

In 2001, the parties agreed to convert the flat dollar amounts provided for the HazMat, EMT, and Education Incentive stipends to a percentage of the Deputy Chief weekly base pay.

During negotiations for the 2010 – 2012 collective bargaining agreement, in response to pension reform, the parties agreed to add language that the HazMat stipend was to be treated as base pay for all purposes retroactively to July 1, 2010. This language changed the overtime and holiday rate but did not change how the

rate for the other stipends was calculated. The Union made no objection to the method or manner of the calculations.

In 2014, the parties increased the percentage value of the HazMat and EMT stipends. The method and manner of calculating these stipends was not changed, and the Union received documentation from the City demonstrating the manner in which these stipends were calculated.

In 2022, the Union elected a new president and executive board. In March 2022, the Union signed off on a full integration of the parties' collective bargaining agreement which contained no changes to the means and methods used to calculate stipends.

In April 2022, Union president David Provencher (Provencher), began to question the City regarding the stipend payments. In June 2022, he questioned the Auditing Department regarding how the stipend payments were calculated. Provencher argued that the Deputy Chief weekly base pay is only used to calculate the HazMat, Weekend and Night differential stipends. Thereafter, the Deputy Chief weekly base pay - increased by the HazMat, Weekend and Night differential stipends - is used to calculate the Education Incentive and EMT stipends. The City disagreed with this interpretation and on June 30, 2022, Provencher filed a grievance on behalf of the Union asserting that the means and methods of calculating the stipends is incorrect. The grievance was denied at each step of the grievance procedure, resulting in the instant arbitration.

POSITIONS OF THE PARTIES

Arbitrability

THE EMPLOYER

The grievance is procedurally and substantively not arbitrable. Article VI § 3 requires the Union to file a grievance within thirty (30) days of the occurrence of the fact giving rise to the grievance or gaining knowledge of such facts, whichever is later. The Union has had knowledge regarding the City's method and manner of calculating these benefits since 2011. Accordingly, the Union is at least 10 years too late in its filing of this grievance, and it should be dismissed.

In 2001, the parties agreed to convert the flat dollar stipends for a HazMat certification, EMT certification, and Educational Incentives to a percentage of the Deputy Chief weekly base pay. From that point forward, per the express language of the parties' agreement, the City and the Department have calculated the weekly value of each stipend by multiplying the Deputy Chief weekly base pay by the designated percentage included in the parties' agreement for each stipend. Moreover, as far back as 1999, when the EMT and Education Incentive stipends were initially created, the parties agreed they would increase the employee's annual base compensation and thus be applied to an employees' regular weekly compensation, overtime and holiday pay rate, and pension contributions. At no point did the Union raise a concern or file a grievance asserting that the Deputy Chief weekly base pay should be increased by the weekend and night shift differential and that modified amount should be used to calculate the EMT an/or Education Incentive stipends, as the Union now advocates.

In 2012, the parties agreed the HazMat stipend would be treated as the base pay for all purposes in order to ensure that it was pensionable. There was no change to the language regarding the manner and method of calculating the

stipend, it continued to be a percentage of the Deputy Chief weekly base pay. The goal was to ensure that this stipend was pensionable like the others.

Not once in the intervening period did the Union seek to alter the method or manner for calculating these stipends during negotiations or file a grievance regarding the method and manner of calculating them. To the contrary, in March 2022, the Union affirmatively agreed to the continued use of the specific language that provides for this method and manner of calculation. This is true despite the fact that the current Union President who filed this grievance testified that he developed this new methodology around January 2022. It was not until June 30, 2022 that the Union, for the first time, filed a grievance claiming that the City should be using the Deputy Chief weekly base pay increased by the HazMat stipend and the weekend and night shift differentials to calculate the EMT and education incentive stipends, rather than using the Deputy Chief base weekly pay as provided for in the parties' agreement and as historically calculated.

Accordingly, the Union has been on notice since at least 2011 regarding how the City calculates, applies, and implements these four stipends. Moreover, Union President Provencher testified that he reviewed the collective bargaining agreement and came to his calculation method in January 2022. He testified that he did not bring it to the Department until April 2022, after the parties had signed an integrated agreement in March 2022. Further he did not file this grievance until June 30, 2022 – well beyond the thirty days provided for under the parties' collective bargaining agreement.

Doctrine of Laches

The City anticipates the Union will assert this is a continuing violation and thus the timeline detailed above is irrelevant. However, here, when the Union did not raise any objection for at least ten years regarding the method and manner of calculating the HazMat stipend, and for over twenty years failed to raise any concern regarding the method and manner of calculating the other three stipends, the City would be unfairly prejudiced by permitting such a claim to move forward. Pursuant to the doctrine of laches, an arbitrator may deny relief to a claimant who has unreasonably delayed or been negligent in asserting a claim, when the delay or negligence has prejudiced the party against whom relief is sought. The Union provided no explanation for its delay other than the fact that its new president just developed this new calculation method in January 2022, and the Union provided no additional information as to why it waited another six months to file the grievance. To allow the Union to lie in wait for decades severely prejudices the City's ability to defend itself, and undermines the stability of the parties' agreement, particularly here when the City has agreed to numerous increases of stipends based on the mutual understanding of how they would be calculated. As such this matter should be dismissed based on the doctrine of laches.

