

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of the Arbitration Between:

CITY OF AMESBURY

-and-

AMESBURY FIRE FIGHTERS

LOCAL 1783, IAFF

*
*
*
*
*
*
*
*

ARB-18-6662

Arbitrator:

Timothy Hatfield, Esq.

Appearances:

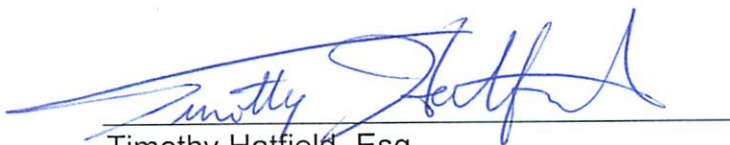
Deborah Ecker, Esq. - Representing City of Amesbury

Patrick Bryant, Esq. - Representing Amesbury Fire Fighters,
Local 1783, IAFF

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 did not violate the collective bargaining agreement when it assigned fire fighters rather than permanent lieutenants to the 55 position nor when it failed to pay out of grade pay to a fire fighter assigned to the 55 position. The grievance is denied.



Timothy Hatfield, Esq.

Arbitrator

November 18, 2019

INTRODUCTION

On June 1, 2018, the Amesbury Fire Fighters, Local 1783 IAFF (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 Department's Boston office on November 13, 2018.

The parties filed briefs on January 14, 2019.

THE ISSUE

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

The Union proposed:

Whether the City's failure to pay working out of grade pay to a fire fighter assigned to the 55 position violates the collective bargaining agreement?

Whether the City's assignment of fire fighters, rather than permanent lieutenants, to the 55 position violates Article 2?

If so, what shall be the remedy?

The City proposed:

Did the City violate the collective bargaining agreement by failing to pay a shift's senior private out of grade for manning the front right seat of the ladder truck during shifts when a lieutenant was on duty?

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:

1. Whether the City's failure to pay working out of grade pay to a fire fighter assigned to the 55 position violates the collective bargaining agreement?
2. Whether the City's assignment of fire fighters, rather than permanent lieutenants, to the 55 position violates Article 2?
3. If so, what shall be the remedy?

RELEVANT CONTRACT LANGUAGE

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

Article 1 Section 1– Management Rights

Except as otherwise expressly provided by the terms of this Agreement, the determination of policy and the operations of the Fire Department are vested solely in the Fire Chief. Provided further, that only as otherwise expressly provided by the terms of this Agreement, nothing shall be construed to in any way alter, modify, change, or limit the authority of the Fire Chief, as provided by law or the Charter of the City of Amesbury.

In making rules and regulations and in determination of policy and operations of the Fire Department relating to personnel policy procedures and working conditions, the Employer shall give due regard and consideration to the obligations imposed by this Agreement.

Article 2 Section 2 – Vacancies

All promotions within the Department to the rank of Lieutenant shall be made as a result of competitive examination given and granted by the Division of Civil Service, notice of which examination shall be given, if possible, six (6) months in advance of the exam. The authorities shall make promotions as soon as practicable after a vacancy occurs.

Article 11 Section 5 – Working Out of Grade

Whenever an employee is required to perform the work of an employee of a higher rank, for the period of two (2) hours or more, such employee shall be compensated, for so long as he performs such work, to be computed as if such employee regularly receives the rate of compensation applicable to the higher ranked employee. This provision shall apply to all work performed during regular or overtime working hours.

FACTS

The City of Amesbury (City) and the Union are parties to a collective bargaining agreement that was in effect at all relevant times to this arbitration. The City of Amesbury Fire Department is comprised of the fire chief, two deputy chiefs, four lieutenants, and twenty-eight fire fighters/privates. Prior to 2017, there were two fire stations in the City, Elm Street and the headquarters. One engine and one ambulance were located at Elm Street and one engine, one ladder truck and one ambulance were located at headquarters. Since 2017, the Fire Department has worked exclusively out of the headquarters with all apparatus housed there.

Fire fighters in the City are divided into four groups of up to eight fire fighters per shift who work a rotating 24-hour shifts. The minimum number of fire fighters per shift is six, one of which is a lieutenant or a private working out of grade as a lieutenant. The lieutenant's responsibilities include overseeing the shift and maintaining day to day operations. The lieutenant is also responsible for incident command on a call and overseeing personnel deployment. Only one lieutenant is assigned per group and is referred to on the radio by the number 5 and their group number (i.e. 51-54). The call number 55 is reserved for a private working out of grade as a lieutenant. Lieutenant vacancies are filled by offering the overtime first to the three other lieutenants. If all the lieutenants decline overtime, the vacancy

is filled by a private, and the most senior private on the shift acts as the lieutenant, is designated as the 55 on the radio and is paid out of grade. The most senior private is entitled to out of grade pay whenever there is no lieutenant on a shift or when the lieutenant on shift is unavailable for two hours or more due to an extended call within Amesbury or a mutual aid call for assistance outside of Amesbury.

