COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of the Arbitration Between: CITY OF LOWELL -and- AFSCME, COUNCIL 93	ARB-23-10217

Arbitrator:

Timothy Hatfield, Esq.

Appearances:

Garrett Beaulieu, Esq. - Representing City of Lowell

Abigail Geier, Esq. - Representing AFSCME, Council 93

The parties received a full opportunity to present testimony, exhibits and arguments, and to examine and cross-examine witnesses at a hearing. I have considered the issues, and, having studied and weighed the evidence presented, conclude as follows:

AWARD

The City violated Article 12, Section 8 of the collective bargaining agreement when it changed the calculation method for emergency/forced overtime for Dispatchers and Detention Attendants starting in November 2020. The City is ordered to make the Dispatchers and Detention Attendants whole for all lost wages associated with its decision to change the manner in which it compensated them for emergency/forced overtime.

I will retain jurisdiction until such time as the parties have agreed on the appropriate payout to satisfy this award.

Timothy Hatfield, Esq.
Arbitrator
June 10, 2025

INTRODUCTION

On September 8, 2023, AFSCME, Council 93 (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 March 1, 2024.

The parties filed briefs on April 5, 2024.

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 12, Section 8 of the collective bargaining agreement when it changed the way emergency/forced overtime is paid to Dispatchers and Detention Attendants starting in November 2020?

If so, what shall be the remedy?

The City proposed:

Did the Employer violate Article 12, Section 8 of the collective bargaining agreement when it paid Dispatchers and Detention Attendants emergency/forced overtime at the double time rate instead of double the overtime rate?

If so, what shall be the remedy?

Issue:

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

Did the Employer violate Article 12, Section 8 of the collective bargaining agreement when it changed the calculation method for emergency/forced overtime for Dispatchers and Detention Attendants starting in November 2020?

If so, what shall be the remedy?

RELEVANT CONTRACT LANGUAGE

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

ARTICLE 12 OVERTIME

Section 1. General Provision

An employee covered by this Agreement shall be paid overtime at the rate of one and one-half (1.5) for work in excess of eight (8) hours in one (1) day and forty (40) hours in one (1) week …

Section 4. LPD Dispatchers and Detention Attendants

Although the irregular work schedule for Dispatchers and Detention Attendants is not a straight forty hours, employees will continue to be paid overtime (within the confines of the Agreement) after they have worked a complete schedule, Sunday through Saturday at the rate of time and one-half (1.5). It is understood that during some work periods employees will work five days during the time frame and sometimes four days.

A. 4 Hour Increments

If the overtime rotation has been exhausted and no volunteer exists, the Employer in order to provide appropriate coverage may offer overtime shifts in four (4) hour increments. …

Section 8. Overtime, Voluntary, Emergencies, Police Dispatchers and Detention Attendants

Overtime work shall be voluntary, except for emergencies. There shall be no discrimination against any employee who declines to work overtime. In the event that a Police Dispatcher, or Detention Attendant, is required to work on an involuntary basis during an

> emergency, that employee shall be compensated on a double (2.0) time basis for all hours worked during that declared emergency.

STIPULATIONS

Since 2007, Dispatchers were paid for emergency/forced overtime for double the hours worked at time and a half.

Since 2017, Detention Attendants were paid for emergency/forced overtime for double the hours worked at time and a half.

FACTS

The City of Lowell (City or Employer) and the Union are parties to a collective bargaining agreement that was in effect at all relevant times to this arbitration. The Lowell Dispatch Center operates on a twenty-four-hour, seven day a week basis. Police Dispatchers and Detention Attendants work one of three shifts, 7AM – 3PM, 3PM -11PM, or 11PM - 7AM. Neither position is permitted to work more than 16 hours in a 24-hour timeframe. When Police Dispatchers and Detention Attendants are forced to work emergency overtime, the least senior employee working the prior shift is forced to stay and cover the subsequent shift.

Since the parties' 2004-2007 collective bargaining agreement, Article 12, Section 8 has stated:

> Overtime work shall be voluntary, except for emergencies. There shall be no discrimination against any employee who declines to work overtime. In the event that a Police Dispatcher, or Detention Attendant, is required to work on an involuntary basis during an emergency, that employee shall be compensated on a double (2.0) time basis for all hours worked during that declared emergency.

This language has remained unchanged since its adoption except for the addition of Detention Attendants in June 2017.

