

American Arbitration Association

City of Haverhill

AAA # 01-16-0005-5212

And

Gr: Superintendent Salary

Haverhill Fire Fighters Union, Local 1011

Date: November 7, 2017

Arbitrator: Roberta Golick, Esq.

Hearing: July 17, 2017

Appearances: For the City
David F. Grunebaum, Esq.

For the Union
Leah Marie Barrault, Esq.
Pyle Rome Ehrenberg, PC

The Issue

At arbitration, the Union framed the issue as follows:

Did the Employer violate the parties' Collective Bargaining Agreement by paying Eric Sullivan at a rate of Lieutenant's base pay?

If so, what shall be the remedy?

The City's counsel responded, "I think this is the issue, but I'm not stipulating to it." The City declined to propose a different statement of the issue.

The evidence presented at the hearing and the arguments in post-hearing briefs centered on the very question posed by the Union, that is, whether the City violated the Collective Bargaining Agreement by paying Eric Sullivan at a Lieutenant's pay rate rather than at the pay rate specified for the Superintendent of Fire Alarm. The original grievance document is in accord. I accept as reflective of the dispute at hand the statement of the issue as proposed by the Union.

The Agreement¹

The collective bargaining agreement between the parties provides, in relevant part:

Article VI

Section 4. Job Description

The City further agrees that if at any time during the duration of this agreement it shall submit to Civil Service any job description for composition of duties which differ from those hereto affixed and found in Attachment "B", it shall so notify the Union in writing at least ten (10) days prior to the submission of said proposed change to Civil Service.

Section 5. Change of Job Description

The City agrees that if any time during the term of this contract it elects to amend the duties, including those as set forth in Attachment "B" and affixed hereto, then the local has the right to reopen this contract for re-negotiation of wage and hour provisions.

Article XII

Section 1: Salaries

It is agreed and understood between the parties that the City shall pay to all Bargaining Unit employees, according to the following schedule: (Steps effective on their anniversary date.)

...

¹ As explained at arbitration, the parties have not had a fully integrated collective bargaining agreement since the expiration of the 2001-2002 contract. There have been several memoranda of agreement since 2002, but the parties have yet to sign a fully integrated collective bargaining agreement. The most recent signed Memorandum of Agreement, dated December 19, 2016, provides for a 1.75% salary increase effective July 1, 2016, and further provides, "All terms and conditions of the current collective bargaining agreement to remain in full force and effect."

Effective 7.1.2016 1.75%²

	Start	6 Months	1 Year
Lieutenant	\$1,091.01	\$1,139.64	\$1,188.30
Captain	\$1,239.79	\$1,291.29	\$1,342.77
Fire Alarm Super.			\$1,342.77

Article XIV

Section 7. Waiver or Relinquishment

The failure of the Union or the employer to insist, in any one or more situations, upon performance of any of the terms or provisions of this Agreement shall not be considered as a waiver or relinquishment of the right of the Union or the City to the future performance of any such term or provisions and obligation of the City and the Union or such employee for such future performance shall continue in full force and effect.

Article XVII

Section 1: Manning

The present structure of the Fire Department is according to Document 103 of 1998, an Ordinance Relating to the Complement of all Departments.

...

Fire Alarm Headquarters

- 1 – Superintendent of Fire Alarm (Captain)
- 1 – Signal Maintainer
- 8 – Alarm Operators (Fire Fighter)

Background

As set forth in the parties' collective bargaining agreement, the Haverhill Fire Department has a Fire Alarm unit headed by a Superintendent of Fire Alarm (SFA). The Superintendent of Fire Alarm supervises Alarm Operators (firefighter dispatchers) and a non-uniformed Signal Maintainer, all in the bargaining unit. The Union's claim in this case is that the City placed Lieutenant Eric Sullivan into the SFA's position effective July 3, 2016, yet has failed to compensate SFA Sullivan at the contractually required rate of pay.

² The current rates are contained in the City's Municipal Ordinance Relating to Salaries dated January 10, 2017.

The background to this dispute reaches back to 2009.

Until 2009, the position of Superintendent of Fire Alarm was held by Captain Paul Garon. When SFA Garon retired in July 2009, the City posted a bid for the position. The same day, the City temporarily promoted non-uniformed Signal Maintainer Michael Lavoie to serve as Acting Superintendent of Fire Alarm. The City paid Acting Superintendent Lavoie at the rate specified in the collective bargaining agreement for the SFA position – the equivalent of Captain’s pay.

