

**AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR  
Tammy Brynie, Esq., Arbitrator**

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In the matter of the  
arbitration between:

Chelsea Fire Fighters Association,  
Local 1937, IAFF

and

Case No. 01-16-0005-2733

City of Chelsea

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**Decision and Award**

**For the City**

Kay H. Hodge, Esq.

**For the Union**

Alfred Gordon O'Connell, Esq.

**Background**

This matter was heard on March 29, 2017. At that time, the parties presented the following stipulated issue:

Did the City of Chelsea violate the collective bargaining agreement by failing to fill deputy chief vacancies on an overtime basis on or after November 14, 2016?

If so, what should be the remedy?

The City and the Union are parties to a collective bargaining agreement covering all of the firefighters, lieutenants, captains and deputy chiefs (as well as a mechanic) employed by the Chelsea Fire Department.<sup>1</sup> In the Spring of 2016, there were six Deputy Chief positions within the Fire Department.<sup>2</sup> Generally, overtime for Deputy Chiefs involves having a co-worker, of the same rank, fill in (when not otherwise scheduled) for the absent Deputy Chief. Officers working-out-of-grade is an alternate means by which (under some circumstances) coverage for an absent Deputy Chief may be accomplished. Historically, the Fire Chief, in January, would send an department e-mail to ascertain the willingness of department members to work in a higher grade. Then, volunteers would be used to fill long-term vacancies, i.e. a vacancy of thirty days or more.

Leonard Albanese became Chief of the City's Fire

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<sup>1</sup> All of the positions within the Fire Department, except for its Chief, are in the bargaining unit represented by the Union.

<sup>2</sup> At the time, four deputy chiefs worked as shift leaders to four different groups, while one deputy was in charge of fire prevention. The final position was the Administrative Deputy.

Department in April of 2016, after a long tenure within North Providence's Fire Department. Albanese testified that in his experience, firefighters, in general, general, firefighters like promotions to come from within their own departments. With that understanding, it was apparent to Albanese that, as an outside candidate, there was some unhappiness among departmental personnel about his assumption of the Chief's position.

When Albanese started as the City's Fire Chief, Captain Michael Gurska was performing the Administrative Deputy role, in an out-of-grade assignment. About a day (or so) after Albanese's arrival, Gurska advised the he would "no longer accept acting out of grade" work as of the following week. City Exhibit #1, p. 4. Ultimately,<sup>3</sup> Chief Albanese assigned the junior Captain (Doherty) to the out-of-grade Administrative Deputy position, leading the Union to file an unfair labor practice charge.

Albanese and Capistran then had discussions about how to resolve the situation. Evidently, a compelling concern for Albanese was to have an Administrative Deputy on duty, to assist with the day-to-day dealings

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<sup>3</sup> Albanese testified that his out-reach efforts to then-Union President Capistran, at that point, were unavailing.

of the department. A resolution was ultimately reached, whereby Doherty received a remedy, with the Union agreed to encourage members to work out-of-grade, and the Chief acknowledged that he would fill the Administrative Deputy position more frequently during absences. As a result, the unfair labor practice charge was settled.

Consistent with the understanding reached with the Union, the Chief issued DP-32, an Administrative Guideline pertaining to Administrative Staff Vacancies. Union Exhibit #1. The newly issued policy provided, in part:

When a full week (four tour) vacancy occurs for the Administrative Deputy, Captain of Training & Safety and Captain of Hazardous Material due to vacation, service related sickness or injury; a backfill will be provided to manage the required work of the division for three (3) of the four (4) work tours, which will be worked on Tuesday, Wednesday and Thursday of that week...

Union Exhibit #1.

Albanese also expressed an interest in reorganizing the Department's command staff. His objectives included, in effect: upgrading the Captain of Training and Safety position to the rank of Deputy Chief; recalibrating the job title of Administrative Deputy to Deputy Chief of Operations; creating a new Deputy Chief

position, with responsibility for Training and Safety; and revising aspects of Deputy Chiefs' job descriptions. The Union and the City signed a Memorandum of Agreement relating to command staff restructuring on June 24, 2016. City Exhibit #7.

