

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of the Arbitration Between:

TOWN OF HOLDEN

-and-

RECCA, MCOP, LOCAL 450

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ARB-17-5949

Arbitrator:

Timothy Hatfield, Esq.

Appearances:

Daniel Fogarty, Esq. - Representing RECCA, MCOP, Local 450

Corey Higgins, Esq. - Representing Town of Holden

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 procedurally arbitrable. The Town did not violate the collective bargaining agreement when it scheduled a part-time dispatcher for a shift on February 3, 2017 without offering it to a full-time bargaining unit dispatcher first. The grievance is denied.



Timothy Hatfield, Esq.

Arbitrator

October 5, 2018

INTRODUCTION

RECCA¹, MCOP, Local 450 (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 Holden Police Station on December 20, 2017.

The parties filed briefs on March 20, 2017.

THE ISSUE

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

The Union proposed:

Did the Employer violate the collective bargaining agreement by the manner in which it filled unfilled shifts? If so, what shall be the remedy?

The City proposed:

Did the Town violate Article 18, Section 18.1 of the collective bargaining agreement between the Town of Holden and the Regional Emergency Communications Control Association, MCOP, Local 450 when it scheduled a part-time dispatcher for a shift on January 31, 2017 that became open in advance of the shift when the Town granted leave to a full-time dispatcher for that shift? If so, what shall be the remedy?

¹ The Union's official name has been referred to alternatively as the Regional Emergency Communications Control Association and the Regional Emergency Communications Center Association.

Issue:

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

1. Is the grievance procedurally arbitrable?
2. If so, did the Town violate the collective bargaining agreement when it scheduled a part-time dispatcher for an open shift on February 3, 2017, without offering the shift to full-time dispatchers first?
3. If so, what shall be the remedy?

RELEVANT CONTRACT LANGUAGE

The parties' collective bargaining agreement (Agreement) contains the following pertinent provisions:

ARTICLE 1 RECOGNITION

The Town of Holden recognizes the Regional Emergency Communication Control Association, MCOP, Local 450 (the Union) as the exclusive bargaining representative for the purpose of collective bargaining with respect to wages, hours, and other terms and conditions of employment for all full-time dispatchers of the Town of Holden and part-time dispatchers of the Town of Holden who regularly work twenty-three (23) or more hours per week, and excluding all police officers, administrator of dispatching, clerical, managerial, confidential, and casual employees, and all other employees of the Town of Holden.

ARTICLE 2 MANAGEMENT RIGHTS (In Part)

2.1 The Town will not be limited in any way in the exercise of the functions of management and will have retained and reserved unto itself the right to exercise, without bargaining with the Union, all powers, authority and prerogatives of management specified below:

- t. the mandatory requirement and assignment of overtime including recall to duty and holding employees over at the end of the employee's shift;

- u. the determination of which employees, if any, are to be called in for work at times other than their regularly scheduled hours; ...

ARTICLE 5 GRIEVANCE PROCEDURE (In Part)

5.1 A Grievance is defined as an actual dispute arising as a result of the application or interpretation of one or more express terms of this Agreement and the fringe benefits manual of the Town.

5.2 The parties understand that the grievance procedure is a procedure for the prompt resolution of disputes. Therefore, it is agreed that any grievance by either party shall be commenced within thirty (30) days of the time of the incident or event upon which the grievance is based, or within thirty (30) days of the time the grieving party knew, or should have known (through the exercise of reasonable diligence), of such occurrence. For this purpose, the knowledge of any employee aggrieved or the knowing of the Union steward shall be deemed knowledge of the Union. Whether this time limitation shall have been satisfied in any particular case may be a subject of a grievance and arbitration, but if such time limitation shall not be satisfied, or shall be found not to have been satisfied, then no relief through grievance or arbitration may be granted. ...