In response to the bid, Captain Raymond Robinson sought the position. Fire Chief Richard Borden rejected Robinson’s bid, finding him not qualified due to his lack of substantial knowledge of and experience with electrical work. The Union grieved, and went to arbitration on the issue of whether the City violated the contract when it appointed Michael Lavoie temporarily to the position of Acting Superintendent of Fire Alarm. The Union contended that the City posted the position as requiring a single qualification, i.e., that the incumbent be a Fire Captain, and that Captain Robinson was therefore entitled to the job. In his September 2010 arbitration decision, Arbitrator Bruce Fraser wrote:

I find that the position incumbent was required to be a Fire Captain and possess a knowledge and experience in electrical matters. This is supported by the description of the job, provided by testimony, and by the fact that the past three incumbents were Captains and licensed electricians.

Arbitrator Fraser agreed with the City that Captain Robinson was not a qualified applicant, and that the City therefore did not violate the contract by continuing with Lavoie in a temporary acting position of Superintendent until a suitable solution could be found. Fraser concluded:

In summary, if the assignment of Lavoie had been a permanent one to the position of Superintendent, my reasoning would be different. But, given it was a temporary assignment to the position of Acting Superintendent, I find no violation of the Agreement.³

³ Haverhill Firefighters, Local 1011 and City of Haverhill, AAA # 11-390-02025 09, Sept. 22, 2010, Fraser, Bruce, Arb.

More than three and a half years after the temporary appointment of Lavoie as Acting Superintendent of Fire Alarm, Lavoie remained in the position and received the contractual SFA rate. In or around early January 2013, the City approached then-Union President Lieutenant Gregory Roberts. The City proposed to the Union “that [the] requirement contained in Article XVII of the most recent collective bargaining agreement which provides that the position of SFA shall be filled by a person with the rank of ‘Captain’ ...shall be amended by deleting the word ‘Captain’ and in place thereof inserting the word ‘Lieutenant’”. The City’s proposal also incorporated a listing of the responsibilities previously performed by SFA Garon and SFA Von Guertin before him:

This Lieutenant serving as Superintendent of Fire Alarms would be responsible for the following:

1. Direct supervision of dispatch to include dispatch coverage when necessary as well as overseeing all training and certification for personnel assigned to dispatch;
2. EMD review for emergency calls;
3. Collection and review of pertinent information for records requests;
4. Oversee dispatcher training and make recommendations to move personnel into the lead operator position;
5. Conduct training regarding topics that are specific to Haverhill that count toward recertification;
6. Supervise the department electrician, and provide him assistance when necessary;
7. Assist with all aspects of Post Incident Analysis (PIA) for the Department.
8. All other duties as assigned.

The Union voted down the City’s proposed amendment to the collective bargaining agreement.

In late February 2013, the Union filed a new grievance, asserting that the City violated the contract by continuing the appointment of a non-uniformed employee as Acting Superintendent. The City then reposted the position in early March 2013. The posting generated two applications, one from Captain Robinson whose bid had been rejected in 2009, and another from a firefighter who was ineligible to seek promotion at that time. The City opted to continue the Signal Maintainer’s acting appointment, and the Union’s grievance went to arbitration before Arbitrator Marc Greenbaum.

In his January 2014 award, Arbitrator Greenbaum noted:

The record in this case largely mirrors the record before Arbitrator Fraser...The evidence indicates that the signal maintainer has devoted his energies to the maintenance and repair of the relevant electrical systems and devices. The evidence also indicates that he has played little role in supervising the Department's dispatchers.

Arbitrator Greenbaum wrote, in relevant part:

Fairly construed, the Fraser Award has two holdings. First, the Agreement requires the Superintendent to be a Captain. Second, the City can require the Captain to have relevant electrical experience. There is the rub. The Union is correct in arguing that the City is effectively choosing to enforce one requirement to the exclusion of the other. The argument, however, also works in reverse. The Agreement, as construed by Arbitrator Fraser, does not require the City to appoint a Captain without electrical experience to the Superintendent's position.

