

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of the Arbitration Between:

WORCESTER HOUSING AUTHORITY

-and-

MASSACHUSETTS & NORTHERN NEW
ENGLAND LABORERS' DISTRICT
COUNCIL

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ARB-15-4929

Arbitrator:

Timothy Hatfield, Esq.

Appearances:

Nicholas Anastasopoulos, Esq. - Representing Worcester Housing Authority

Tom Coffey, Esq. - Representing Massachusetts & Northern New
England Laborers' District Council

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 Worcester Housing Authority did not violate the collective bargaining agreement by denying Jerry Santiago unsupervised overtime opportunities between May 22, 2015 and January 16, 2016. The grievance is denied.



Timothy Hatfield, Esq.
Arbitrator
July 8, 2016

INTRODUCTION

The Massachusetts & Northern New England District Council, (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 Law Offices of Mirick, O'Connell, DeMallie & Lougee in Westborough, Massachusetts on February 11, 2016.

The parties filed briefs on May 2, 2016.

THE ISSUE

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

The Union proposed:

Whether the Worcester Housing Authority had just cause to extend its denial of unsupervised overtime opportunities for an additional six months, and if not, what shall be the remedy?

The Worcester Housing Authority proposed:

Did the Worcester Housing Authority violate the collective bargaining agreement by denying the Grievant, Jerry Santiago, unsupervised overtime opportunities between May 22, 2015 through January 16, 2016, and, 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 Worcester Housing Authority violate the collective bargaining agreement by denying Jerry Santiago unsupervised overtime opportunities between May 22, 2015 and January 16, 2016? If so, what shall the remedy be?

RELEVANT CONTRACT LANGUAGE

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

ARTICLE 3 SCOPE OF THE AGREEMENT AND WHA RIGHTS (In Part)

The Union acknowledges and agrees that nothing in this Agreement shall limit the WHA in the exercise of its regular and customary function of management and in the direction and supervision of the WHA's business. This includes, but is not limited to the right to: add or eliminate departments; require and assign overtime; increase or decrease the number of jobs; change process; assign work and work to be performed; schedule shifts and hours to work and lunch or break periods; hire; suspend; demote, discipline, or discharge; transfer or promote; retain employees; layoff because of lack of work or other legitimate reasons; establish rules, regulations, job descriptions, policies and procedures; conduct orderly and efficient operations; establish new jobs; abolish and change existing jobs; determine where, when, how, and by whom work will be done; determine standards of proficiency in required skills and physical fitness standards and to take whatever action may be necessary or advisable to carry out the mission of the WHA; except where any such rights are specifically modified or abridged by terms of this Agreement. ...

ARTICLE 18 GRIEVANCE PROCEDURE (In Part)

Section 1 – Definition of Grievance – An alleged violation of a specific, express provision of this Agreement.

Section 2 – Grievance Steps – (d) Step Four (Arbitration)

The submission to arbitration must be made within thirty (30) days after the expiration of the last grievance procedure period.

The arbitrator shall be selected by the mutual agreement of the parties. ... Hearings before the arbitrator ... shall be conducted in accordance with the rules of the ... Massachusetts Board of Conciliation and Arbitration. ...

The decision of the arbitrator shall be binding, subject to review in accordance with the procedure established under provisions of M.G.L. chapter 150 (c). The arbitrator shall have no power to alter, amend, add to, or detract from the language of this Agreement; nor shall the arbitrator have any power with respect to any rights or relief for any period prior to the effective date of this Agreement. ...

ARTICLE 12 – HOURS OF WORK AND OVERTIME (In Part)

Section 3 – Except where the WHA, in its discretion, indicates that overtime work is optional, overtime work shall be mandatory. Employees are expected to report to work in response to mandatory overtime calls as a term and condition of employment. Optional overtime work shall be distributed among those employees who desire to be included for such work in accordance with a schedule arranged by the WHA. The WHA may assign optional overtime work to employees of the unit in buildings or in areas with which they are familiar, regardless of the order contained in the overtime schedule. Once an employee signs up for optional overtime, that overtime shall be considered mandatory and the employee is required to report to work as a term and condition of employment. If an employee is unable to report, the employee must provide an appropriate verifiable reason.