In 2015, Chief Berkenbush (Chief), issued the following shift rotation policy:

Purpose:

The purpose of this policy is to establish guidelines for rotation of personnel on shift.

Scope: All Personnel

General:

All groups shall implement a rotation of personnel from Headquarters station to the Elm St. station. Two privates from Headquarters station shall move to the Elm St. station for 4 months, at the completion of that time the next two privates shall move to the Elm St. station, and the previous personnel shall return to Headquarters station. The only personnel not in the rotation are the Shift commander and the Senior Private as this is to keep a constant standard in the respective stations.

In August 2017, the Elm Street fire station was closed, and all personnel and apparatus were transferred to headquarters. On August 15, 2017 the Chief issued a new rotation of personnel memo (rotation memo/policy):

Purpose:

The purpose of this General Order is to ensure rotation of personnel.

Scope:

This General Order applies to all personnel.

General:

The department must ensure that personnel remain efficient in all aspects of emergency response within the department. This includes but [is] not limited to Pump operation, Ladder operation, Apparatus driving and EMS skills on real patients in Amesbury.

The rotation will be every 24 hours and will move through all primary apparatus Engine 1, Ladder 1 and Ambulance 1, all other apparatus will be staffed as needed per the OIC.

The OIC will maintain a position on the First Due Engine Company for stills and Fire calls requiring an Engine.

The shift's Senior Private will maintain the Front Right seat on the ladder and also respond as the 3rd person on medicals as needed.

Rotation

- Position 1: Shift Officer, E-1 officer position
- Position 2: 55, L-1 officer position, E-2 officer position, Utility 1
- Position 3: E-1 Driver
- Position 4: E-1 Rear 1st position
- Position 5: A-1 Driver/L-1 Driver or E-2 Driver
- Position 6: A-1 Tech/L-1 Rear or E-2 Rear
- Position 7: E-1 Rear 2nd position (7 on duty)
- Position 8: L-1 rear (8 on duty)

Positions 1 and 2 will not rotate.

Positions 3 through 8 will rotate daily.

The shift officer will move members as needed.

At times a "temporary permanent" position assignment may occur from the administrative office or the shift officer.

All other personnel shall move to a different position or piece of apparatus every 24 hours. The positions are Ambulance driver, Ambulance tech, Engine driver, Engine rear, Ladder 1 driver, Ladder 1 rear. If the shifts are at 7 or 8 the second rear step of the Engine and then the second rear step of the ladder shall be filled. The OIC shall ensure that at no time will two basic EMTs be together on the Ambulance.

The only time a person shall not rotate is if they have been placed in a position for training or remediation.

The Union objected to the creation of the permanent 55 position as outlined in the new rotation policy. The Union attempted to resolve its concerns with the Chief. The Union proposed additional compensation for fire fighters based on an increase in duties and responsibilities created by the 55 position. Unable to reach a satisfactory resolution to the dispute, the Union filed a grievance dated April 27, 2018, which was denied at all steps by the City and resulted in the instant Arbitration.

POSITIONS OF THE PARTIES

THE UNION

In August 2017, the Fire Chief implemented a new rotation policy that expanded and increased the 55 assignment to beyond just occasional situations when a lieutenant was out of the station for at least two hours. The new policy assigned a private as the 55 for every single hour on every single shift, not just when the lieutenant was absent.

The collective bargaining agreement provides that fire fighters who perform the work of an employee of a higher rank are entitled to be compensated at the higher rank. Here, the private assigned as the 55 is entitled to out of grade pay (OOG) because the 55 assignment has always resulted in OOG compensation and the City implemented new leadership duties and responsibilities in the 55 assignment that are consistent with the previous 55 assignment and lieutenant responsibilities.

The undisputed past practice has been that a fire fighter designated as the 55, and who identifies themselves as the 55, has received OOG pay. The 55 assignment requires the 55 to occupy the apparatus position specifically identified as the "officer position" and 55 is a reference to acting lieutenant in the series of radio identifiers for lieutenants. Previously, no 55 assignment existed on a shift where a lieutenant was working. The dramatic change in duties and responsibilities of the individual designated as 55 strengthens the argument that the 55 performs the work of an employee of higher rank.

The evidence at the hearing demonstrated that the 55 assignment now requires the senior private (unless bypassed by the lieutenant) to carry out increased duties and responsibilities and to adhere to new leadership expectations. Previously, the senior private was entitled to bid on any position on any apparatus. Now, the senior private must occupy the passenger seat position of the engine or ladder and direct the apparatus, just as a lieutenant is required to do. The 55 is also required to perform leadership duties on the apparatus, communicate with dispatch, maintain the integrity of the apparatus whether on a call or in the station, and command the scene.