In denying the grievance, Greenbaum wrote in January 2014:

The Agreement cannot be construed to require the City to appoint a Superintendent of Alarm without the necessary experience. At the same time, the lack of qualified candidates means that functions vital to the Department are not being performed, with the potential compromise of the Department's duty to protect the public. The arbitrator cannot solve this problem. Its solution lies in the parties' hands. One can only hope that this award incents both sides to find the solution that serves their interests and the public's.⁴

In July 2014, Acting Superintendent Levoie returned to his previous Signal Maintainer position and his previous rate of pay when Union President Lieutenant Roberts bid into a position posted by Fire Chief Borden as Dispatch Supervisor Days. For the next two years, Roberts performed the SFA responsibilities previously performed by Captain Garon, with the exception of assisting Signal Maintainer Levoie with high voltage electrical work because Roberts was not a licensed electrician. During this period, when Signal Maintainer Levoie occasionally required assistance that Roberts was not licensed to provide, Roberts hired a subcontractor to assist. Roberts occupied the SFA office for the duration of his time in the dispatch supervisor position. He received Lieutenant's pay for the two years he remained in the

⁴ Haverhill Fire Fighters Union, Local 1011 and City of Haverhill, AAA # 11 390 00463 13, Jan. 2014, Greenbaum, Marc, Arb.

position. Lieutenant Roberts, a Union officer, was aware of the collective bargaining agreement and did not protest either his title or his rate of pay.

At some point, Fire Chief Borden retired and was replaced by Fire Chief John Parow (in an acting capacity). On June 29, 2016, Fire Chief Parow posted General Order 2016015, announcing, in relevant part, the following:

Effective Sunday July 3, 2016 at 08:00 Hrs. Lieutenant Gregory Roberts has been promoted to Acting Captain.

Effective Sunday July 3, 2016, at 08:00 hours, the following men are hereby transferred:

Captain Gregory Roberts from Fire Alarm Superintendent Days to Water Street Group 4.

Lieutenant Eric Sullivan from Water Street Group 6 to Superintendent Fire Alarm Days.

Lieutenant Sullivan moved into the SFA office and assumed the duties performed by Lieutenant Roberts before him. The City paid him at the Lieutenant's rate. In July 2016, Fire Chief Parow was replaced by Fire Chief William Laliberty.

In September 2016, the Union filed a grievance on behalf of Lieutenant Sullivan, claiming that the City was in violation of the contract by its failure to compensate "Fire Alarm Superintendent Lieutenant Eric Sullivan" at the contractual rate. Fire Chief Laliberty denied the grievance on September 22, 2016, explaining:

The wording "Fire Alarm Superintendent" [in the General Order] was an error and should have stated Dispatch Supervisor.

Lieutenant Sullivan was transferred into the Dispatch Supervisor's position previously assigned to now Temporary Fire Captain Gregg Roberts, while he held the rank of Lieutenant, since July 1, 2014, the inception of the Dispatch Supervisor's position. The Dispatch Supervisor's position has always been paid as a Fire Lieutenant with a day stipend.

Mayor James J. Fiorentini denied the grievance at his level on December 14, 2016, echoing the rationale offered by Chief Laliberty in September. The Mayor added:

The City and the Union have tried to resolve the issues concerning filling the Fire Alarm Supt. position, which has been the subject of 2 arbitrations. The City is willing to again engage in discussions in upcoming negotiations to bring a final resolution to this matter that is satisfactory to both parties.

On December 22, 2016, the City issued an "Amended" General Order 2016015. The Chief reworded the original General Order to describe the July 3, 2016 transfers as follows:

Captain Gregory Roberts from Dispatch Supervisor Days to Water Street Group 4.

Lieutenant Eric Sullivan from Water Street Group 6 to Dispatch Supervisor Days.

The grievance remained unresolved, and proceeded to arbitration in July 2017.

Positions of the Parties

The Union argues that Lieutenant Sullivan was entitled to pay equivalent to a top step Captain under the clear language of the collective bargaining agreement and applicable City Ordinance. Sullivan was assigned to the SFA position and has been performing predominantly the same duties that Captain Garon performed in the SFA position. The salary schedule in the contract is clear and unambiguous; the City violated the contract by only compensating Sullivan at the Lieutenant's level.

This case is different from the Fraser and Greenbaum arbitrations, the Union continues. Neither Fraser nor Greenbaum ruled that the City must fill the SFA position with an individual holding an electrician license. The two merely held that the City was *not required* to appoint an individual without electrical experience to the Superintendent's position. Here, the City chose to place Sullivan into the Superintendent position.