FACTS

The Worcester Housing Authority (WHA) and the Union are parties to a collective bargaining agreement that was in effect at all relevant times. Raymond Mariano (Mariano) is the Executive Director of the WHA. The grievant, Jerry Santiago (Santiago) has been employed by the WHA since January 2001. Since the inception of his employment at the WHA, Santiago has been disciplined on twenty-one (21) occasions. He has received four (4) counseling memos, three (3) oral warnings, eight (8) written warnings, and six (6) suspensions.

In order to perform the essential functions of his position, the WHA issued numerous keys to Santiago. On May 26, 2010, Santiago signed the following

Key Acknowledgement and Protocol:

I, (Jerry Santiago), hereby verify and agree that I have turned in all keys that I have in my possession, that have been issued to me by the Worcester Housing Authority (WHA), and/or that I may have obtained while employed at the WHA. I further understand that should I have in my possession any other keys that I have failed to return and/or acknowledge to the WHA, I will be subject to disciplinary action.

Further, I understand that the keys, access cards and/or other such devices that allows access to secured areas and/or apartments are issued in order for me to complete my job duties and that the proper storage and usage of these items are of vital importance to the safety of WHA residents and staff. By accepting these keys, I understand that I am responsible for the safe keeping and proper usage of these keys, access cards and any other such devices, and that the following protocol must be adhered to:

1. Keys, access cards and/or any other such devices are not to be duplicated or reproduced in any way and/or are not to be given to anyone to duplicate or otherwise reproduce.
2. Keys, access cards, and/or any other such devices are not to be given, loaned or otherwise transferred to any other individual, including but not limited to other WHA employees, outside contractors and/or residents.
3. Should my keys, access cards and/or any such devices become lost for any reason, I am required to immediately notify my immediate supervisor, as well as the Control Center Supervisor.
4. Only the Control Center is authorized to issue keys, access cards and/or any other such devices.

(Jerry Santiago)
Employee Signature

(5-26-2010)
Date

On May 23, 2014, Santiago was suspended for three days. The interoffice memo issued by the WHA to Santiago stated that:

On Saturday, May 17, you worked an overtime evening shift from 3:30 PM to midnight ... the following deficiencies and falsifications were found:

- 1) You falsified your labor ticket with times that were significantly different than your actual time associated with each activity. During our recent meeting, you admitted to the falsification;
- 2) You did not complete most of the custodial work orders assigned to you for 69 Tacoma Street. During our recent meeting, you said that the reason you did not complete the work was that there were not sufficient supplies in the building. That statement is not true because there are sufficient supplies at that location;
- 3) You were recorded traveling at speeds, in excess of 60 mph, and up to 69 mph, in a 50 mph zone on I-290;
- 4) You spent up to three hours driving throughout the city with no specific connection to your work with the WHA.

These infractions, taken separately, are each a serious offense. However, when taken collectively, and in addition to your 17 previous disciplines, including four different suspensions, they represent a disturbing and unacceptable pattern of behavior and performance deficiencies.

Accordingly you are hereby suspended without pay for three days. ... Further, because you cannot be trusted to work unsupervised, you will be prohibited from working any Saturday, weekend or holiday overtime shifts for a period of one year beginning May 23, 2014 and continuing through May 22, 2015. Please be advised that the WHA will review your performance prior to May 22, 2015 to determine whether it has improved to the point where you can be trusted to work unsupervised again. ...¹

¹ Although both parties acknowledge that Santiago worked some overtime between May 23, 2014 and July 2, 2015, the parties dispute whether the overtime was supervised or unsupervised. Based on the testimony of Mariano, I find the overtime Santiago was allowed to work was supervised.

Neither Santiago, nor the Union, filed a grievance over the suspension, overtime restriction, or the one-year review outlined in the interoffice memo.