Prior to the addition of Article 12, Section 8, Dispatchers forced to work overtime were paid for their actual hours worked at the rate of time and a half, the same rate as Dispatchers who voluntarily worked an overtime shift. Based on the language of Article 12, Section 8, since 2007, Dispatchers have been paid for emergency/forced overtime for double the hours worked at time and a half, and since their inclusion in 2017, Detention Attendants have been paid for emergency/forced overtime for double the hours worked at time and a half.

In November 2020, the City unilaterally stopped paying Dispatchers and Detention Attendants at the rate of double the hours worked at time and a half for emergency/forced overtime, instead reverting to actual hours worked at time and a half as had been paid prior to 2007. Former Budget Director for the Lowell Police Department, Tien Nguyen had a different interpretation of the language and when questioned by the Union, told it to file a grievance. Two grievances were subsequently filed by the Union in November and December 2020. Both grievances were denied by the Town Manager at Step III in August 2023, resulting in the instant arbitration.

POSITIONS OF THE PARTIES

THE UNION

Article 12, Section 8, which is the basis of this grievance, is poorly written and not clear and unambiguous. There exists, however, an established practice accepted by the Union and the City that gives meaning and context to Article 12,

Section 8. This practice has been in place consistently since 2006, when the parties added the section to the 2004-2007 collective bargaining agreement.

One of the most important standards used by arbitrators in the interpretation of ambiguous contract language is the relevant custom or past practice of the parties. To establish a binding past practice as an implied term of the contract, "the way of operating must be so frequent and regular and repetitious so as to establish a mutual understanding that the way of operating will continue in the future."[1]

In this case, the Union's position is that the City violated Article 12, Section 8 when it started paying Police Dispatchers and Detention Attendants for emergency overtime at a rate of double their straight time rate for hours actually forced. Article 12, Section 8 states:

> In the event that a Police Dispatcher, or Detention Attendant, is required to work on an involuntary basis during an emergency, that employee shall be compensated on a double (2.0) time basis for all hours worked during that declared emergency.

Prior to November 2020, before the City changed the way emergency overtime was paid, Police Dispatchers and Detention Attendants were paid for double the hours worked during the emergency overtime shift at a rate of time and one half. That had been the practice for 14 years and is consistent with the meaning given to Section 8 when the parties negotiated that section into the collective bargaining agreement.

[1] Elkouri and Elkouri, How Arbitration Works, p 625, (6th Ed.).

While the City contends it discovered an "error" in or around mid-October 2020 regarding an "overpayment" of forced overtime, the City ignores the fact that employees were paid that way because that was what the parties agreed to in 2006. There was no error – the language in Article 12, Section 8 says what it says and there is a fourteen year practice that gives meaning to what the parties intended by the words "double time basis."

The custom or past practice of the parties is the most widely used standard to interpret ambiguous and unclear contract language.[2] It is easy to understand why, as the parties' intent is most often manifested in their actions.[3] Where practice has established a meaning for contractual language contained in past contracts and continued by the parties in a new agreement, the language will be presumed to have the meaning given to it by the practice.[4]

Since November 2020, the City has taken the position that the Union's interpretation of Section 8 and the 14-year practice has resulted in Police Dispatchers and Detention Attendants getting paid "triple time" for all emergency overtime worked. The City's argument that the "double time basis" language means payment at a rate of double straight time for all emergency overtime hours worked is without merit because the 14-year practice supports the Union's argument that "double time basis" refers to double the hours worked for emergency, involuntary overtime.

[2] Elkouri and Elkouri, How Arbitration Works, p 623, (6th Ed.).
[3] Id.
[4] Id.

It is important to note that the former Budget Director for the Lowell Police Department who sounded the alarm to the City in October 2020 that there was an accounting error for the payment of emergency overtime, had not been with the City long and has since left her employment with the City. For 14 years prior to her arrival, the former Budget Director for the Police Department and other payroll employees for the Department, including the Police Chief, were well aware that Police Dispatchers and Detention Attendants were paid for double the hours worked for emergency overtime at a rate of time and one half. Staff manually entered double the hours for any emergency overtime shift worked at the overtime rate of pay. The City's proclaimed error is erroneous, unsupported, and cannot overcome the language within Section 8 that is consistent with a 14-year practice between the parties. In fact, the language has gone through many contract cycles over the years and been signed by the City Manager, City Solicitor and Union officers. There is no evidence in the record to support a finding that this was an error, or that the meaning of Section 8 is payment on a double straight time basis for emergency overtime.