As for the City's defense that the assignment to Lieutenant Sullivan was intended to be to a Dispatch Supervisor position, the Union asserts that no such position exists under the parties' contract. The City took no contractual steps to create a Dispatch Supervisor position and Sullivan's assignment to SFA was not a mistake. The Union did not receive the Amended General Order apparently created in December 2016, and in any event, the City's effort to modify Sullivan's assignment was in response to the Union's grievance and after the complaint was heading to arbitration.

Finally, the Union contends, the fact that the Union did not grieve the payment of Roberts at a Lieutenant's rate while in the SFA position did not waive the Union's right to grieve on behalf of Sullivan while he serves in the SFA position. Article XIV ensures that the Union is not prevented from pursuing a grievance to enforce the contract's terms even if an alleged practice differs from those terms.

The Union seeks a finding that Sullivan has served as SFA and that the City has violated the Agreement by failing to compensate him at the appropriate SFA rate. It requests an order that the City make Sullivan whole.

The City contends that in 2014, a new position of Supervisor of Dispatch was created, and Lieutenant Gregory Roberts became the first Supervisor of Dispatch. Roberts performed in the role for two years without objection and without any grievance from the Union. The General Order issued in July 2016 naming Eric Sullivan as SFA was a mistake, as the position Sullivan transferred into was the same position, Supervisor of Dispatch, previously held by Lieutenant Roberts. The Union cannot use this "gotcha" error to elevate Sullivan to a different position.

The prior two arbitration decisions are binding precedent, the City continues, and no relevant new facts have changed the situation regarding the SFA. Lieutenant Sullivan does not possess the electrical qualifications that are required of a person filling the role of SFA. He does not perform the advanced electrical duties previously performed by Captain Garon, the last person to permanently hold the position.

Critically, the City argues, this is a matter governed by a clear past practice. Lieutenant Roberts accepted the pay and the title of Dispatch Supervisor for two years without objection. Thus, the Union knew and accepted the arrangement over an extended period. The Union's third attempt to gain a benefit to which it is not entitled should be rejected, and the grievance denied.

Discussion

Despite all the twists and turns since 2009 in the saga surrounding the SFA position, including two arbitrations, a failed effort to modify the terms of the SFA position, and an ongoing exercise to finalize the first integrated agreement in fifteen years, the collective bargaining provisions that address the SFA are the same today as they were in 2002. There have been pay raises in subsequent negotiations, but references to the SFA position in the parties' Agreement continue unchanged. The rate of pay for the bargaining unit employee with the title Fire Alarm Supervisor is shown to be the same rate of pay given a Captain at maximum. That, evidently, is based on the expectation memorialized in Article XVII (Manning) that the Fire Alarm Headquarters will include one Superintendent of Fire Alarm who, by the parenthetical designation following the title, will be a Captain.

Grievant Eric Sullivan, we know, holds the rank of Lieutenant. So, how is it that he comes to assert entitlement to the pay that the contract specifies for the SFA?

Putting aside, for a moment, the matter of rank and job title, the assertion comes from the claim that Sullivan is, in fact, serving in the SFA position, not simply because the June 2016 General Order placed him in the position, but because he's been doing the work of the position. In that regard, the evidence does demonstrate that with the exception of assisting the Signal Maintainer on expert electrical tasks, Sullivan performs all the responsibilities that Captain Garon performed in his capacity as SFA.⁵ Sullivan directly supervises uniformed personnel in the Fire Alarm unit; he oversees the Signal Maintenance electrician, assigns him tasks, and communicates directives from the Chief; he conducts trainings for dispatchers; and he handles the other personnel functions, such as time off approvals, that SFA Garon performed while he was SFA.⁶ He also occupies the physical space previously occupied by SFA Garon. And no one *else* is performing the SFA job.

One would suppose, then, that inasmuch as the City placed Sullivan in the job effective July 3, 2016 and inasmuch as he has been serving in the SFA job for all practical purposes, he should be paid the wages set forth in the collective bargaining agreement for the person holding that position.

The City challenges that supposition, however, on two related fronts. It points out that in 2014 it "created" a new position, entitled Dispatch Supervisor. It is *that* position that Lieutenant Roberts bid into in 2014. Roberts performed his duties for two years without protesting either his title or his Lieutenant's rate of pay. The City contends that under a past practice analysis, the Union must be found to have knowingly accepted the terms. Also, when the City referred to Roberts as Fire Alarm

⁵ The parties do not dispute the responsibilities of the SFA. Both Roberts and Sullivan had experience working as dispatchers under SFA Garon's supervision. They testified that they performed the same duties as Garon, the exception being the infrequent occasions when the Signal Maintainer needed high voltage electrical assistance, in which case they hired a subcontractor to assist.