ARTICLE 10 OVERTIME (In Part)

10.2 Assignment of Overtime

b. The Town shall offer unit members the opportunity to work an unfilled shift, which the Town intends to fill, as voluntary overtime prior to offering that unfilled shift to an employee outside the bargaining unit. The provision of initial voluntary overtime opportunity shall not apply to part-time employees who are not in the bargaining unit. ...

ARTICLE 18 ASSIGNMENT OF NON-BARGAINING UNIT PERSONNEL

18.1 The Town may assign part-time dispatchers who are not in the bargaining unit to perform dispatcher duties from time to time.

18.2 In the event of an emergency situation or due to operational necessity as determined by the Police chief or his designee, police officers, including supervisory personnel, and administrator of dispatching, may be assigned to perform dispatching duties.

ARTICLE 27 STABILITY OF AGREEMENT (In Part)

27.2 The failure of the Town or the Union to insist on any one or more incidents, or upon performance of any of the terms or conditions of the Agreement, will not be considered as a waiver or relinquishment of the right of the Town or the Union to future performance of any such terms or conditions, and the obligations of the Town and the Union to such future performance will continue in full force and effect.

FACTS

The Town of Holden (Town) and the Union are parties to a first collective bargaining agreement that was in effect from August 19, 2016 to June 30, 2018. The Union's bargaining unit consists of all full-time dispatchers and part-time dispatchers who regularly work twenty-three or more hours per week. At the time of this arbitration there were no regular part-time dispatchers.

Prior to the negotiation of the first collective bargaining agreement, if a full-time dispatcher called out for a shift prior to the date of the shift, the Town offered the shift to part-time dispatchers before offering it to full-time dispatchers as an overtime opportunity.

During the negotiations for the first collective bargaining agreement, the Union submitted a proposal seeking to have open shifts offered to full-time dispatchers as an overtime opportunity prior to the shifts being offered to non-bargaining unit part-time dispatchers. The Town rejected this proposal stating that the right of first refusal would be very expensive, and cost the Town \$93,000 in annual overtime which it was not budgeted for. The parties further discussed the meaning of an unfilled shift. The Town's position was that it had the right to fill a shift with a part-time dispatcher if it was open prior to the date of the shift and only had to offer it to a full-time dispatcher if the opening occurred on the

same day. Once filled by a part-time dispatcher, it was no longer an open shift. The Union disputed that interpretation.

At the conclusion of bargaining, the parties agreed to the following relevant articles in the collective bargaining agreement:

10.2 Assignment of Overtime

b. The Town shall offer unit members the opportunity to work an unfilled shift, which the Town intends to fill, as voluntary overtime prior to offering that unfilled shift to an employee outside the bargaining unit. The provision of initial voluntary overtime opportunity shall not apply to part-time employees who are not in the bargaining unit. ...

ARTICLE 18 ASSIGNMENT OF NON-BARGAINING UNIT PERSONNEL

18.1 The Town may assign part-time dispatchers who are not in the bargaining unit to perform dispatcher duties from time to time.

ARTICLE 27 STABILITY OF AGREEMENT

27.2 The failure of the Town or the Union to insist on any one or more incidents, or upon performance of any of the terms or conditions of the Agreement, will not be considered as a waiver or relinquishment of the right of the Town or the Union to future performance of any such terms or conditions, and the obligations of the Town and the Union to such future performance will continue in full force and effect.

The parties ratified and executed the first collective bargaining agreement in August 2016. Shortly after ratification, then Union President Sean McKiernan² (McKiernan) asked Chief Armstrong to clarify whether full-time dispatchers have the right of first refusal for open shifts. Chief Armstrong indicated that the Town

² McKiernan has since been promoted to Patrol Officer and is no longer a member of the bargaining unit.

would continue to follow the same procedure that it had followed prior to the adoption of the collective bargaining agreement.

