COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

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In the Matter of the Arbitration Between: *
*
CITY OF WORCESTER *
*
-and- * ARB-14-3759
*
NAGE, LOCAL 495 *
****

Arbitrator:

Timothy Hatfield, Esq.

Appearances:

William Bagley, Esq. - Representing City of Worcester

John Mackin Jr., Esq. - Representing NAGE, Local 495

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 grievance is substantively arbitrable, but the City did not violate the collective bargaining agreement when it did not call Robert Odgren on March 16, 2012 for an overtime opportunity on March 17, 2012. The grievance is denied.

Timothy Hatfield, Esq.
Arbitrator
August 12, 2016

INTRODUCTION

NAGE, Local 495 (Union) filed a unilateral petition for Arbitration. Under the provisions of M.G.L. Chapter 23, Section 9P, the Department of Labor Relations (Department) appointed Timothy Hatfield, Esq. to act as a single neutral arbitrator with the full power of the Department. The undersigned Arbitrator conducted a hearing at the Worcester Police Department on July 23, 2014.

The parties filed briefs on February 2, 2016.

THE ISSUES

1) Is the matter arbitrable?
2) Did the City violate the collective bargaining agreement when it did not call Robert Odgren on March 16, 2012 for an overtime opportunity on March 17, 2012?
3) If so, what shall the remedy be?

RELEVANT CONTRACT LANGUAGE

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

ARTICLE 4 – MANAGEMENT RIGHTS

> In the interpretation of this Agreement, the City shall not be deemed to have been limited in any way in the exercise of the regular and customary functions of municipal management or governmental authority and shall be deemed to have retained and reserved unto itself all the powers, authority and prerogatives of municipal management or governmental authority including, but not limited to, the following examples: the operation and direction of the affairs of the departments in all of their various aspects; the determination of the level of services to be provided; the direction, control, supervision and evaluation of the

employees; the determination of employee classifications; the determination and interpretation of job descriptions, but not including substantive changes; the planning, determination, direction and control of all the operations and services of the departments (and their units and programs); the increase, diminishment, change or discontinuation of operations in whole or in part; the institution of technological changes or the revising of processes, systems or equipment; the alteration, addition or elimination of existing methods, equipment, facilities or programs; the determination of the methods, means, location, organization, number and training of personnel of the departments, or its units or programs; the assignment and transfer of employees; the scheduling and enforcement of working hours; the assignment of overtime; the determination of whether employees (if any) in a classification are to be called in for work at times other than their regularly scheduled hours and the determination of the classification to be so called; the determination of whether goods should be made, leased, contracted or purchased on either a temporary or a permanent basis; the hiring, appointment, promotion, demotion, suspension, discipline, discharge, or relief of employees due to lack of funds or of work, or the incapacity to perform duties or for any other reason; the making, implementation, amendment, and enforcement of such rules, regulations, operating and administrative procedures from time to time as the City deems necessary; and the power to make appropriation of funds; except to the extent abridged by a specific provision of this Agreement or law.

The rights of management under this article and not abridged shall not be subject to submission to the arbitration procedure established in Article 11 herein.

Nothing in this article shall be interpreted or deemed to limit or deny any rights of management provided the City by law.

ARTICLE 11 GRIEVANCE PROCEDURE (In Part)

5. The award of the arbitrator shall be final and binding upon all parties, subject to the following conditions:

a. The arbitrator shall make no award for grievances initiated prior to the effective date of this Article.

b. The arbitrator shall have no power to add to, subtract from, or modify this contract or the rules and regulations of the City and the Charter, Ordinances and Statutes concerning the City, either actually or effectively.

c. The arbitrator shall only interpret such items and determine such issues as may be submitted to him by the written agreement of the parties.

d. Grievances may be settled without precedent at any stage of the procedure until the issuance of a final award by the arbitrator.

e. Appeal may be taken from the award to the Worcester Superior Court as provided for in paragraph 6.

6. Appeal from the arbitrator's award may be made to Superior Court on any of the following bases, and said award will be vacated and another arbitrator shall be appointed by the Court to determine the merits if:

a. The award was procured by corruption, fraud, or other undue means;

b. There was evident partiality by an arbitrator, appointed as a neutral, or corruption by the arbitrator, or misconduct prejudicing the rights of any party;

c. The arbitrator exceeded his powers by deciding the case upon issues other than those specified in sections 5(b) and (c), or exceeded his jurisdiction by deciding a case involving non-grievable matters as specified in Section 1, or rendered an award requiring the City, its agents, or representatives, the Union, its agents or representatives, or the grievant to commit an act or to engage in conduct prohibited by-law as interpreted by the Courts of this Commonwealth;

d. The arbitrator refused to postpone the hearing upon a sufficient cause being shown therefor, or refused to hear evidence material to the controversy or otherwise so conducted the hearing as to prejudice substantially the rights of a party;

e. There was no arbitration agreement on the issues that the arbitrator determined, the parties having agreed only to submit those items to arbitration as the parties had agreed to in writing prior to the hearing, provided that the appellant party did not waive his objection during participation in the arbitration hearing; but the fact that the award orders reinstatement of an employee with or without back pay or grants relief that would not be granted by a court of law or equity, shall not be grounds for vacating or refusing to confirm the award.