An aspect of the dialogue concerning the command staff restructuring was a Union concern about overtime opportunities; namely, that an addition of one more Deputy could result in a decrease in overtime opportunities for the current Deputies. Albanese then agreed that the Deputy Chief of Training and Safety would be consistently backfilled (rather than the Administrative Deputy, now known as the Deputy Chief of Operations), on a day-to-day basis. Union President Brian Capistran testified (without contradiction) that he "needed something in writing" with respect to the overtime arrangement, which was accomplished with the issuance of DP-19, A Standard Operating Guideline (SOG) pertaining to Administrative Staff Vacancies. Union Exhibit #2. Albanese sent his proposed revised SOG guidelines to Capistran for review on July 5, 2016, with the cover memorandum indicating, in part, that the

"staffing Admin vacancies is now DP-19 and has been revised to meet the updated guidelines we discussed." City Exhibit #9. DP-19 provided that "[v]acancies due to vacation, service related or non-service related sickness or injury that occur on a scheduled work day for the Deputy of Training & Safety shall be filled on a day to day basis (normal 4 day week) in order to provide for the ongoing training program and to provide a safety officer during high call volume time frames." Union Exhibit #2. The Purpose detailed within DP-19 reads: "To provide for coverage of the Administrative Division positions of Training & Safety and Hazardous Materials Officer during vacancies in order to provide for effective department operations provided sufficient funding." Union Exhibit #2.

Michael Masucci was promoted to Deputy for Training and Safety. It appears that, between July 25, 2016 and November 10, 2016, his position was backfilled for every absence, including when Masucci was on Union leave and when he was using compensatory time. Joint Exhibit #3.

By November of 2016, Albanese had concerns about

overtime costs within the Department. Evidently, about half of the allotted overtime budget for the year had already been used -- and Albanese's projection was that the department would be about a quarter of a million dollars over budget, for overtime alone, for the year. In addition, Albanese testified that he did not feel like he was always getting a full day's training work for a full day's pay when backfilling the Training Deputy position. As a result, on November 14, 2016, Albanese rescinded DP-19 "until further notice." Union Exhibit #3.

On November 15, 2016, the Union filed a grievance, asserting that rescinding the Administrative Staff Vacancies Policy violated the collective bargaining agreement. Joint Exhibit #2A. The grievance was processed, without resolution, through the contractual grievance procedure to arbitration. At the conclusion of the hearing, both parties filed post-arbitration written submissions.

### **Relevant Contract Provisions**

#### **ARTICLE V Management Rights**

Section 1: Except as otherwise expressly and specifically provided in this agreement, the Association recognizes and agrees that the supervision, management and control of the City's business, operations, working force and facilities are exclusively vested in the management of the City. Without limiting the generality of the foregoing, the Association recognizes and agrees that the right to determine the standards of services to be provided and the standards or productivity and performance of its employees; . . . determine the methods, means and personnel by which its operations are to be conducted; determine the content of job classifications; appoint, promote, assign and direct personnel; . . . establish reasonable work rules; and take all necessary actions to carry out its mission in emergencies is vested exclusively in the management of the City.

The City agrees to meet and confer with the Union with respect to its exercise of the following management rights: to establish and/or revise personnel evaluation programs and the determination of the content of job classifications.

**ARTICLE XIV Overtime**

Section 4(B): All overtime assignment shall be made in accordance with present practice, by the Chief or the Senior Officer in each station.

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Section 6. Avoidance of Overtime. The scheduled tours of duty or work shifts of individual employees will not be changed or altered for the purpose of avoiding the overtime provisions of this Article.

**ARTICLE XVI Vacations**

Section 8:

(B) The Union has agreed to help the Fire Chief contain overtime costs and resources so that the



department does not exceed its funding overtime. The Union understands that the overtime funding is provided to maintain sufficient manpower due to vacations, sickness, FMLA, injury and death leave, etc. Should it become apparent that the overtime resources are insufficient to cover the costs by the City or the Fire Chief, then the parties agree to meet to discuss modifying the vacation selection plan agreed upon in sub-paragraph (A).