On April 21, 2015, WHA employee Juan Garcia (Garcia), at the request of Santiago, used his key to allow Santiago and a resident entry through a security door into a WHA property at 68 Boylston Street.

On April 24, 2015, as a result of a separate investigation into potential criminal activity stemming from the April 21, 2015 incident above, Santiago's supervisor ordered him to turn in his keys. Santiago informed his supervisor that he had lost his keys one week prior and had not reported it to anyone. A total of twenty-four (24) keys were lost and have not been recovered.

On May 6, 2015, WHA General Counsel Antonia Peabody (Peabody) sent Santiago a letter stating that:

The Worcester Housing Authority (WHA) was made aware of a criminal investigation pending involving you and a WHA resident. Please be advised that your current proposed thirty-day suspension for loss of keys is separate from that matter and the WHA reserves the right to proceed with additional discipline up to and including termination, based on the results of that investigation by the Worcester Police Department. The issuance or service of that suspension in no way waives the WHA's rights going forward on that separate matter.

Based on Santiago's violation of the WHA reporting protocols, he was suspended for a period of thirty-days. Mariano informed Santiago of the suspension by stating that:

Following a hearing on May 6, 2015, the hearing officer made a recommendation to uphold the thirty-day suspension issued to you for the loss of twenty-four keys and your failure to report the loss as required. After review of the hearing recommendation by Alex Corrales, I adopt the findings as stated and you are suspended for a thirty-day period.

During his thirty-day suspension, Santiago inquired about his eligibility to work unsupervised overtime upon his return to work. On June 29, 2015, an informal meeting was held to discuss his request for reinstatement for unsupervised overtime. In a letter dated July 2, 2015, Mariano stated:

After careful thought and consideration, the WHA does not feel as though you have exhibited behavior over the past year that would make you eligible to be returned to full unsupervised duties. Specifically, you recently were disciplined for losing several sets of master keys and failing to report the loss to the WHA. In fact, only due to another complaint filed by a resident did the WHA become aware that you were not in possession of these valuable keys that have a direct impact on tenant safety.

As for the re-issuing of keys, you will be given a minimal set of keys and access card that will be assigned to your supervisor, John Gordon. These keys will be given to you at the beginning of your shift and returned at the end of your shift. They are not to be kept by you outside of those hours.

This decision will be reviewed in six months and your ability to return to unsupervised overtime shifts will be reconsidered.

The Union filed a grievance over the continued overtime restriction that was denied at each step of the grievance procedure and resulted in the instant arbitration.

On January 14, 2016, the WHA reinstated Santiago to the overtime list, removing the restriction on unsupervised overtime.

POSITIONS OF THE PARTIES

THE UNION

The issue in this arbitration is one of "Double Jeopardy". On April 29, 2015, Mariano stated in a letter to Santiago that:

a formal hearing would be held on Monday May 4, 2015, ... to determine whether you should be suspended for thirty days from

your position of Custodian II. ... The reasons for such contemplated action are as follows:

- 1) On Friday, April 24, 2015, as a result of a separate investigation into potential criminal matters, your supervisor requested that you turn over your keys pending the outcome of the investigation.
- 2) You then informed your supervisor that you had lost several keys approximately one week prior and failed to report that to the WHA.
- 3) A review of the key inventory list revealed that you lost a total of twenty-four keys, many of which were master keys controlling entire buildings and developments.
- 4) In addition to the above, you have been disciplined twenty previous times, including four counseling memos, three oral warnings, eight written warnings and five suspensions, one of which was for a five day period.
- 5) Based on the above, the WHA concludes that you have violated WHA policies and procedures by losing the keys and failing to promptly report the loss to the WHA, placing residents and other employees in harm's way.

The Union submits that this April 29, 2015 letter clearly advised Santiago that the proposed thirty-day suspension was the sole discipline for the five listed charges. This fact was fully reinforced by Peabody's May 6, 2015, letter to Santiago. Peabody noted the thirty-day suspension as the only proposed discipline for the loss of keys. She never placed Santiago on notice that the WHA reserved the right to impose any additional discipline for the keys, such as the loss of future overtime opportunities.

