COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of the Arbitration Between:	
CITY OF HAVERHILL -and- AFSCME COUNCIL 93, LOCAL 939	ARB-22-9731

Arbitrator:

Timothy Hatfield, Esq.

Appearances:

Timothy Zessin, Esq.	- Representing City of Haverhill
Abigail Geier, Esq.	- Representing AFSCME Council 93 Local 939

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 Employer violated the collective bargaining agreement when it changed the wages of four employees in October 2022. The City is ordered to make the grievants whole for all losses in a manner consistent with this decision.

Timothy Hatfield, Esq.
Arbitrator
May 20, 2024

INTRODUCTION

On December 22, 2022, the AFSCME Council 93, Local 939 (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 June 2, 2023.

The parties filed briefs on August 11, 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 Employer violate Article 1 and/or Article 6 of the collective bargaining agreement when it reduced the wages of four employees in October 2022? If so, what shall the remedy be?

The City proposed:

Did the Employer violate Article 1 and/or Article 6 of the collective bargaining agreement as alleged by the Union in its October 13, 2022 grievance? 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 Employer violate the collective bargaining agreement when it changed the wages of four employees in October 2022? If so, what shall the remedy be?

RELEVANT CONTRACT LANGUAGE

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

ARTICLE 1
RECOGNITION

> The City recognizes the Union as the sole and exclusive bargaining agent for hours, wages and conditions of employment for the following job classifications: Wastewater Treatment Electrician / Instrumentation / Mechanic, Senior Wastewater Treatment Plant Operator, Wastewater Treatment Plant Operator, Wastewater Treatment Plant Operator Trainee, Lab Technician, Maintenance Mechanic, Mobil Equipment Operator, Wastewater Treatment Plant Storekeeper, Maintenance Mechanic Helper, Senior Collection Operator, Collection Operator, Collection Operator/ CB Cleaner and Wastewater Treatment Plant MEO-Custodian/Laborer. …

RELEVANT SIDE LETTER

> In recognition of an outstanding matter related to a grievance filed by the Union, the parties agree to the following:
>
> The position of the Senior Maintenance Mechanic shall include a standby provision. The Senior Maintenance Mechanic shall be officially on standby twenty-four (24) hours per day to keep abreast of arising problems and to coordinate the solution to them. In exchange for the extra duties the amount of $1.00 per hour shall be added to the current Senior Maintenance Mechanic's salary. This change shall take effect upon the passage of the Memorandum of Agreement by the Haverhill City Council.
>
> Date: January 15, 2014

FACTS

The City of Haverhill (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 listed in the recognition clause of the collective bargaining agreement including the grievants. Bruce Constantino (Constantino) is a Senior Maintenance Mechanic. Normand Paquette (Paquette) is a Senior Wastewater Treatment Plant (WWTP) Operator. Stephen Pingree (Pingree) is an Electrician in the WWTP. Samuel Marinez (Marinez) is a Senior Collection Operator in the WWTP.

The City's Department of Public Works (DPW) consists of seven divisions including the Wastewater Division (WWD). Robert Ward (Ward) is the DPW Director. Isaiah Lewis (Lewis) is the current Facility Manager of the WWD, and former Union Shop Steward. Fred Haffty (Haffty) was the former Facility Manager of the WWD. Denise McClanahan (McClanahan) is the City's Director of Human Resources.

On or about January 15, 2014, as a resolution to a grievance, the parties agreed to pay Constantino an additional $1.00 per hour as compensation for remaining on stand-by outside his normal working hours to coordinate responses to after-hours calls. The hourly wage of the Senior Maintenance Mechanic on the City's Salary Ordinance was not adjusted from $29.55 per hour even though Constantino was receiving $30.55 per hour.