Former Union President and Dispatcher Therese Cooper testified as to her memory and direct knowledge of the language agreed to by the parties in 2006. The Union proposed the language in 2006 because there was no difference in compensation for Police Dispatchers who were forced to stay and work an extra shift versus those who voluntarily picked up an overtime shift. After discussing the proposal with the Union, former City Manager Cox agreed to the proposal and justified it because forced overtime was infrequent, and the deal worked both ways

by keeping management accountable for avoiding forced overtime situations since forced overtime would be paid for double the hours forced at a rate of time and one half. The meaning and intent of double time basis was never intended to mean double straight time rate of pay because such an amount was not much more than what was earned during voluntary overtime.

Conclusion

For all the foregoing reasons, the City violated Article 12, Section 8 when it unilaterally changed the way in which forced/emergency overtime is paid to Police Dispatchers and Detention Attendants. To date, the City continues to compensate emergency overtime incorrectly and is in continuous violation of Article 12, Section 8. The Union seeks a full make whole remedy for all emergency overtime worked from November 2020 to the present and an order to the City to compensate Police Dispatchers and Detention Attendants in accordance with the practice that has been in place since 2006.

THE EMPLOYER

The City has complied with the collective bargaining agreement in its calculation of forced overtime. The City's calculations are consistent with the language of the collective bargaining agreement. The language of the collective bargaining agreement governs when the language is clear and unequivocal. To determine whether the language is clear and unequivocal, or ambiguous, one "must first examine the language of the contract by itself, independent of extrinsic evidence concerning drafting history or the intentions of the parties."[5]

[5] Bank v. Thermo Elemental, Inc., 451 Mass. 638, 648 (2008)

Clear and Unambiguous Language of the Collective Bargaining Agreement

The City is calculating the forced overtime rate as established by the clear and unambiguous language of the collective bargaining agreement. A term should be given its plain and ordinary meaning, unless a contrary intent is demonstrated.[6] Plain and ordinary meaning is usually determined by the term's dictionary definition.[7] "Double time" is defined as the "payment of a worker at twice the regular rate."[8] Article 12, Section 8 provides that when an employee works forced overtime, that employee shall be compensated on a double (2.0) time basis for all hours worked.

At the hearing, the Union submitted testimony attempting to illustrate that back in 2004, both parties intended that the relevant collective bargaining agreement provision to mean that the forced overtime rate was to be double the overtime rate. However, there is no written documentation of this, no notes, no memoranda, only one person's recollection of an event. Memories tend to fade over days, weeks, months and years. In this case it is a memory from twenty years ago. As such, it stretch of the imagination to accept this version of events as accurate without any supporting documentation. If the forced overtime rate was intended to be double the overtime rate, those should have been the words used in the collective bargaining agreement. It would have been very simple for the drafters of the collective bargaining agreement to make clear. However, those were not the words used.

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[6] Town of Boylston v. Commissioner of Revenue, 434 Mass. 398, 405 (2001)
[7] Id.
[8] Double Time, Merriam-Webster Dictionary, https://www.meriam-webster.com.

Independent of extrinsic evidence, the language of the contract cannot support a reasonable difference of opinion as to the meaning of the words used. The plain meaning of “double time” is clear: it is the payment of twice the regular wage rate. Therefore, because the collective bargaining agreement is clear and unambiguous concerning the payment of double time for forced overtime, and the City is paying at the double time rate for forced overtime, the City is in compliance with the clear and unambiguous terms of the collective bargaining agreement.

No Past Practice

Even if the language of the collective bargaining agreement is not clear and unambiguous, the Union cannot establish that a past practice existed regarding the payment of forced overtime at double the overtime rate. A valid past practice requires showing that the practice is: 1) unequivocal; 2) clearly enumerated and acted upon; and 3) readily ascertainable over a reasonable period of time as fixed and established practice accepted by both parties. Past practice must be clearly stated and understood, maintained over a reasonable time and accepted by both parties, and one that could not be terminated unilaterally.

Here, the past practice could, and in fact was, terminated unilaterally because the payments were incorrect. It would be illogical to require an employer to continue overpaying its employees simply because the employer unintentionally overpaid its employees for a defined period of time. An employer must be allowed to fix an error when its employees are being paid incorrectly.

Conclusion

For the foregoing reasons, the City requests a ruling in the City's favor and asks the arbitrator to affirm the City's forced overtime rate payment of double time the regular wage rate.

OPINION

The issue before me is:

Did the Employer violate Article 12, Section 8 of the collective bargaining agreement when it changed the calculation method for emergency/forced overtime for Dispatchers and Detention Attendants starting in November 2020?