Prior to September 30, 2016, Union Attorney Fogarty again raised the issue of the right of first refusal for full-time dispatchers. In a letter dated September 30, 2016, Town Attorney Moschos reiterated that full-time dispatchers did not have the right of first refusal to all shifts, and the Town would continue to fill shifts and offer overtime in the manner it had prior to the adoption of the collective bargaining agreement. The Union took no further action against the Town after either the Chief's response, or Attorney Moschos' response.

Max Jette (Jette) was elected Union President shortly after finishing his probationary period in January 2017. Jette was scheduled to work on February 3, 2017. On January 31, 2017, Jette put in for a holiday day off for the February 3, 2017 shift. The Town offered the shift to a part-time dispatcher and did not offer the shift to a full-time dispatcher as an overtime opportunity. As a result, on February 20, 2017, the Union filed a grievance over the Town's refusal to offer open shifts to full-time dispatchers in violation of the collective bargaining agreement. The grievance was denied by the Town at all steps of the grievance procedure and resulted in the instant arbitration.

POSITIONS OF THE PARTIES

Procedural Arbitrability

THE EMPLOYER

The Union's Step I grievance was not properly grieved pursuant to Section 5.2 of the parties' collective bargaining agreement. Under this section, a

grievance must be filed within thirty days of the time the grieving party knew, or should have known (through the exercise of reasonable diligence) of the occurrence of the incident or event upon which the grievance is based.

In the instant case, the Union did not submit its grievance until February 20, 2017, when it filed the grievance with Chief Armstrong. The grievance alleges that the Town violated the collective bargaining agreement when it assigned a shift to a part-time employee outside the bargaining unit after the shift was called out on January 31, 2017. The subject of the Union's grievance was initially raised by the Union in September 2016. The Town, through Attorney Moschos, specifically informed the Union that its claim that full-time dispatchers have the right of first refusal to shift vacancies was not accurate and that the Town would continue to follow the past practice and the contract. The Union therefore, knew or should have known (through the exercise of reasonable diligence) in September 2016, that the Town disputed the Union's claim and intended to continue to assign overtime based on the contract and past practice. The Union therefore had thirty days from September 30, 2016 to file a grievance and failed to do so.

The collective bargaining agreement states that the arbitrator has no power to add to, subtract from, or modify the agreement. Only by disregarding the time lines set out in the agreement could the arbitrator rule on the merits. Therefore, according to the contract language, the arbitrator is foreclosed from adjudicating the merits of the Union's grievance. As the Union has failed to

comply with the express requirements of Section 5.2 of the collective bargaining agreement, the grievance is not procedurally arbitrable.

THE UNION

Shortly after settling the parties' first collective bargaining agreement, McKiernan, the Union President at the time, approached Chief Armstrong to clarify whether full-time dispatchers should be offered the opportunity to work unfilled shifts before the Town offered those shifts to employees outside the bargaining unit. Chief Armstrong claimed that he was entitled to continue using part-time employees to fill in for full-time dispatchers. Subsequently, Attorney Moschos sent a letter to the Union alleging that Union members were not entitled to the right of first refusal over non-unit part-time dispatchers where there was an advance request for time off. The Union did not file a grievance at this time.

In January 2017, Jette was elected Union president shortly after completing his probationary period. At this time, the Union focused its concern that the Chief was violating the collective bargaining agreement by offering shifts to part-time employees outside the bargaining unit before offering the shifts to unit members as voluntary overtime. Jette raised the issue with Chief Armstrong, but the Chief persisted and offered a February 3, 2017 shift to a part-time employee without offering the shift to unit members as voluntary overtime. In light of the Chief's actions, the Union filed a grievance over the issue and then properly processed the grievance at each step of the grievance procedure.

The Union's grievance is procedurally arbitrable, as it was filed and processed in a timely manner. The precipitating incident occurred at the earliest

on January 31, 2017, when the Chief hired an employee outside the bargaining unit to work on February 3, 2017. The Union filed its grievance within thirty days of the incident, and properly processed the grievance at each step. The Town's contention that the Union is prevented from challenging a violation of the collective bargaining agreement because it should have known the Chief would violate the collective bargaining agreement months before the incident at issue is not supported by the facts, the collective bargaining agreement, or the law.