ARTICLE 15 SICK LEAVE (In Part)

(b) ... the accumulation ... at the rate of one and one-fourth (1¼) credit per month. ...

(e) That the administration of sick leave will be subject to such regulations as may be deemed necessary by the City Manager to effectuate the provisions of the allowance.

ARTICLE 19 ASSIGNMENT OF OVERTIME (In Part)

1. Insofar as practicable in the assignment of overtime service, department heads and bureau heads will apply the following standards, consistent with efficient performance of the work involved and the best interests of the operation of the department:

(a) Overtime will be awarded on an equal opportunity basis. (It is the intent of this standard that each employee shall be afforded an equal number of opportunities to serve with no obligation on the part of the City to equalize actual overtime hours.)

(b) To be eligible for overtime service, employees must, in the opinion of their department head or bureau head, be capable of performing the particular overtime task.

(c) A roster will be kept by each bureau head of overtime calls and overtime service by name, by date and by hour. In case of a grievance involving such records, they shall be subject to examination by the Union representative or the shop steward in the presence of the department head or his representative. After four (4) consecutive refusals to perform overtime service, an employee's name shall be dropped from the overtime roster for six (6) months.

(d) There will be no discrimination or personal partiality in the assignment of overtime service.

(e) Where overtime service is necessary on a particular job at the end of the working day, the overtime opportunity can be granted to the person doing that particular job on that day, without need of calling in another person under clause (a) above.

(f) Where overtime service is necessary with respect to a particular job on a day when a person who ordinarily handles that job is not on duty, the overtime opportunity can be granted to that person without need of calling in another person under clause (a) above.

2. Where overtime service must be performed on an emergency basis in the opinion of the department head, the above standards shall not apply.

3. In any situation where the above standards for overtime service are satisfied and two or more persons are equally available and qualified as determined by the department head for such service, the assignment of overtime service will be made on a seniority basis.

4. This agreement is understood to be without prejudice to the City's position that mandatory overtime service is a governmental prerogative and to the Union's position that overtime service by the employee is voluntary, provided, however both the Union and the City agree that overtime is mandatory during a declared emergency by the City Manager.

RELEVANT MEMORANDUM OF AGREEMENT

Memorandum of Agreement
Between
The City of Worcester
And
NAGE/Local 495, S.E.I.U., AFL-CIO (In Part)

Whereas, the City of Worcester (the City) and NAGE/Local 495, SEIU, AFL-CIO (the Union) have been negotiating in connection with certain issues related to the calculation of "time worked" for eligibility for overtime compensation and other paid leave time accrual ...

Now, therefore, the existing collective bargaining agreement in effect between the City and the Union shall be amended as follows:

Notwithstanding the provisions of Article 20 of the current collective bargaining agreement ... any employee covered by the Agreement shall be entitled to have his or her paid sick leave calculated as "time worked" for purposes of accruing time for payment of overtime compensation. ...

RELEVANT ADMINISTRATIVE DIRECTIVES

Emergency Communications Department

Administrative Directive #09-001

January 1, 2009

To: All Personnel
From: David W. Clemons, Director
Re: Overtime

Effective at 0700 hrs on January 1, 2009 any employee calling in sick will be ineligible for any overtime until they returned (sic) to work and have worked a regular shift.

Emergency Communications Department

Administrative Directive #10-001 (In Part)

May 5, 2010

To: All Personnel
From: David W. Clemons, Director
Re: Sick Leave

Sick Leave has two basic purposes. It secures an employee's income during periods of illness or injury and it protects the health of the employee and co-workers. ...

The City provides sick leave for absences from work for short term personal illness or injury, when the employee has a medical, dental or eye appointment/examination for which arrangements cannot be made outside of working hours ...

FACTS

The City of Worcester (City) and the Union are parties to a collective bargaining agreement that was in effect at all relevant times to this arbitration. The grievant Robert Odgren (Odgren) is a dispatcher, employed in the City's Emergency Communications Department (Department).

On June 27, 1995, the City and the Union signed a Memorandum of Agreement (1995 MOA) that states in relevant part that:

> Notwithstanding the provisions of Article 20 of the current collective bargaining agreement ... any employee covered by the Agreement shall be entitled to have his or her paid sick leave calculated as "time worked" for purposes of accruing time for payment of overtime compensation.