⁶ It's notable that for 3.5 years the City paid Mr. Lavoie at the SFA rate when he served in an Acting capacity as SFA, yet Lavoie performed *none* of the supervisory duties attendant to the position, a situation that Arbitrator Greenbaum noted resulted in the potential compromise of the Department's duty to protect the public.

Superintendent in the July 2016 General Order, it was in error – an error the City corrected by amending the General Order in December 2016.

The City's challenges must fail, however. As the Union correctly observes, there is no position called Dispatch Supervisor addressed in the parties' collective bargaining agreement. Nor did the City follow the provisions set forth in Article VI, Sections 4 or 5 for creating a new job or modifying an existing position covered by the contract. There was no bargaining over the creation and duties of a Dispatch Supervisor, nor is there any tangible evidence of an agreement between the parties to create such a position. In effect, what the City did in 2014 is change the title and pay for the Superintendent of Fire Alarm without changing the job. It imposed unilaterally the contract modification it sought and failed to achieve in 2013.

As for the *intangible* evidence of the new job creation, that is, the claimed past practice that the City contends bestowed an official imprimatur on the Dispatch Supervisor position, that, too, fails to deliver. First, the two-year practice, such as it was, cannot be touted as a shared *interpretation* of any ambiguous contract language. There is nothing ambiguous about the provisions at issue here, and no one has suggested any disagreement about the contractual expectation that the person in the SFA position be paid at the Captain's rate. If anything, the "practice" of paying Lieutenant Roberts for performing the SFA job under a unilaterally-devised title and at a unilaterally-devised rate of pay was in clear conflict with the explicit terms of the contract. That the Union did not protest the arrangement while Roberts was performing the job did not waive the Union's right to enforce the contract when Lieutenant Sullivan assumed the role. Article XIV, Section 2 preserved the Union's right, in 2016, to

insist that the City fulfill the contractual obligations that the Union refrained from enforcing while Roberts performed the SFA responsibilities.⁷

The so-called “error” that the City fixed in December 2016 does not change the landscape. Whether the July General Order naming Roberts as the outgoing SFA and Sullivan as the incoming SFA was an error is open for debate. At a minimum, the fact that in June 2016 no one challenged the allegedly improper designation of Roberts as the departing SFA and Sullivan as the incoming SFA suggests that both parties saw Roberts as the SFA, even if his title on City records was Dispatch Supervisor. The “amendment” of the General Order changing the title to Dispatch Supervisor did not occur until the present grievance was poised for arbitration – too late to have any probative value in this case. And in any event, the fact remains that Lieutenant Sullivan began performing the SFA job on July 3, 2016, and continues to do so.⁸

Neither the Fraser nor the Greenbaum award relieves the City of its obligation to compensate Lieutenant Sullivan at the rate negotiated for the SFA. Those awards held that the City was not required to remove Signal Maintainer Lavoie from his assignment as Acting SFA (at SFA pay) when no Captain met all the qualifications for the position that the City had deemed necessary. This, despite the fact that Signal Maintainer Lavoie assumed *no* supervisory responsibilities during his tenure in the job. The present case is entirely different. Here, we have an employee performing virtually all the responsibilities of the SFA position without getting the contractual rate of pay. The Union has persuasively

⁷ Lieutenant Roberts explained at arbitration why he did not challenge the title and pay during his two-year tenure: “The SFA position was vacant for five years. Lavoie was doing electrical duties, but not supervisory duties. I thought it was more important to regain the position, so I did not want to make waves. I wanted a supervisor up there.”

⁸ The City chose to put Sullivan in the position that, for all practical purposes is the SFA position. The Union has not complained that the City filled the SFA job with a Lieutenant rather than a Captain. The complaint at hand is strictly one of the proper pay.

demonstrated in this case that while Lieutenant Sullivan is de facto in the SFA position, he is entitled to the pay that goes along with the job.

Award

The City of Haverhill is in violation of the collective bargaining agreement by paying Eric Sullivan at a Lieutenant's rate of pay. Effective July 3, 2016, Sullivan became entitled to the negotiated salary for Superintendent of Fire Alarm.

As a remedy the City is directed to make Sullivan whole for the period July 3, 2016 to the present, and continuing at the applicable Superintendent's rate so long as he remains in the job.



Roberta Golick, Esq.
Arbitrator

Date: November 7, 2017