The Town's argument misappropriates an aspect of the grievance procedure intended to toll the deadline to file a grievance in the event that a grievant could not have reasonably known that a violation occurred. Nothing in the collective bargaining agreement suggests that the Union, members of the bargaining unit, or even future members of the bargaining unit will be precluded from asserting their rights should they fail to bring a grievance during one narrow window of time after the Town indicates that a difference of opinion related to the collective bargaining agreement exists. If the Town truly intended for the grievance procedure to include such uncommon requirements, it was responsible for drafting clear, unequivocal language to that effect and placing the Union on notice during bargaining. Yet, the plain language of the collective bargaining agreement does not support its position, and the record does not include any evidence that the Town previously asserted that the grievance procedure would operate as it now suggests.

Finally, Article 27 of the collective bargaining agreement explicitly considers and rejects the Town position. The parties agreed to include a

provision protecting both parties' right to future performance of the terms of the collective bargaining agreement, even if either party previously failed to enforce those terms. This language specifically protects the Union's right to enforce the terms of the collective bargaining agreement going forward, even if it did not challenge similar actions in the past. Neither party waives its right to enforcement merely by failing to insist at any one time on the performance of its term. As a result, the Union's grievance is procedurally arbitrable.

Arguments on the Merits of the Case

THE UNION

The Town violated the collective bargaining agreement by offering a non-unit part-time dispatcher the opportunity to work the evening shift on February 3, 2017, before offering unit members the opportunity to work the shift. The collective bargaining agreement unequivocally requires the Town to offer unfilled shifts to unit members before offering the shift to employees outside the bargaining unit. Even if the collective bargaining agreement is susceptible to multiple, reasonable interpretations, it must be interpreted against the Town because it drafted the provisions at issue. Moreover, the Town's position is not supported by a legitimate past practice, or relevant bargaining history.

The Town violated the Plain Meaning of the Collective Bargaining Agreement

When interpreting a collective bargaining agreement, an arbitrator must first determine whether the meaning of the provision at issue can be determined by considering the plain meaning of the language within the context of the

agreement as a whole. Where the agreement is clear and unambiguous, the arbitrator should not look beyond it to other evidence. Article 10.2 states that:

The Town shall offer unit members the opportunity to work an unfilled shift, which the Town intends to fill, as voluntary overtime prior to offering that unfilled shift to an employee outside the bargaining unit. The provision of initial voluntary overtime opportunity shall not apply to part-time employees who are not in the bargaining unit.

There is only one reasonable interpretation of this provision. The first sentence provides unit members the opportunity to work voluntary overtime before the Town offers an unfilled shift to an employee outside the bargaining unit, and the second sentence clarifies that voluntary overtime will not be provided to non-unit part-time employees.

In this case, Jette was scheduled to work from 3:00 p.m. to 11:00 p.m. on February 3, 2017. On January 31, 2017, Jette scheduled a holiday day off for the February 3, 2017 shift. As soon as Jette took the shift off, the shift was unfilled. No one was assigned to work that shift. It is also clear from the record that the Town intended, and in fact did fill the shift. As a result, a non-unit part-time dispatcher accepted the shift before any unit member had a chance to accept the work. The Town's actions constitute a blatant violation of the collective bargaining agreement.

The Town argues that the February 3, 2017 shift was not an unfilled shift, within the meaning of the collective bargaining agreement, because Jette scheduled his leave of absence in advance and then the shift was filled by a part-time dispatcher. Attorney Moschos testified that "if a full-time dispatcher asks in advance to have a day off, the chief will first schedule a part-time dispatcher; so

the shift becomes filled, it's not unfilled." The circularity of Attorney Moschos' logic exposes the unreasonable nature of the Town's interpretation of the collective bargaining agreement. The Chief cannot fill a shift with a part-time employee unless the shift was unfilled in the first place. Understanding that the shift was unfilled, and the Town intended to fill it, the Town had an obligation to first schedule a unit member, rather than a part-time dispatcher.