In 2016, the grievants all received a $1.00 per hour increase in their respective rates of pay with no increase in duties. In addition to this increase, Constantino continued to receive his additional $1.00 per hour from his 2014 agreement for being on stand-by duty. The Salary Ordinance for FY 17 passed by the City Council after review by the City's department heads contained the

increased $1.00 per hour for the grievants. It continued to not include Constantino's increase from 2014, though he continued to receive it.

In 2016, upon realization of the increase in the salary ordinance, Constantino and Paquette brought it to the attention of then Shop Steward Lewis. Lewis emailed McClanahan and spoke directly with Haffty to question whether the Salary Ordinance was correct. No changes were made as a result of Lewis' inquiry. Constantino and Paquette also spoke directly with Haffty about the increase. Haffty told them that there were no issues with the rates listed in the Salary Ordinance.

Between 2017 and October 4, 2022, the date of the City's letter announcing its intent to change the grievants' rate of pay, the parties negotiated three successor collective bargaining agreements. At no time did the City demand to adjust the pay rate of any of the grievants and all COLA adjustments were based off the FY 2017 and subsequent years' Salary Ordinances. At no time did the City state that it needed to correct an error.

In 2022, current Facility Manager Lewis brought it to Ward's attention that he believed that the rates in the Salary Ordinance were not in line with prior agreements between the City and the Union. On October 4, 2022, Lewis sent Union representative Carol Markland (Markland) a letter which stated:

This letter is to inform you of a correction being made to the AFSCME Wastewater Group Municipal Ordinance relating to salaries.

> In 2014 a side letter agreement was signed between the City of Haverhill and AFSCME Local 939 adding $1.00 per hour to the Senior Maintenance Mechanic for 24-hour standby duty. However,

> in the following contractual agreement for Fiscal Year 2016, the additional $1.00 was mistakenly added to the following position[s]:
>
> Senior WWTP Operator
> WWTP Electrician
> Senior Collections Operator
>
> Since 2016, these three positions have received an additional $1.00 for all hours worked in error. At this time, the City will not seek reimbursement of these funds, that should not have been paid, but will correct the Salary Ordinance to reflect the accurate wages moving forward. …

On October 7, 2022, the Union sent a cease-and-desist letter, and a demand to bargain over the City's decision to reduce the grievants' wages. On October 7, via email, the City Solicitor declined to bargain over the issue. The Union filed a grievance over the City's decision that was denied at all steps of the grievance procedure, resulting in the instant arbitration.

POSITIONS OF THE PARTIES

THE UNION

It is well established in labor arbitration that there is no need for interpretation unless the agreement is ambiguous. Here, Article VI of the collective bargaining agreement covers wages and classification of titles in the bargaining unit. The collective bargaining agreement and subsequent MOAs entered into for successor agreements set forth bargained for annual wage increases for employees. Once the agreed upon wage increases are calculated by the City, a salary ordinance document is created and then rubber stamped by the City Council.

2014 Senior Maintenance Mechanic Side Letter Agreement

In 2014, the parties executed a side letter agreement to resolve a past grievance for additional duties placed on the Senior Maintenance Mechanic without compensation. This side letter agreement adds an additional $1.00 per hour to the Maintenance Mechanic salary to compensate for added 24/7 standby duties. While the side letter agreement is clear, it does not specify whether the change would be reflected on the salary ordinance. Following the execution of the 2014 side letter agreement, Constantino's hourly rate immediately increased by $1.00 per hour. Constantino's hourly rate on his pay stub reflects $1.00 per hour more than the step 6 rate on the 2015 salary ordinance.

Beginning July 1, 2016, Constantino began receiving $2.00 per hour extra above the rate of the salary ordinance. This kept his salary at the agreed upon $1.00 per hour above the other positions for his standby duties. Constantino's $2.00 per hour extra that he received as a combination of the rate payroll adjusted and by way of the 2016 salary ordinance remained in effect until it was unilaterally reduced by the City on October 13, 2022.