THE UNION

The City's procedural arbitrability argument is puerile, demonstrating abusive advocacy reflective of apprehension of exposure on the merits. The City failed to articulate specific reasons for this argument, nor did it offer any relevant testimony so we're left to assume precisely what it is claiming. It would appear that the City is arguing that the erroneous wage calculation went on for so long

that the Union waited too long to challenge it. The City's observations and contentions are unsubstantiated on this record and are a frivolous effort to avoid the City's ultimate exposure on the substantive aspects of this case.

When Provencher became Union President, he first familiarized himself with the collective bargaining agreement, and when he reviewed the wage schedules, he realized that the calculation was being done incorrectly. On April 5, 2022, Provencher brought this issue to the attention of Baldwin, the CFO of the City. The Union received the denial of the claim on June 1, 2022, and filed the grievance on June 30, 2022. Therefore, the City's disingenuous procedural argument must be rejected. Relevant contract provisions and equities do not support a finding of procedural defects in terms of the Union's filing of this grievance, even when one views the facts in the light most favorable to the City. On these facts, it cannot be said that the Union did not file the grievance or proceed to arbitration in accordance with the contractual requirements.

The City's procedural arguments simply are efforts to avoid the merits of the case; however, the City has failed to show that it was prejudiced in any way by its claim of procedural defects. The City never asserted that it was unprepared for the grievance which the Union filed for arbitration. It should also be noted that this grievance protesting the City's improper calculation of wages concerns an allegation over a continuing violation of the contract. It is axiomatic that grievances protesting continuing violations are not barred by the same strict limitations.

In summary, even before considering the facts relating to the City's claims of failing to follow proper procedure, the Arbitrator should note that the City has the burden of proof; that he should resolve doubts against the City; he should consider

that the City failed to show that any alleged procedural defects resulted in any prejudice to the City; and that the grievance involves a continuing violation.

Merits

THE UNION

The City's conduct violates the clear and unambiguous language of the collective bargaining agreement. To credit the City's argument would render the agreed upon language moot. The City contends that employer-promulgated rules can trump express contract language. The Union contends that the collective bargaining agreement is the essential and controlling document, and that where the contract's procedures are applicable, no work rules or other extra contractual regulations may apply.

Confronted by documents and personal knowledge testimony clearly establishing agreement on the calculation methodology in the collective bargaining agreement, the City's effort to avoid that bargain is relegated to diversion and confusion. The City presented the testimony of the City Auditor who was not included in contract negotiations. On this record, the Union cannot be held accountable for any claimed lack of understanding by the non-participant City Auditor. The issue as to what the parties agreed to regarding the calculation methodology cannot be attributed to any joint mistake. The City Auditor may have misunderstood or may have misconstrued the intent of the language; however, her unexpressed, subjective thought process cannot serve to release the City from the agreement. Whatever may have been on the City Auditor's mind regarding the intent of the language or how to calculate the stipends at issue, the City agreed to the unambiguous language and views or understandings not expressed in

bargaining are inadmissible and must not be considered. It is well established that unilateral error cannot serve to undermine an agreement.

The City acknowledges agreement with the language of the collective bargaining agreement. It is only in a post agreement environment that the claim of a misunderstanding arose. In the instant case, having acknowledged agreement on the language, the City must assert a narrower meaning than set forth in the contract. Assuming arguendo, that the language is reasonably susceptible to a broad or a narrow meaning, and assuming, again arguendo, that the City had in mind, albeit unexpressed, a narrower construction of that language, this record does not show a bilateral misunderstanding. The City through its negotiator's conduct, was negligent or unreasonable in permitting the use of a term which did not clearly express its intended meaning. The Union was quite reasonably misled as to the City's intention. The Union, having acted reasonably throughout bargaining, can reasonably rely upon the expressed agreement memorialized in the collective bargaining agreement.

Adverse Inference

The Arbitrator should consider the City's failure to have the Fire Department's Payroll Supervisor appear and testify. The City failed without any explanation to have a key witness appear and testify at the hearing. Debby Howard (Howard) was the City's representative primarily responsible for calculating the stipends and should have been called to explain the calculation methodology. The Arbitrator should conclude that Howard failed to appear at the hearing because her testimony would not have helped the City's position.

Moreover, Howard's failure to appear at the hearing creates the inference that she would have provided testimony in support of the Union's position.

Conclusion

The Union respectfully requests that you find that the City violated the provisions of the collective bargaining agreement in the manner in which it calculated the stipends. As a remedy, the Union requests that the City correct the error, conduct a payroll audit and make every affected member whole retroactively.