If the Town wanted the term "unfilled shift" to carry a special meaning, it should have clarified that meaning in the collective bargaining agreement. However, nothing in the collective bargaining agreement indicates that a shift is only unfilled at some point in time. Moreover, nothing in the collective bargaining agreement contemplates some other type of shift, besides either filled or unfilled. The only reasonable conclusion is that a shift is unfilled when no one is scheduled to work the shift. This occurs any time the employee originally assigned to work the shift takes paid or unpaid leave.

The Town may also argue that Article 10 is limited by Article 18. However, there is no dispute that part-time dispatchers outside the bargaining unit have performed, and may continue to perform bargaining unit work at times. Article 10 specifically addresses when the Town may assign non-unit personnel to work in dispatch, absent exigent circumstances. Article 18 does not limit the benefits provided to bargaining unit members in Article 10, and it cannot be read to be in conflict with the right of first refusal. Instead a proper reading of Article 10 and Article 18 together shows that the Town is allowed to hire non bargaining unit

personnel to perform bargaining unit work from time to time, after it has given bargaining unit members the opportunity to work voluntary overtime.

Any Ambiguity Must be Interpreted in Favor of the Union

While the Union believes that the collective bargaining agreement is best understood by reflecting on its plain meaning, any ambiguity must be interpreted in favor of the Union. The principal of *contra proferentem* states that “if the language supplied by one party is reasonably susceptible to two interpretations ... the one that is less favorable to the party that supplied the language is preferred.” Here, there is no dispute that the Town drafted the language at issue. Attorney Moschos confirmed that the Town drafted a new draft of the collective bargaining agreement at each negotiating session and eventually the final draft accepted by the parties. Therefore, if the arbitrator finds that Article 10 is reasonably susceptible to multiple interpretations, he must interpret the language against the Town.

The Bargaining History Supports the Union’s Grievance

The bargaining history of the parties supports the Union’s grievance. The Union made an initial proposal concerning overtime, which included a provision requiring the Town to offer unfilled shifts to bargaining unit members before it offered those shifts to employees outside the bargaining unit. When the proposal was first made, the Town opposed it. Chief Armstrong supposedly told the Union that the Town could not afford such a proposal, though McKiernan did not recall the Chief making those comments at the bargaining table. This issue remained open throughout the rest of bargaining and mediation. Attorney Moschos

claimed that he told the Union, sometime in the spring of 2016, that the Town would continue to hire part-time dispatchers when unit members provide advanced notice of a leave of absence. Importantly, Attorney Moschos could not recall exactly when these statements were made, and did not provide any corroborating evidence. Additionally, Chief Armstrong did not corroborate Attorney Moschos' claim despite being on the Town's bargaining team.

When the parties finally reached agreement, the Union reasonably believed that Article 10 required the Town to offer unfilled shifts to bargaining unit members before non-unit part-time employees.

The Town Did Not Establish a Legitimate Past Practice

The Town did not provide evidence of a past practice of sufficient generality and duration to imply acceptability of it as an authentic construction of the contract. For a past practice to be binding on the parties, the circumstances must ensure that the practice has been understood and accepted by both as an implied term of the contract. The practice must be understood as the result of the parties' mutual understanding of the provisions at issue. Here, however, the Town is relying primarily on its own unilateral actions before the collective bargaining agreement and the Union even existed. The Town's actions before the collective bargaining agreement was negotiated are completely irrelevant. Moreover, even after the collective bargaining agreement was executed, the Union never assented to the Town's current position. The Union clearly expressed its concern that the Town was violating the collective bargaining

agreement, and the Town cannot now claim that its violations inform a mutual understanding of Article 10.