Following the formal hearing, Mariano confirmed the hearing officer's recommendation of a thirty-day suspension. Santiago's thirty-day suspension was the WHA's sole discipline for the loss of the keys and his failure to report the

loss to his supervisor. The WHA was well aware that Santiago's 2014 loss of contractual overtime opportunities was to be reviewed in May of 2015. However, the WHA never provided Santiago with due process and notice that the "key incident" would also be used as the justification for the continued suspension of his contractual overtime opportunities.

The WHA clearly understood the importance of providing Santiago with due process and notice when it advised him that an adverse finding by the Worcester Police Department could result in additional discipline over the thirty-day suspension. However, the WHA failed to provide Santiago with notice and due process when it failed to specifically reserve, as an additional disciplinary right, the denial of future overtime opportunities for the key incident when it issued the original thirty-day suspension.

The July 2, 2015 letter denying Santiago his future Article 12 overtime opportunities was clearly based on the key incident for which he was previously suspended for thirty days. Mariano stated that:

After careful thought and consideration, the WHA does not feel as though you have exhibited behavior over the past year that would make you eligible to be returned to full unsupervised duties. Specifically, you recently were disciplined for losing several sets of master keys and failing to report the loss to the WHA. In fact, only due to another complaint filed by a resident did the WHA become aware that you were not in possession of these valuable keys that have a direct impact on tenant safety.

There was absolutely no other reason given by Mariano for the continued suspension of Santiago's overtime opportunities over the next six months. This is clearly a case of Santiago suffering double jeopardy, resulting in a serious economic loss, at the hands of the WHA.

The parties have negotiated a comprehensive overtime assignment policy in Article 12 of the collective bargaining agreement, which effectively vests its members with certain rights to overtime once they meet the contractually outlined requirements. Article 12 does not subject these overtime opportunities to the disciplinary process or allow them to be withdrawn at the whim of the WHA.

It should also be noted that while the WHA originally denied Santiago the opportunity to work scheduled weekend overtime, he worked unsupervised emergency overtime week after week before the WHA's recent Double Jeopardy action against him. The WHA's rationale for the denial of weekend overtime opportunities was that it was unsupervised. However, throughout this entire period, Santiago worked unsupervised emergency overtime without incident. This fact alone undermines the WHA's rationale in this case. Additionally, the WHA had sufficient safeguards in place to grant Santiago overtime opportunities without the need to re-issue a full set of keys.

Conclusion

While Santiago has been reinstated to overtime opportunities as of January 15, 2016, the Union requests that the Arbitrator rule that he was wrongly denied overtime opportunities from July 2, 2015 through January 15, 2016, and order that he be made whole for all resulting financial losses.

THE EMPLOYER

The extension of Santiago's ineligibility period for unsupervised overtime was not discipline. As Mariano testified, Santiago's discipline for failing to comply with the WHA's lost key protocol was limited to a thirty-day suspension. A careful

review of the various statutory notices, grievance answers and final discipline notice supports this position. Not once does the WHA mention Santiago's eligibility to perform certain overtime in its discipline. It should be noted that Santiago was allowed to perform regular supervised overtime during the period at issue.

The extension of the ineligibility period for an additional six-months (subject to further review before reinstatement), however, was well within the WHA's managerial prerogative. The WHA has negotiated very specific language in the collective bargaining agreement establishing among other things, the right: to establish qualifications; to enforce existing work rules; distribute overtime; and to establish standards of conduct.

In the present matter, the WHA was confronted with an employee with an extensive disciplinary record that was replete with examples of deception and untrustworthiness. Part of Santiago's work history includes falsifying work tickets and driving around the city for three hours for no work-related reason. Given his history of deception and disregard for work rules, the WHA has concluded that Santiago is not a trustworthy employee when he is not supervised. As a result, the WHA is completely within its right to determine that Santiago is not qualified to perform unsupervised work, let alone at an overtime rate at night or on the weekends, when there are no supervisors available to track his activities.