On January 1, 2009, David Clemons (Clemons), the then Director of the Emergency Communications Department, issued Administrative Directive #09-001 (2009 Directive) stating that:

> Effective at 0700 hrs on January 1, 2009 any employee calling in sick will be ineligible for any overtime until they returned (sic) to work and have worked a regular shift.

Since its inception, the Department has uniformly enforced this overtime restriction for both employees who call in sick for an entire shift, as well as employees utilizing sick leave for only a portion of their shift. The Union has never filed a grievance over the overtime eligibility restriction for employees utilizing sick leave.

On March 16, 2012, Odgren was working his regular shift when he needed to leave to attend a doctor's appointment. Odgren used 2.5 hours of sick leave. Around 4 PM on March 16, 2012, an overtime opportunity for the 3 PM to 11 PM shift on March 17, 2012 became available. Using the overtime seniority list, the Department made calls to fill the shift. Odgren had left work to attend a doctor's appointment, had used sick leave, and was marked as sick on the overtime roster. Under Department policy, the City did not call and offer him the overtime shift.

The Union filed a grievance with the City alleging that marking Ogdren as sick and skipping him on the overtime list was improper. The grievance was denied at all steps of the grievance procedure and resulted in the instant arbitration.

POSITIONS OF THE PARTIES

THE UNION

Arbitrability

The grievance is arbitrable. The collective bargaining agreement provides in Article 11 that a grievance shall be defined to be an actual dispute arising as a result of the application or interpretation of the express terms of the contract. This grievance regards a violation of Article 19, the assignment of overtime, which states that overtime should be awarded on an equal opportunity basis in accordance with an overtime roster. The improper notation of Odgren as sick on the overtime roster took away his opportunity for overtime and constituted a contractual violation.

Merits

Odgren filed this grievance because he believed that he was improperly denied an overtime opportunity on March 17, 2012 from 3:00 PM to 11:00 PM. He had worked the previous day, March 16th and left work to go to a doctor's appointment, using 2.5 hours of sick leave. The overtime rotation sheet listed an "S" beside his name indicating that he had used sick leave. When a Union steward brought the issue to the attention of the Assistant Director of Communications, Sandy Mawdsley (Mawdsley), Mawdsley replied that it was department policy when employees use sick leave, they are ineligible for overtime until they work a regular shift.

The denial of the overtime opportunity based on the sick notation on the overtime roster violates the memorandum of agreement signed by the parties in

1995. The memorandum of agreement states that "any employee covered by the agreement shall be entitled to have his or her paid sick leave calculated as time worked for purposes of accruing time for payment of overtime compensation."

Odgren was not out sick for his 7-3 shift on March 16th. It was not a situation where he called in sick. He worked for 5.5 hours, and then took 2.5 hours of sick leave to attend a doctor's appointment. The 2009 Directive upon which the City relies, by its language, refers to different circumstances than are presented here. The 2009 Directive talks to "any employee calling in sick." Odgren worked on the day in question, and did not call in sick. When the calls were made prior to 4 PM on the 16th for the overtime opportunity from 3 PM to 11 PM on the 17th, Odgren was not out sick as contemplated by the 2009 Directive. He was entitled to have his paid sick leave be considered and calculated as time worked. Thus, he was eligible for the overtime opportunity on the 17th, but was not offered the opportunity to work.

Conclusion

The Union argues that the grievance be sustained and Odgren be made whole for the lost overtime opportunity on March 17, 2012.

THE EMPLOYER

Arbitrability

The instant matter is not substantively arbitrable because the City's actions are not subject to submission to the grievance procedure set forth in the collective bargaining agreement.

The Union presented no evidence to establish that there is contract language that compels the City to call Odgren on March 16th to offer the March 17th overtime opportunity to him. To the contrary, the evidence demonstrates that the City's decision to refrain from calling Odgren on March 16th is not arbitrable, because the "making, implementation, amendment, and enforcement of such rules and regulations, operating and administrative procedures" is a right reserved to management pursuant to Article 4 of the parties' collective bargaining agreement and the agreement, which also excludes the exercise of such rights from the grievance procedure.

Pursuant to Article 4, the City implemented rules governing eligibility for overtime when employees are sick to ensure the efficient administration of the overtime roster. Because the City's Article 4 rights are not subject to submission to the arbitration procedure as described in Article 11, this case should be dismissed.

Merits

The parties do not dispute that the 2009 Directive requiring employees to return to work from an illness or injury prior to being offered an overtime opportunity has been in place since January 1, 2009. Also, neither Odgren nor the Union asserted that this policy had been enforced sporadically. To the contrary, it is clear that this policy was uniformly enforced for the efficient operation of the Department.