The Town claims that it has a practice of distinguishing between unfilled shifts, which are supposedly only shifts needing to be filled on short notice, and some other unnamed type of shift that can be filled days in advance. Yet the existence of this practice is undermined by the Chief's own testimony that he offered to start treating shifts differently if they became vacant shortly before the shift was scheduled to begin in February 2017. He testified that he has been filling shifts in this way since about two weeks before the grievance. If this practice began two weeks before the grievance as the Chief suggests, it cannot support the mutually understood meaning of "unfilled shift" during bargaining, or even in the months to follow.

The Arbitrator Should Not Consider the Practical Impacts of Sustaining the Grievance

The Town claimed that complying with the collective bargaining agreement, and offering unfilled shifts it intends to fill to unit members before offering those shifts to employees outside the bargaining unit would be expensive, and have other consequences to the Town. Attorney Moschos stated that the Town had not budgeted sufficient funding to comply with Article 10. The Town however, did not support any of these claims with sufficient evidence, or provide enough context to evaluate vague conclusions. Even if the Town supported the claims, each is irrelevant to the merits of the case. The Town is merely trying to avoid the result of the collective bargaining process by refusing

to comply with the collective bargaining agreement, and hopefully shed its obligations through arbitration.

Conclusion

The Town violated the collective bargaining agreement when it offered the evening shift on February 3 to a non-bargaining unit member before offering it to a bargaining unit member as voluntary overtime. The language of Article 10 only supports one reasonable interpretation of its terms, which provides unit members with the right of first refusal. Moreover the Town's actions are not supported by a consistent practice of the parties or bargaining history. Therefore, the arbitrator should uphold the Union's grievance and make unit members whole, and retain jurisdiction to resolve any dispute of enforcement or remedy.

THE EMPLOYER

It is well established that the burden in contract violation cases is on the party asserting a breach. The Union, therefore, bears the burden of proving that the disputed language had the asserted meaning. The Union has presented no evidence to meet its burden of proving that the Town violated the collective bargaining agreement when it assigned a part-time dispatcher to work on February 3, 2017. When the language set forth in Article 2, Article 10, and Article 18, are read together, it is clear that the Town did not violate the collective bargaining agreement.

The fundamental issue in this case is whether the language contained in Article 10 is clear and unambiguous on its face or whether such language is ambiguous and requires the arbitrator to look to past practice to interpret it.

Notwithstanding the parties' discussions during negotiations about what constitutes an unfilled shift, the Union now contends that the Town violated the collective bargaining agreement when it assigned a part-time dispatcher on February 3, 2017. In light of the apparent differences in the parties' interpretation of what constitutes an unfilled shift, it is clear that the language of Article 10 is ambiguous, particularly when it is interpreted in the context of other applicable sections of the collective bargaining agreement, the parties' bargaining history, and past practice.

Article 10 is not the only provision of the collective bargaining agreement that pertains to filling shifts. Article 18 specifically provides that "the Town may assign part-time dispatchers who are not in the bargaining unit to perform dispatching duties from time to time." The Town made it clear during negotiations (in its proposed language that ultimately became Article 18) that non-bargaining unit dispatchers would be able to fill shifts. The Town insisted that the language contain the phrase from "time to time" in response to the Union's proposal that the Town could not use part-time dispatchers unless no full-time dispatchers wanted to work the open shift.

The evidence presented at the arbitration hearing plainly establishes that during the parties' first contract negotiations, the Town proposed and the parties specifically discussed what would constitute filling an unfilled shift. The term "unfilled shift" was discussed in the context of applying to a shift that became open on the day that particular shift was to be worked. In that scenario, the parties agreed that the Town would have to offer that day-of vacant shift to a full-

time dispatcher. On the other hand, the parties also discussed during collective bargaining negotiations that if a dispatcher requested time off in advance of the day of the scheduled shift, in accordance with the Town's long-standing practice, such an occurrence would not constitute an unfilled shift, and the Town would fill that shift with a part-time dispatcher. Once the Town fills the shift in advance of the day of the scheduled shift, Article 10 no longer applies because there is no unfilled shift.