If so, what shall be the remedy?

For all the reasons stated below, the City violated Article 12, Section 8 of the collective bargaining agreement when it changed the calculation method for emergency/forced overtime for Dispatchers and Detention Attendants starting in November 2020.

As this is a contract interpretation case, I must first decide if the language of Article 12, Section 8 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 bargaining history and past practice.

The City claims that the language in Article 12, Section 8 is clear and unambiguous and supports its rationale for why it should prevail. The Union claims

that the language is poorly written, and not clear and unambiguous. The language states that:

> Overtime work shall be voluntary, except for emergencies. There shall be no discrimination against any employee who declines to work overtime. In the event that a Police Dispatcher, or Detention Attendant, is required to work on an involuntary basis during an emergency, that employee shall be compensated on a double (2.0) time basis for all hours worked during that declared emergency.

This language has remained unchanged since its inclusion in the collective bargaining agreement in the 2004-2006 cycle for Dispatchers, and since 2017 for Detention Attendants who were added through a Memorandum of Agreement. The Union's argument is that the phrase "that employee shall be compensated on a double (2.0) time basis for all hours worked during that declared emergency" means exactly what it says, an employee forced to work overtime shall be compensated on a double time basis for all hours worked at the overtime rate of time and a half. The Town argues that double time basis refers to two times the employees' rate of pay for all hours actually worked.

Based on each party's current difference of opinion on the meaning of the language, I can see how the phrase "double time basis" could be interpreted in multiple ways, i.e. double the number of hours worked compared to double the rate of pay for the hours actually worked. As such, I find the language to be ambiguous and turn my attention to other factors such as bargaining history and past practice to help resolve the dispute.

Bargaining History

Evidence presented at the hearing by the Union establishes that Article 12, Section 8, was introduced into the 2004-2007 collective bargaining agreement.

Unrebutted, first-hand testimony corroborates that the Union proposed the language to address the issue of emergency/forced overtime for Dispatchers. The Union was trying to manage the amount of emergency/forced overtime being mandated. Prior to the current language being implemented, the amount paid for voluntary overtime was the same as paid for emergency/forced overtime. The Union wanted there to be a disincentive to the continued use of emergency/forced overtime, and felt that when a Dispatcher was forced to work a second consecutive shift with little notice, they should be compensated differently than an employee who volunteered to work overtime.

City Manager John Cox and the Union agreed to the language contained in Article 12, Section 8 and the language has remained unchanged, with the exception of adding the Detention Attendants in 2017.

Past Practice

The parties have stipulated that since 2007, Dispatchers have been paid for double the hours worked for emergency/forced overtime at the rate of time and a half. The parties have further stipulated that since 2017, Detention Attendants have also been paid for double the hours worked for emergency/forced overtime at the rate of time and a half.

As such, we have a complete thirteen-year history for how the City paid Dispatchers for emergency/forced overtime, and a complete three-year history for how the City paid Detention Attendants for emergency/forced overtime under the provisions of Article 12, Section 8. Prior to the City's claimed uncovering of a

"mistake" in 2020, each group was paid time and a half for double the number of hours worked for emergency/forced overtime.

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 all three of the elements.

There is no debate that the practice has been ongoing since 2007 for the Dispatchers and since 2017 for the Detention Attendants, when the parties agreed to the current language and implemented it into the collective bargaining agreement. Each group, respectively, began receiving time and a half pay for double the hours worked for emergency/forced overtime. This calculation for emergency/forced overtime pay was never questioned by either party. The City mandated the forced overtime, when necessary, and approved the employees' submitted timesheets and paid the employees without question. The parties even negotiated multiple successor collective bargaining agreements, and the calculation of emergency/forced overtime was never discussed as a problem or issue. The fact that in 2020, the City changed its mind about what it believed Article 12, Section 8 meant, does not negate the fact that for thirteen years and three years, respectively, the parties were in complete agreement of how each group was to be paid for emergency/forced overtime. The overwhelming evidence supports the Union's position that a binding past practice exists between the parties.

AWARD

The City violated Article 12, Section 8 of the collective bargaining agreement when it changed the calculation method for emergency/forced overtime for Dispatchers and Detention Attendants starting in November 2020. The City is ordered to make the Dispatchers and Detention Attendants whole for all lost wages associated with its decision to change the manner in which it compensated them for emergency/forced overtime.

I will retain jurisdiction until such time as the parties have agreed on the appropriate payout to satisfy this award.

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Timothy Hatfield, Esq.
Arbitrator
June 10, 2025