In addition, previously, the lieutenant commanded the ladder in response to mutual aid calls. Now, the 55 is assigned to mutual aid calls and serves as the officer in command of both the staff and the apparatus on a mutual aid call. Previously, the lieutenant responded to advanced medical calls on the engine and lesser medical calls in the utility vehicle. Now the 55 is required to respond to basic medical calls in the utility vehicle and is not allowed to bid on the ambulance.

The new 55 assignment is consistent with longstanding plans of the Chief to upgrade the officer complement of the department. The apparatus seat assigned to the 55 is referred to as the "officer position," which never previously had this designation. Additionally, the Chief expects the 55 to have qualifications and abilities to serve as a leader. Such leadership qualities would be pointless if the City did not associate the 55 with an acting leader position.

The City's defenses to the Union's argument are not merely without merit, but disingenuous and possibly pretextual. At the hearing, the City contended that the rotation policy merely codified existing practice. That claim is patently untrue. Rather than codifying existing practice, the City's memo introduced new procedures and practices to improve performance by enabling the consistency and integrity for apparatus. The City similarly claims that the Union is attempting to receive lieutenant positions that it could not receive through bargaining or budgets. That argument is simply projection, as it is the Chief, not the Union, endeavoring to obtain the benefit of additional shift or apparatus leaders that he could not persuade the City to fund. The Chief's actions made it clear that he was endeavoring to create new leadership positions; he added duties and responsibilities that never previously existed for the senior private.

Civil Service

If the arbitrator determines that the City failed to compensate the 55 assignment correctly, then it follows that the City also violated Chapter 31. Under Chapter 31, a City is prohibited from using out of grade appointments for longer than 30 days without filling a vacancy via the Civil Service process. Here, the

vacancies are permanent ones given that the assignments are indefinite and have lasted longer than 30 days.

Article 2, Section 2 of the collective bargaining agreement states:

All promotions within the Department to the rank of Lieutenant shall be made as a result of competitive examination given and granted by the Division of Civil Service, notice of which examination shall be given, if possible, six months in advance of the exam. The authorities shall make promotions as soon as practicable after a vacancy occurs.

Here, the City's use of out of grade 55 assignments violated Chapter 31 because the 55 assignments were not made pursuant to a Civil Service list, the shift lieutenants, rather than the appointing authority made the 55 promotions or assignments, the City never obtained approval from HRD for these promotions or assignments, and the assignments have lasted longer than thirty days.

Remedy

The arbitrator should order the City to make the Union and its members whole, including no less than OOG pay for privates assigned to the 55 position, from the date of implementation of the rotation policy to present. In addition, the arbitrator should find that the City violated Chapter 31 by using out of grade assignments rather than promotions. The City should be directed to take steps necessary to comply with the law, including hiring from any eligible list, obtaining approval from HRD for any promotions made without a list, and seeking a new examination.

Conclusion

The Union asks that the arbitrator grant the grievance and provide all appropriate relief to remedy the violation of the collective bargaining agreement and the law.

THE EMPLOYER

Currently, the City's fire department consists of twenty-eight firefighters, four lieutenants, two deputy chiefs and one chief. There are currently four shifts that work on a rotating schedule, assigned to four groups with eight personnel. Pursuant to the collective bargaining agreement, there shall not be less than six firefighters working on a shift, and one lieutenant is assigned to every shift.

A lieutenant's responsibilities include overseeing the shift and maintaining day to day operations. The lieutenant is also responsible for incident command that involves triaging while on a call and overseeing personnel deployment.

The radio call numbers for lieutenants are the numbers 51, 52, 53, and 54. The radio call number for the senior private working out of grade has in the past been 55. However, the use of the radio call number 55 does not necessarily mean the senior private is working out of grade. Whether a senior private using the radio call number 55 is in charge of a scene depends on if there is a lieutenant on the scene to direct the crew. The 55, as the right front seat person, is in charge of the apparatus. If a lieutenant is not working on a shift or gets called out of town on a mutual aid call, the senior private, regardless of where that senior private sits on the apparatus, has been paid out of grade. This has not changed under the rotation policy.

The Rotation Personnel Policy (rotation policy) was issued to ensure rotation of personnel on the apparatus so that personnel remain efficient in all aspects of emergency response. Pursuant to the rotation policy, personnel move through all primary apparatus including Engine 1, Ladder 1 and Ambulance 1. The rotation policy has eight positions, of which position 1 and 2 do not rotate. Position 2 has the senior private sit in the right front seat of the ladder truck, designated as the 55 position. The person in the 55 position is responsible for the apparatus, not necessarily the group. The reason that position 2 does not rotate is so that senior privates on each shift would not have to rotate through the ambulance position leaving that for more junior members. It was not done for the purposes of compensation.