In addition to interpreting the term "unfilled shift" in the context of the other provisions of the collective bargaining agreement and the parties' bargaining history, the evidence establishes that a longstanding practice has existed in the Town for at least 32 years whereby if a full-time dispatcher requests time off in advance of the day of his scheduled shift, the Town would first seek to schedule a part-time dispatcher for that open shift, instead of first offering it to full-time dispatchers. This practice was in effect and continued to be in effect when the parties' collective bargaining agreement took effect on August 19, 2016 and continues to this day.

Funding

As further evidence of the Town's position on the definition of unfilled shift and its rejection of the Union's proposal for the right of first refusal for full-time dispatchers, Chief Armstrong told the Union during negotiations that the Town was not budgeted for that and had never been budgeted for full-time dispatchers to have the right of first refusal for overtime shifts. Granting the Union's grievance would cost the Town approximately \$93,000 in annual overtime costs.

Article 18

Chief Armstrong testified that if the Union's right of first refusal grievance is granted, part-time dispatchers – who are required to work a certain amount of hours to maintain their dispatch certification and their familiarity with the Town - would not be able to maintain their certification and proficiency if they are not scheduled to work enough hours. In such a case, the Town would lose its pool of available non-bargaining unit part-time dispatchers, which would not only impact the Town's capacity to fill shifts, but would render the language of Article 18 superfluous.

Conclusion

For all the forgoing reasons, the Town requests that the arbitrator find that it did not violate the collective bargaining agreement by assigning a part-time dispatcher to work the evening shift on February 3, 2017, and deny the Union's grievance.

OPINION

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

1. Is the grievance procedurally arbitrable?
2. If so, did the Town violate the collective bargaining agreement when it scheduled a part-time dispatcher for an open shift on February 3, 2017, without offering the shift to full-time dispatchers first?
3. If so, what shall be the remedy?

For all the reasons stated below, I find that the grievance is procedurally arbitrable, but the Town did not violate the collective bargaining agreement when it scheduled a part-time dispatcher for a shift on February 3, 2017 without offering it to a full-time bargaining unit dispatcher first.

Procedural Arbitrability

It is undisputed that the Union inquired about the right of first refusal for open shifts on numerous occasions after ratification of the first collective bargaining agreement. Also undisputed is the fact that the Town consistently stated that full-time bargaining unit dispatchers did not have the right to first refusal on all open shifts. Finally, it is also undisputed that the Union initially chose not to file a grievance or an unfair labor practice charge over the Town's responses.

Even with this as a backdrop, the Town's claim that the Union's grievance is untimely is completely without merit. Article 27.2 is clear and unambiguous when it states that:

The failure of the Town or the Union to insist on any one or more incidents, or upon performance of any of the terms or conditions of the Agreement, will not be considered as a waiver or relinquishment of the right of the Town or the Union to future performance of any such terms or conditions, and the obligations of the Town and the Union to such future performance will continue in full force and effect.

The Union's decision to forgo a grievance on at least three occasions has no bearing on its ability to insist on the Town's compliance with the collective bargaining agreement in future instances, which in this case was the Union's belief that the Town violated the collective bargaining agreement in the manner in

which it filled an open shift on February 3, 2017. Since there is clear and unambiguous language that allows either side to insist on future performance of the terms and conditions of the collective bargaining agreement, and there is no dispute that the Union followed all prescribed timelines in the collective bargaining agreement once it filed the grievance, I find the grievance to be procedurally arbitrable.

Merits

As both sides acknowledge, the first question to be resolved in this dispute is whether the language of Article 10.2 of the collective bargaining agreement is clear and unambiguous. Based on the evidence presented by the parties and the testimony of the numerous witnesses, I find that the language of Article 10.2 is neither clear nor unambiguous.