**ARTICLE XXII Past practices**

The Union affirms its responsibility to make best efforts to provide adequate fire fighting and related services and acknowledges that the City has the right to manage the Department in the most efficient manner. Accordingly, it is recognized that operation practices, those relating to the governance of the Fire Department and the directing of said Department by the City and the Chief shall not be restricted by this Article.

(1) No established past practices which affect wages and other economic benefits will be changed without agreement with the Union.

Joint Exhibit #1.

**Contentions of the Parties**

The Union asserts that the City violated the collective bargaining agreement when it rescinded DP-19, and ceased backfilling the Training Deputy position in November 2016. The contract requires overtime assignments to be made "in accordance with present

practice." Here, the Union proved by a preponderance of the evidence that the present practice of overtime assignments -- as agreed to by the parties in July 2016 and consistently followed thereafter -- was that the Training Deputy position would be backfilled on overtime whenever he was out on vacation, sick or injury leave.

Contrary to the City's position, there is no indication that the parties' backfilling overtime agreement was subject to available funding. It defies credulity that the Union would have entered such an agreement that basically allows the Chief to nullify its terms at will.

Moreover, the parties have agreed, at Article XVI, that they would meet and discuss the vacation selection plan "should it become apparent that overtime resources are insufficient to cover costs...". Therefore, by contract, the City was not privileged to take unilateral action in case of lack of overtime funds.

As remedy, the City should be ordered to return to the pre-existing practice and make the make the Deputy

Chiefs whole for their lost overtime opportunities. In addition, the Arbitrator should retain jurisdiction, to resolve any remedial dispute.

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The City contends that it had the right to rescind DP-19, and that discontinuing backfilling absences for the Deputy for Training and Safety did not violate the collective bargaining agreement. The decisions to discontinue backfilling absences of the Deputy for Training and Safety, and rescind DP-19, were clearly within the Department's managerial prerogatives. By contract, the City has the right to manage the Department in the most efficient manner, including the ability to determine the methods, means and personnel by which its operations are conducted and establishing reasonable work rules.

Here, the Union, having been given an advance copy, did not raise any concerns about DP-19. The Union offers no facts to challenge the reasonableness of, or factual basis concerning, the Chief's decision. The

Chief was facing a large overtime budget overrun while, at the same time, feeling that backfilling the Deputy was not accomplishing expanded training. As a result, the Chief exercised his managerial authority to discontinue DP-19, until further notice.

No provisions of the collective bargaining agreement were violated by the discontinuation of DP-19. Backfilling of the Deputy of Training and Safety had only lasted for four months. The contract's reference to overtime "present practice" relates to the requirement for the equitable distribution of overtime, and Section 4(b) establishes the method for that equitable distribution. That contract section does not prohibit the discontinuation of the backfilling or overtime opportunities. Moreover, the existence of a requirement for backfilling under DP-19 for only four months does not constitute a past practice. Overall, no violation of the collective bargaining occurred.

### **Opinion**

The critical question here is whether the City's

decision to discontinue the backfilling of the absences of the Deputy of Training and Safety, through the rescission of DP-19, violated the collective bargaining agreement. I determine that the City's action did violate the contract.

The record indicates that Chief Albanese and the Union met about, and agreed upon, a new command staff structure. Albanese sought an increase in the number of Deputy Chiefs -- from six to seven -- while the Union expressed a concern about the possible loss of overtime opportunities for current Deputies. As a result, I am convinced that the Union and the City agreed that a new Deputy Chief's position would be created and that the position would be backfilled (thereby creating overtime opportunities for the current Deputy Chiefs), on a day to day basis, for vacation, sick and injury leave. It is undisputed that, for about four months, the City backfilled the Training Deputy's position for every absence. Thus, at a minimum, I am persuaded that the parties' established present practice, by the fall of 2017, involved the backfilling of the Training Deputy's position, on a day to day overtime basis, for absences.