The decision to extend the unsupervised overtime prohibition is further supported by the complete lack of judgement exhibited by Santiago in June of 2015. While still serving his thirty-day suspension, he called the WHA asking

when he could expect to start doing unsupervised overtime. In plain language, the WHA put Santiago and the Union on notice that the initial one-year prohibition would be reviewed at the end of the period to determine future eligibility. The WHA is hard pressed to think of a circumstance or employer that would entertain rewarding an employee, who just served a thirty-day suspension, with reinstatement of overtime opportunities.

Credibility

The Union failed to call a single witness. The reason, let alone the inference to be drawn, is obviously that Santiago and the Union cannot credibly refute the facts put forth by the WHA. The failure of the Union to present any direct testimony, other than a cross-examination of the WHA's witnesses, further supports the WHA's position that the grievance should be denied since it is the Union's burden to prove a contractual violation when the WHA extended Santiago's restriction on performing unsupervised overtime for an additional six months.

Conclusion

Based on the foregoing, the WHA requests that the grievance be denied and that the arbitrator rule that the employer did not violate the collective bargaining agreement.

OPINION

The issue before me is: Did the Worcester Housing Authority violate the collective bargaining agreement by denying Jerry Santiago unsupervised

overtime opportunities between May 22, 2015 and January 16, 2016? If so, what shall the remedy be?

For the reasons stated below, I find that the WHA did not violate the collective bargaining agreement by denying Jerry Santiago unsupervised overtime opportunities between May 22, 2015 and January 16, 2016. The grievance is denied.

It is clear from the documents submitted at the hearing that since May 23, 2014, Santiago and the Union were on notice that the WHA's restriction on Santiago working unsupervised overtime on Saturdays, weekends and holidays would be reviewed in a year. The WHA specifically stated:

Please be advised that the WHA will review your performance [performance review] prior to May 22, 2015 to determine whether it has improved to the point where you can be trusted to work unsupervised again.

Equally important is the fact that neither Santiago, nor the Union filed a grievance challenging the three-day suspension, or the overtime restriction with the one-year performance review. As such, the Union is now estopped from protesting when the WHA initiated its promised performance review and decided that Santiago's performance over the last year, including his recent thirty-day suspension, was not satisfactory enough to warrant a return to working unsupervised overtime. Additionally, having failed to grieve the WHA's authority to restrict Santiago's overtime opportunities for one year, I am not persuaded by the argument that the collective bargaining agreement somehow prohibits the WHA from extending that restriction an additional six months.

Double Jeopardy

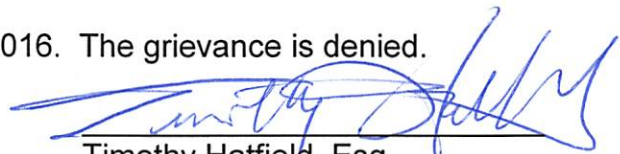
The six-month extension on the restriction of unsupervised overtime was the result of the WHA's unchallenged right to conduct a performance review which was outlined an entire year prior to the thirty-day suspension, and not an additional discipline for Santiago losing his keys and failing to report them missing. As such, the Union's double jeopardy argument is ultimately unpersuasive.

The Union is arguing that the WHA, in considering any discipline incurred during the last year by Santiago, has violated the double jeopardy standard by factoring it in his performance review. It is axiomatic that the WHA intended to review Santiago's complete work performance for the year, and did not agree to exclude disciplinary issues when conducting its review. Under the Union's argument, the WHA would have to defer disciplining Santiago if it wanted to consider those infractions during the performance review, a novel argument that is not supported by the record before me.

For all the reasons stated above, the WHA did not violate the collective bargaining agreement, and the grievance is denied.

AWARD

The Worcester Housing Authority did not violate the collective bargaining agreement by denying Jerry Santiago unsupervised overtime opportunities between May 22, 2015 and January 16, 2016. The grievance is denied.



Timothy Hatfield, Esq.
Arbitrator
July 8, 2016