The City's assertion that the 2016 salary ordinance reflects an error which ultimately impacted rates of pay for subsequent years is simply not true. According to the City, three senior employees in the positions of Senior WWTP Operator, WWTP Electrician, and Senior WWTP Collection Operator received the additional $1.00 for all hours worked in error because the calculations in the 2016 salary ordinance were only supposed to reflect an increase for the Senior Maintenance Mechanic. The City is wrong and the evidence in the record does not support a

finding that the 2016 salary ordinance was miscalculated. Even the City's actions over the last eight years say otherwise. Given that the City did not adjust the salary ordinance after the 2014 side letter agreement and instead adjusted the rate on Constantino's paycheck demonstrates that the parties did not intend for the increase to appear on the salary ordinance. The additional $1.00 per hour did not appear on the salary ordinance until 2016 when all the senior employees received a $1.00 per hour increase and Constantino continued to be paid an additional $1.00 per hour extra for his on-call duties.

Separate Agreement for Increase to Grievants

The City's actions since 2014 with respect to Constantino's hourly rate support Paquette's testimony that the parties had a separate understanding in terms of increased wages by $1.00 per hour for the positions of Senior Maintenance Mechanic, Senior WWTP Operator, WWTP Electrician, and Senior WWTP Collection Operator. The additional $1.00 per hour increase was done for reasons having nothing to do with the 2014 side letter agreement. If the understanding was to change the ordinance for the Senior Maintenance Mechanic, the ordinance would have been changed in 2014. Not only is the City's assertion baseless, but its alleged error has come at the expense of bargaining unit members who have lost a significant amount of money.

Binding Past Practice

The City violated Article VI of the collective bargaining agreement when it reduced the hourly rate of four employees in October 2022. A binding practice of paying all four employees a dollar an hour more was understood and accepted by

the parties over the course of six years when the City continued to make annual COLA increases on the higher rate. In October 2022, the City unilaterally stopped paying four employees the rate in the salary ordinance and, instead, decreased their pay by $1.00 per hour. The City claims that the employees were paid an incorrect rate due to an error in the 2016 salary ordinance and never corrected until 2022, and that the ordinance remains incorrect since annual increases were made to the incorrect hourly rate reflected in the 2016 ordinance.

The City cannot correct the "error" unilaterally and pay a wage that is less than the rate in the current salary ordinance, due to a binding practice that was established between the parties. Paying the four positions an additional dollar per hour at Step 6 became understood and accepted by the parties for six years.

Where contract language is clear, the existence of a binding past practice may be established where it is shown to be understood and accepted by way of doing things over an extended period of time.[1] Mutuality of the parties must be shown as a party contending that clear language has been modified must show the assent of the other party and the minds of the parties … to have met on a definitive modification.[2] An arbitrator's award that appears contrary to the express terms of the agreement may nevertheless be valid if it is premised upon reliable evidence of the parties' intent.[3]

Here, mutuality of the parties can be shown. Evidence in the record supports a finding that both parties were aware in 2016 of the additional dollar per

[1] See Elkouri and Elkouri, How Arbitration Works. P 629. (6th ed.)
[2] Id.
[3] Id.

hour added to the rate of pay for the four positions at Step 6 on top of the 1.75% COLA wage increase. Annual wage increases were subsequently calculated on the 2016 rate, and moreover, between 2016 and 2022, the parties attended numerous negotiation sessions for successor contracts, and no one addressed the 2016 or 2017 rate. Paquette testified that he brought the calculations and salary ordinance to the attention of the Union shop steward as well as his supervisor back in 2016 and again in 2017. Constantino also testified that he had a verbal conversation with McClanahan in 2016 or 2017 about the calculations in the salary ordinance.

The City cannot deny it had knowledge in 2016 – or any point prior to 2022 - of the additional dollar per hour added to the rate of pay for the four positions. Lewis admitted he knew of the calculations in 2016 and 2017, and further admitted that Constatino and Paquette brought it to his attention and that he personally put management on notice via an email to the Direct of Human Services of the calculations in his capacity as shop steward.