The dispute over what the collective bargaining agreement language meant in reference to an unfilled shift began almost as soon as the first collective bargaining agreement was ratified. On more than one occasion the Union went to the Chief and questioned the manner in which he was filling shifts, believing it to be a violation of Article 10.2. The Chief, and later the Town's counsel, reiterated their belief that the Town was granted the authority by the collective bargaining agreement to fill shifts with part-time non-unit dispatchers when the opening occurred prior to the day of the shift. It is clear that there was never a meeting of the minds about what constituted an open shift, or more specifically, who could be assigned to fill that shift. Finding the language of Article 10.2 to be

ambiguous allows for an investigation into the bargaining history between the parties and any potential past practice.

Past Practice

The Town argues that it has a consistent practice dating back more than thirty years of filling open shifts with part-time dispatchers instead of offering the shifts to full-time dispatchers on overtime. While this bare fact may be true, the Town fails to acknowledge that prior to the implementation of the current collective bargaining agreement, it was free to fill shifts in any manner it wished, as the employees were unrepresented. Attempting to claim and enforce a past practice founded on a unilateral decision made in the years prior to the Union's existence is baseless.

For a valid past practice to be binding on both parties, 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. By definition, there must be two parties, making the Town's statements concerning the manner in which it filled shifts prior to the Union's existence completely irrelevant to the discussion of whether a past practice exists. Additionally, the Town is unable to meet the criteria for a past practice, outlined above, during the short existence of the current collective bargaining agreement. The Union repeatedly questioned the manner in which the Chief filled open shifts, and ultimately filed a grievance over the issue; actions that defy the concept of an "established practice accepted by both sides."

Bargaining History

The parties' bargaining history during their initial collective bargaining agreement negotiations however, is relevant and does shed some light on this disagreement. The evidence shows that the Union made a proposal that would have given the right of first refusal for all open shifts to full-time bargaining unit dispatchers. The evidence also shows that the Town rejected this proposal repeatedly, and insisted on language that allowed non-bargaining unit part-time dispatchers the ability to work under the collective bargaining agreement. Ultimately, the parties settled on the language of Article 18 which states:

The Town may assign part-time dispatchers who are not in the bargaining unit to perform dispatcher duties from time to time.

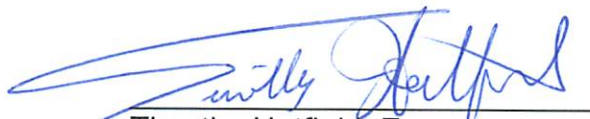
The Town was explicit in its rejection of the Union's proposal regarding overtime, explaining during negotiations that it did not have the funding necessary for the amount of overtime that would be generated if it agreed with the Union's right of first refusal proposal. Additionally, the Town explained its desire to continue to fill shifts in the manner it had prior to beginning negotiations. While the manner in which it filled shifts prior to the advent of the Union's bargaining unit is irrelevant to the discussion of a valid past practice, it does, combined with the language of Article 18, show the Town's intention regarding the filling of overtime shifts. The Union's ultimate acquiescence to the language contained in the complete collective bargaining agreement, and the subsequent ratification by the membership, precludes the Union from claiming that the language of Article 10.2 read alone prevents the Town from filling open shifts with part-time non-bargaining unit dispatchers. The collective bargaining

agreement must be read as a whole, and in this light it is clear that the parties did not agree on a process that required all openings to be offered to full-time bargaining unit dispatchers first on an overtime basis. As such, the Union has not met its burden of showing that the Town violated the collective bargaining agreement in the manner alleged.

For all the reasons stated above, the Town did not violate the collective bargaining agreement when it scheduled a part-time dispatcher for an open shift on February 3, 2017, without offering the shift to full-time dispatchers first. The grievance is denied.

AWARD

The grievance is procedurally arbitrable. The Town did not violate the collective bargaining agreement when it scheduled a part-time dispatcher for a shift on February 3, 2017 without offering it to a full-time bargaining unit dispatcher first. The grievance is denied.



Timothy Hatfield, Esq.

Arbitrator

October 5, 2018