I am persuaded that the City's unilateral rescinding of BP-19, and the cessation of the present practice of backfilling of the Deputy for Training and Safety position, violated Articles XIV and XVI of the governing collective bargaining agreement. In reaching this conclusion, I am convinced that parties had explored the new Chief's staffing perspective, revised job descriptions and addressed overtime considerations. I am also persuaded that an aspect of their resulting agreement with respect to a new, and seventh, Deputy Chief position, was that certain absences would be filled by current Deputies on an overtime basis.

After agreeing to backfill the Training and Safety Deputy Chief position (with the resulting overtime consequences), memorializing that agreement within the body of DP-19, and then backfilling the position, and paying overtime for a number of months, the City was not free to unilaterally rescind DP-19. Instead, I am persuaded that the parties' present overtime practice, pursuant to Article XIV, Section 4(B), included providing for coverage for an absent Safety and Training Deputy Chief on an overtime basis.

I am further convinced that the parties already negotiated, and agreed-upon, an initial mechanism to address potentially excessive overtime costs. At Article XVI, Section 8(B), the parties agreed that if it is "apparent that the overtime resources are insufficient to cover the costs by the City or the Fire Chief then the parties agree to meet discuss modifying the vacation selection plan..." otherwise in effect. Joint Exhibit #1. By contract, the parties expressed their intention to review overtime costs and, if possible, seek at least an initial resolution of the situation. I am convinced that, by its unilateral action, the City violated the terms (and spirit) of aspects of the collective bargaining agreement.

Despite the City's arguments, I am not persuaded that rescinding BP-19 was an appropriate exercise of contractually enumerated management rights. At Article V, the parties specifically indicated that management rights are subordinated to other terms that are expressly and specifically negotiated. Here, I determine that the parties entered into a specific backfilling agreement with respect to the Deputy

Training and Safety Chief position, and that adherence to that agreement, over several months, had become the parties' present practice. Thus, the specific terms of Article XIV control.

In addition, I determine that, by operation of Article XVI, Section 8(B), the City was not free to take unilateral action with respect to overtime concerns. Instead, the parties had negotiated, and agreed, that if it becomes apparent that overtime funds are insufficient to cover costs (the circumstances the City is alleging here) the parties are to meet and discuss modifying vacation selections. Thus, by contract, the parties agreed-upon an initial resolution effort with respect to a potential overtime overrun -- with the Union/City meeting to discuss, at least within the context of vacation matters, possible overtime reductions.

It is undisputed that Chief Albanese was faced with an unexpectedly large overtime bill for the first quarter of his first fiscal year as Chief. Contractual considerations, however, constrained his response. I am not persuaded that the unilateral rescission of DP-19



was an appropriate exercise of management rights, pursuant to the parties' collective bargaining agreement. Instead, I determine that the parties' present practice was consistent with a specific agreement the Union reached with respect to command staff changes; namely, that a new Deputy Chief position would be created, and that the Safety and Training Deputy Chief position would be backfilled, on a day to day basis, for certain absences. I am further persuaded that, by operation of Article XVI, Section 8 (B), the Chief was obligated to meet and discuss overtime overrun concerns with the Union. As a result, I conclude that by unilaterally rescinding BP-19, the City violated the collective bargaining agreement.

As remedy, I determine that the effected Deputy Chiefs should be made whole for their loss of overtime opportunities. Specifically, the make whole remedy amount shall consist of the total loss of overtime pay resulting from the Deputy Training and Safety Chief's use of vacation, sick or injury leave resulting from rescinding DP-19.

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**AWARD**

The City of Chelsea violated the collective bargaining agreement by failing to fill deputy chief vacancies on an overtime basis on or after November 14, 2016.

As remedy, that the effected Deputy Chiefs should be made whole for their loss of overtime opportunities. The make whole remedial sum shall consist of the total overtime that would have been paid as a result of the Deputy Training and Safety Chief's use of vacation, sick or injury leave following the rescinding of DP-19.

/s/ Tammy Brynie

Tammy Brynie

Arbitrator

October 9, 2017