Since it is clear that the parties were fully aware of the additional dollar per hour that was added to the four positions, it is also clear that the parties intended to leave the rates as they were because the City continued to pay the four employees accordingly. The binding practice became such that the four positions remained ahead of other positions when COLA increases in subsequent years continued to be calculated based on the hourly rate from the previous year. Now, six years later, the City cannot arbitrarily claim it discovered a “miscalculation” in

the 2016 salary ordinance and decrease the hourly rate of pay of employees in the four positions.

It is preposterous for the City to say that four senior employees received an additional $1.00 per hour in “error” six years later. The evidence in the record supports a finding that the parties effectively modified Article VI of the collective bargaining agreement. Increasing the wages of four senior employees at Step 6 was definitive, certain, and intentional. Both parties were aware of the increase, did not make any corrections, and did not utilize negotiations for multiple successor contracts over the course of six years to change what became a binding practice.

Conclusion

For all the foregoing reasons, the City violated Article I and VI of the collective bargaining agreement when it unilaterally reduced wages of four bargaining unit members. The Union requests that the arbitrator uphold the grievance and find that the City violated the collective bargaining agreement. The Union seeks a make whole remedy for the four bargaining unit employees, and any other relief deemed fair and just to make the Union whole in every way.

THE EMPLOYER

The weight of the evidence demonstrates that there was no intent to increase the hourly wages of three positions as part of the FY17 and FY18 Salary Ordinances that were passed by the Haverhill City Council. The testimony and exhibits established that the City and the Union negotiated a successor contract in July 2016 and the only change was an across-the-board 1.75% cost of living adjustment for FY17. When the Salary Ordinance for FY17 was subsequently

drafted by the Human Resources Department and sent around to various officials, Lewis, then the Union shop steward, alerted McClanahan to an error in the ordinance. Specifically, he noted that the Step 6 rates of pay for the positions of Electrician and Senior Operator were approximately $1.00 more than what had been agreed to. The Step 6 rate for the Senior Maintenance Mechanic accurately reflected the $1.00 per hour increase that the parties agreed to in January 2014 as a resolution to Constanino's grievance, which he started receiving in January 2015. Despite being alerted to the error, the mistake was not corrected before the Salary Ordinance was ultimately approved by the City Council.

While the length of time that passed before the error was rectified is somewhat unusual, the circumstances here amount to nothing more than a classic drafting error, in which the contract does not match what the parties actually agreed to. Elkouri addresses the subject of miscalculation of wages as follows:

> Where the clerical error concerns an employee's rate and has continued for some time, the employer still may be permitted to correct it for the future if, on discovery of the error, prompt action is taken, but the arbitrator may be less inclined to permit recoupment.[4]

When parties to a collective bargaining agreement negotiate the terms of a successor contract, they reduce the agreed to changes to writing. Here, when the contract expired, the parties reached an agreement for a one-year deal. A 1.75% cost of living adjustment was the only change the parties agreed to. Other than a $1.00 increase to the rate of the Senior Maintenance Mechanic, there would be no other changes to the contract or the wage scale. The $1.00 per hour stipend

[4] Elkouri and Elkouri, How Arbitration Works. 18-44 (8th ed.)

awarded to the Senior Maintenance Mechanic was mistakenly added to two other positions with the same rate-of-pay (electrician and Senior Operator). When the proposed FY17 schedule was distributed, Lewis alerted them to the discrepancy, but the erroneous FY17 Salary Ordinance was nonetheless presented to and passed by the City Council.

The Union's argument that these undocumented increases were intended by the parties as a way of appeasing senior Wastewater officials who had been left out of a previous deal, is unavailing. The record establishes that the parties have a lengthy and robust relationship in which disputes and grievances are often resolved by way of written agreements. Had the parties intended to grant a financial benefit to this particular group, because they were not part of an earlier deal awarded to other members of the unit, there is simply no plausible explanation for the lack of documentation. If the parties had intended to increase their pay, they could and would have noted the increase in their July 14, 2016 agreement or a separate side letter. The fact that no documentation exists is compelling evidence that there was no intent to award these employees any additional pay beyond what was in the MOA.