On March 16, 2012, Odgren left work early, and used sick time for the remainder of the day. The March 17th overtime opportunity offered to employees

was offered on the afternoon of March 16th, prior to Odgren's return to work. Pursuant to the longstanding and uniformly enforced 2009 Directive, Odgren was not eligible to work overtime until he returned to work and worked a regular shift.

Although the Union asserts that the 2009 Directive conflicts with the 1995 MOA, its position is incorrect. The 1995 MOA provides that employees, who are absent from work because of illness or injury, will have those hours counted as time worked for the purposes of determining whether they are entitled to overtime when they work in excess of eight hours in a given day or forty hours in a given work week. While the 1995 MOA does provide that sick time may be counted for purposes of calculating eligibility for overtime compensation, it does not provide that employees who are on sick leave are entitled to be called for an overtime opportunity.

As set forth above, Odgren left work early on March 16th because he was going to a doctor's appointment. Pursuant to the 1995 MOA, he was compensated for the time that he was absent from work and his compensable time counted toward the forty hours that he worked for the week. However, during the time that he was absent from work, he was not eligible to work an overtime shift.

Because the Union has failed to carry its burden of proving that the City was obligated to offer Odgren an overtime opportunity during the timeframe that he was absent from work on sick leave, the grievance should be denied.

OPINION

The issues before me are:

1) Is the matter arbitrable?
2) Did the City violate the collective bargaining agreement when it did not call Robert Odgren on March 16, 2012 for an overtime opportunity on March 17, 2012?
3) If so, what shall the remedy be?

Under an agreement between the Arbitrator and the parties, the issue of substantive arbitrability was briefed together with the merits of the grievance, with the understanding that the issue of substantive arbitrability would be addressed first, prior to any potential discussion on the merits of the grievance. For the reasons stated below, I find that the grievance is substantively arbitrable, but the City did not violate the collective bargaining agreement when it did not call Robert Odgren on March 16, 2012 for an overtime opportunity on March 17, 2012, and the grievance is denied.

Substantive Arbitrability

The Union argues that this matter is substantively arbitrable because it deals with the potential violation of Article 19 of the collective bargaining agreement concerning the assignment of overtime, as well as the potential violation of a memorandum of agreement from 1995 that has been incorporated in the collective bargaining agreement. To the extent that the Union's arguments present a question of the interpretation of the interplay of Article 19 of the

collective bargaining agreement, the 1995 MOA, and the inherent rights that the City has reserved upon itself, I find the grievance to be substantively arbitrable.

Merits

Having found the grievance substantively arbitrable, I now turn to the factual dispute raised by the grievance. In its argument, the grievant and the Union are asking the arbitrator to find that the City's marking of the grievant as sick on the overtime list for the March 17th overtime opportunity was improper, and that the resulting failure to call the grievant for overtime was a violation of the collective bargaining agreement. Alternately, the grievant and the Union are asking the arbitrator to find the 2009 Directive that denies overtime opportunities to employees who are on sick leave is a violation of a 1995 MOA.

The unrebutted testimony presented at the arbitration hearing was that the 2009 Directive has been in effect since January 1, 2009, and the Union has never challenged the 2009 Directive's restriction of overtime opportunities. Additionally, the City presented unrebutted testimony that since its inception, this directive has been uniformly enforced, including employees calling in sick for an entire shift, or, as is the case here, employees leaving early and using paid sick leave.

The facts before me show that the 2009 Directive is a permissible restriction that does not violate the collective bargaining agreement. Furthermore, while the Union is correct that the 2009 Directive states "any employee calling in sick will be ineligible", the City has presented sufficient testimony to show that it has consistently applied this restriction to both

employees calling in sick for their full shifts, as well as employees leaving during their shifts and using sick leave.

Regarding the 1995 MOA, the City is correct that when employees are absent from work on paid leave because of illness or injury, those compensable hours will be calculated as time worked for the purposes of determining whether the employees are entitled to overtime when they work in excess of eight hours in a given day or forty hours in a given work week. The Union's attempt to transform this language into eligibility for an overtime opportunity is misplaced. The 1995 MOA only provides that sick time may be counted for purposes of calculating eligibility for overtime compensation, but does not provide that employees who are utilizing sick leave are entitled to be offered an overtime opportunity prior to working a regular shift.

For the reasons stated above, the grievance, while substantively arbitrable, is denied.

AWARD

The grievance is substantively arbitrable, but the City did not violate the collective bargaining agreement when it did not call Robert Odgren on March 16, 2012 for an overtime opportunity on March 17, 2012. The grievance is denied.

Timothy Hatfield, Esq.
Arbitrator
August 12, 2016