THE EMPLOYER

The Union, which has the burden, cannot prevail as neither the clear and unambiguous contract language nor the parties' consistent course of dealing support the Union's grievance. The Union, for the first time in the parties' history, asserts a reading that has never been understood or used by the parties and would require the arbitrator to read additional language into the agreement. As such, the Union's position is neither supported by the clear and unambiguous contract language nor the parties' history and course of dealings, and the grievance should be denied.

The Union cannot establish a violation because the unambiguous contract language requires the parties to calculate stipends based on the "Deputy chief weekly base pay," which the City has done, and the Union does not dispute. Even if the arbitrator were to find the language is not clear and unambiguous, the undisputed bargaining history and course of dealing in the intervening decades demonstrates that the manner and method of calculating these stipends has remained unchanged, the Deputy Chief weekly base pay has consistently been used to calculate these stipends.

There is no dispute that the City has consistently calculated and paid relevant stipends using the express language of the contract. The agreement states that each stipend is a percentage of the Deputy Chief weekly base pay. Thereafter, the City added each relevant stipend to an employee's base weekly pay dependent on that employee's certifications and education to determine that employee's regular rate of pay. This method and manner has been understood by the Union since at least 2011 and has never been objected to or disputed.

After the value for each stipend is derived by multiplying it by the Deputy Chief weekly base pay rate, the relevant stipends are added to each individual employee's base weekly pay to arrive at that employee's regular rate of pay. This second step is a result of the additional language in the parties' agreement that requires these stipends to be treated like base pay for all purposes or to increase the annual base salary by using the stipend value for all fringe calculations. This pay is then used to calculate overtime and goes to the individual employee's pensionable income. There is no feasible alternative meaning to the language or how the value of these stipends is to be derived. Although a different multiplier for each stipend has been agreed to and increased over time, the language concerning the manner and method of calculating these stipends remained unchanged for over twenty years.

Conclusion

For all the foregoing reasons, the City submits that the Union has not and cannot meet its burden of demonstrating that the City violated Article(s) XIX, XXI, and XXII when it calculated employees' EMT and Education Incentive stipends using the Deputy Chief weekly base pay rather than using the Deputy Chief weekly

base pay increased by the value of the HazMat stipend and Night and Weekend Differentials. The grievance should be denied.

OPINION

The issue before me is:

1) Is the matter procedurally and substantively arbitrable?

2) If so, did the City of Lowell violate the parties' collective bargaining agreement when it calculated employees' Emergency Medical Technician and Education Incentive stipends using the Deputy Chiefs weekly base pay? If so, what shall be the remedy?

For all the reasons stated below, the matter is procedurally and substantively arbitrable, and the City did not violate the parties' collective bargaining agreement when it calculated employees' Emergency Medical Technician, and Education Incentive stipends using the Deputy Chiefs' weekly base pay. The grievance is denied.

Arbitrability

The grievance is this matter is arbitrable because the grievance is a challenging the alleged miscalculation of wages which is a continuing violation. Each pay period potentially produces a new violation, allowing the Union to file a timely grievance after any pay period with a disputed payment calculation. As such, the Union's filing in this matter is timely.

While I agree with the Town's argument that any potential remedy would be limited based on the date the grievance was filed, my decision herein on the merits, renders that argument moot.

Merits

As this is a contract interpretation case, I must first decide if the language of Article XIX, Section 1B is clear and unambiguous. If the language is clear and unambiguous, then my decision is based solely on the plain language of the collective bargaining agreement. If I find, however, that the language is ambiguous, I may then decide this dispute using additional evidence such as past practice.

In this case, Article XIX, Section 1B states numerous times in clear and unambiguous language that the stipends referenced are calculated based on "Deputy Fire Chief weekly base pay," and "Deputy Fire Chief rank weekly wage." The stipends are to be calculated based on a percentage of the Deputy Fire Chief weekly wage and then added to the pay of eligible firefighters. I find no support in the collective bargaining agreement for the Union's argument that some other calculation of an increased Deputy Fire Chief pay is the appropriate base for calculating the various stipend percentages.

The denial of this grievance is solely based on my finding that the disputed language in the collective bargaining agreement is clear and unambiguous and supports the Town belief that it has been calculating stipends correctly and paying eligible firefighters appropriately.

I would also note that even if I had found the disputed language to be unclear and ambiguous, I would be persuaded by the following factors in ruling for the Town; the Town's consistent manner in calculating stipends over an extended period of time, combined with the Union's knowledge of the calculation, and failure to object to the calculation. Additionally, I note that the Union continued to ratify

successor collective bargaining agreements without changes to the method of calculation or the manner in which the stipends were paid. The combination of these factors would be sufficient for the Town's argument to prevail even if the language was unclear and ambiguous, which, as noted above, it is not. For all the reasons stated above, the grievance is denied.

AWARD

The matter is procedurally and substantively arbitrable, and the City did not violate the parties' collective bargaining agreement when it calculated employees' Emergency Medical Technician and Education Incentive stipends using the Deputy Chief weekly base pay. The grievance is denied.

Timothy Hatfield, Esq.
Arbitrator
March 15, 2024