Where a member of the fire department sits on an apparatus does not determine whether the member is performing the responsibilities of a lieutenant or whether that person is working out of grade. The senior private is only paid out of grade if there is no lieutenant working the shift, or if the lieutenant is called out of town on a mutual aid call. The same continues under the rotation policy.

The current collective bargaining agreement does not include the position of "ladder company officer" or "55", and does not provide payment for working out of grade to an employee simply because the employee sits in the right front seat of the ladder truck on the way to a call, or because the employee is given the radio call number 55. The collective bargaining agreement is clear, an employee is required to perform work of an employee of a higher rank, for a period of two hours or more, to receive working out of grade pay. The employee sitting in the right

front seat of the ladder truck on the way to a call is not sitting in the seat for two hours or more. The lieutenant, if working on the shift and not out on a mutual aid call, is responsible for scene management. The senior private does not perform the duties of a lieutenant if the lieutenant is working the shift regardless of where the senior private is seated in the ladder truck.

Finally, the rotation policy is nothing more than an assignment of employees to apparatus. Under the collective bargaining agreement, the Fire Chief retains the right to determine policy and the operation of the fire department, including the assignment of personnel to apparatus.

Conclusion

Based on the foregoing, the Town respectfully submits that the Union's grievance should be denied.

OPINION

The issue before me is:

1. Whether the City's failure to pay working out of grade pay to a fire fighter assigned to the 55 position violates the collective bargaining agreement?
2. Whether the City's assignment of fire fighters, rather than permanent lieutenants, to the 55 position violates Article 2?
3. If so, what shall be the remedy?

For all the reasons stated below, the City did not violate the collective bargaining agreement when it assigned fire fighters rather than permanent

lieutenants to the 55 position nor when it failed to pay out of grade pay to a fire fighter assigned to the 55 position. The grievance is denied.

The collective bargaining agreement is clear and unambiguous when it states in Article 11, Section 5 that:

Whenever an employee is required to perform the work of an employee of a higher rank, for the period of two (2) hours or more, such employee shall be compensated, for so long as he performs such work ...

Thus, whenever a fire fighter performs the duties of a lieutenant for more than two hours, the fire fighter is entitled to out of grade pay, either because there is no lieutenant on duty for a particular shift, or because the lieutenant is on a mutual aid call and unavailable. The controlling factor for out of grade pay is "for a period of two hours or more."

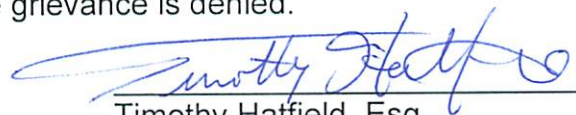
It is clear that the new 55 position places new restrictions on certain fire fighters' ability to work on particular apparatus. It is also clear that the 55 position includes some new duties and responsibilities. However, I am not tasked with the issue of whether the new duties and responsibilities are appropriate. I am tasked with deciding if the collective bargaining agreement has been violated, which brings us back to the controlling factor of "for the period of two hours or more." The evidence before me indicates that the City continues to pay fire fighters out of grade pay when performing duties of a lieutenant for more than two hours, and that has not changed with the implementation of the rotation policy. While the Union has effectively shown that the 55 position comes with new duties and responsibilities, it has not shown that these duties last for more than two hours, triggering out of grade payments. This is especially true when a lieutenant is on

shift working and not out on a mutual aid call. In these instances, any new duties are of a short duration typically limited to the time between being dispatched and responding to a scene.

Civil Service

Having found that the City compensated fire fighters correctly when assigning them to the 55 position, I find that the Union's argument that the City is improperly using out of grade assignments in lieu of promotions is without merit. The duties being assigned under the new rotation policy and 55 position do not rise to the level of a complete set of duties assigned to a lieutenant. The information before me does not show that the City is improperly assigning lieutenant duties in a manner inconsistent with the collective bargaining agreement. As such, the City is not in violation of Article 2 of the collective bargaining agreement.¹

For all the reasons stated above, the City did not violate the collective bargaining agreement when it assigned fire fighters rather than permanent lieutenants to the 55 position nor when it failed to pay out of grade pay to a fire fighter assigned to the 55 position. The grievance is denied.



Timothy Hatfield, Esq.

Arbitrator

November 18, 2019

¹ To the extent that the Union requests that I find the City's actions, in this matter, to be a violation of M.G.L. c. 31, I note that my authority, as arbitrator, to rule on this dispute is grounded in the parties' collective bargaining agreement. As such, I have no authority to determine violations of M.G.L. c. 31 and decline to do so.