Conclusion

Based on the foregoing reasons, the evidence presented at the hearing established that the City was justified in correcting the wage of the four grievants and thus did not violate Articles I and/or VI of the parties' contract. Accordingly, the City requests that the Union's grievance be denied.

OPINION

The issue before me is: Did the Employer violate the collective bargaining agreement when it changed the wages of four employees in October 2022? If so, what shall the remedy be?

For all the reasons stated below, the Employer violated the collective bargaining agreement when it changed the wages of four employees in October 2022.

The City of Haverhill's procedure upon the settlement of a successor collective bargaining agreement with this bargaining unit is for the Human Resources Department to create a draft Salary Ordinance. The Salary Ordinance is then sent to multiple City employees, including the Director of the DPW, for review. Upon review and approval, the Salary Ordinance is then submitted to the City Council for final approval. The evidence presented proved that this procedure has consistently been followed.

In this instance, the FY 17 Salary Ordinance draft provided the grievants with a $1.00 per hour increase in their respective hourly rate. Following the usual procedure, this draft was sent for review, approved, and then submitted to the City Council who passed the Salary Ordinance. The City claims that this was a mistake, while the Union claims it was an intentional increase to address a salary discrepancy in the department. The City's argument, however, is severely undercut by its actions after the ordinance was passed.

It is undisputed that at least two management personnel were questioned about the legitimacy of the increase in the hourly rate. Then shop steward Lewis emailed McClanahan to inquire about the increase, and Lewis and multiple

employees spoke to then Facility Manager Haffty who insisted that the new rates were correct, and no changes were necessary. The parties further agreed to multiple successor collective bargaining agreements based on the prevailing rates listed in the original and subsequent Salary Ordinances. At no time did the City ever claim that there was a need to "correct" any of the rates listed in the salary ordinances, and both sides relied on the information contained in the Salary Ordinances to create and ultimately agree on proposals that were the basis of the memorandum of agreement between the parties.

For a binding past practice to exist, it must be: (1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties. Here, the Union has satisfied its burden to show that all three of the elements needed for a past practice were present.

There is no debate that the practice has been ongoing since 2016, when the salary increase for the grievants was implemented upon approval of the Salary Ordinance by the City Council. Each grievant received a $1.00 per hour increase in their respective base rates of pay. This increase was never changed even after it was brought to the attention of multiple Employer representatives including the Facility Manager, who insisted the rates were correct. The parties even negotiated multiple successor collective bargaining agreements based on the wages included in the Salary Ordinances, and the calculation of the base rate of pay was never discussed as a problem or issue. The overwhelming evidence supports the Union's position that a binding past practice exits between the parties.

Remedy

Having found there to be a binding past practice of paying the grievants the additional $1.00 per hour, there is still the issue of the issue of the appropriate remedy.

Binding past practices are simply practices that the parties have established by their actions over a period of time. These practices have not been collectively bargained and can be properly disavowed by either party at the appropriate time. The appropriate time, however, is not whenever one party deems it appropriate. The proper time to disavow a past practice is during successor contract negotiations, with notice to the other party that it no longer intends to participate in the practice, thus allowing parties to evaluate the information and make proposals as necessary.

In this case, the City is ordered to make the grievants whole for all lost wages associated with its decision to reduce their wages. The correct wages shall continue to be paid until such time as the City properly disavows its participation in the past practice by giving the Union notice of its intent, and then negotiating to resolution or impasse for a successor collective bargaining agreement.

AWARD

The Employer violated the collective bargaining agreement when it changed the wages of four employees in October 2022. The City is ordered to make the grievants whole for all losses in a manner consistent with this decision.

_____

Timothy Hatfield, Esq.
Arbitrator
May 20, 2024