Labor Relations Connection
Voluntary Labor Tribunal
Case No. 24-0437; 591-22

IN THE MATTER OF ARBITRATION BETWEEN

CITY OF BOSTON

(Inspectional Service Division)

&

SALARIED EMPLOYEES OF NORTH AMERICA LOCAL 9158

(Grievant – Overtime)

AWARD OF THE ARBITRATOR

The Undersigned Arbitrator, having been designated in accordance with the arbitration agreement entered by the above named parties and having been duly sworn and having duly heard the proofs and allegations of the parties AWARDS as follows:

For the reasons set forth in the attached Decision, it must be concluded that City violated Article 10, Section 6 of the parties' Collective Bargaining Agreement. The City must return to the status quo, and make all affected SENA employees whole. The Arbitrator shall retain jurisdiction for ninety days should there be any disputes over the appropriate remedy.

June 8, 2023
Boston, Massachusetts

Gary D. Altman

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ARBITRATION DECISION AND AWARD

Introduction

SENA Local 9158 ("Union") and City of Boston, Inspectional Services Department ("Department" or "City") are parties to a Collective Bargaining Agreement ("Agreement"). Under the Agreement grievances not resolved during the grievance procedure may be submitted to arbitration. The parties presented their case in a virtual arbitration hearing before Gary D. Altman, Esq., on March 2, 2023. The Union was represented by Jillian Bertrand, Esq., and the Employer was represented by Michael Berry, Esq. The parties had the opportunity to examine and cross-examine witnesses and to submit documentary evidence. The parties submitted written briefs after the close of the testimony.

Issue

At the outset of the hearing, the parties presented the following issues:

Union's Proposed Issues:

1. Is the grievance arbitrable?

2, If so, did the City violate Article 10, Section G of the collective bargaining agreement by failing to include SENA members on the ISD's distribution lists for third-party overtime?

3, If so, what shall be the remedy?

City's Proposed Issues:

1. Whether the grievance is procedurally arbitrable.

2, Whether or not the Arbitrator has the authority to award overtime work covered by other collective bargaining agreements (IBEW and AFSCME).

3. Whether or not the City violated the past practice language in Article 10, Section G of the SENA collective bargaining agreement by not integrating SENA members into the overtime lists for work covered by the AFSCME and IBEW contracts?

The issues raised by the parties will be addressed in this Decision.

Facts

I. Third Party Overtime

The City's Inspectional Services Department ("ISD" or "Department") is comprised of five regulatory divisions that enforce state and local building, housing, health, sanitation and safety regulations. The Buildings and Structures division is responsible for inspecting all plumbing, gas, electrical, and building inspections throughout the City. There are four middle management positions in the Building and Structures division represented by SENA: Supervisor of Electrical Inspection, Supervisor of Plumbing and Gas Inspection, Supervisor of Building Inspection, and Director of Building and

Structures Division. Each supervisor directly oversees field inspectors in their respective trades. In addition, during their regular hours of work each of the supervisor inspectors has been called upon to perform field inspections with respect to their specific trade.

There are two standard types of overtime generally available to field inspectors in ISD. There is general overtime paid to inspectors who work beyond their regular workday hours. There is also an on-call program to respond to emergency calls at night and on weekends. For example, if a pipe bursts during the night, a gas and plumbing inspector would need to respond to the scene to inspect and sign off on the repair. The plumbing and gas inspectors are represented by AFSCME, and receive a $200 stipend for each week they are on call, plus overtime for actual hours worked if they respond to a scene. Electrical inspectors are represented by the IBEW and receive a $125 on-call stipend plus overtime for actual hours worked. SENA members are only eligible for emergency on-call work on an as-needed basis when no field inspectors in their agency are available.

There is another type of after-hours work known as third party overtime. Specifically, at times, private entities seek to have inspections completed outside of regular business hours, and they are willing to pay a fee to have this inspection work completed. Oftentimes these inspections can be done sooner if the work was performed on the regular inspection schedule. Employees who perform these off-hour inspections are paid at an overtime rate. This work has been called “third party overtime”, the work has been characterized as third-party details, or “off-

hours details". The work is similar to a police detail and the third party vendor pays for this work, not the City.

Third party overtime has been assigned within each trade using a rotation list in which the employee at the top of the list is offered the assignment first. The list is a separate list from the regular overtime list; it has consisted of AFSCME Inspectors for plumbing and gas inspections, and IBEW Inspectors for electrical inspections. The assignment of this third party overtime was done by members of the respective bargaining units and for many, many years, SENA supervisory inspectors have also been on the third-party overtime list to perform this after hours work. If an employee refuses, the next person on the list is offered the assignment, and so on, down the list until an employee accepts the third-party inspection assignment.[1] When an employee works the third-party overtime, he or she submits a form to ISD's personnel division describing the work he or she performed and once approved, payment for the work is included in the employee's regular paycheck. There is a specific code designating the payment as third party overtime to distinguish it from regular overtime. The City then bills the vendor for the work.

[redacted] started working for the City as a plumbing and gas inspector in 1992 and at that time he was a member of AFSCME's bargaining unit. Mr. [redacted] testified that either the AFSCME steward or, if the AFSCME steward was unavailable, the SENA supervisor, offered both

[1] There may be third party overtime work that requires the presence of a supervisor. If that occurs the SENA inspector for the respective trade would perform the work, and then would be skipped for the next third party detail.

inspectors and the SENA supervisor third party plumbing and gas inspections from a single rotation list.

The Union provided electronic scans of two overtime books that were kept by [redacted], the senior AFSCME Inspector and Mr. [redacted]. The books kept a chronological account of who was assigned to any given third party overtime. The excerpts from one of the ledgers spanned 2017 through January 2022 and included information about the date of the distribution, initials of employees who worked, and the location of the inspection. The excerpts from the other ledger included similar information as well as a contact for the work requested and spanned January 2022 through March 22, 2022. Mr. [redacted] stated that control over the list of third party overtime opportunities rested with him and Mr. [redacted]. Mr. [redacted] also explained with regard to an actual list of employees that were eligible for this third party overtime, they did not have a physical list but would instead rely on their own recollection and the ledgers. Mr. [redacted] further explained that some employees were never included, not because they opted out, but because he knew that the excluded employees did not want this third party work.

Mr. [redacted] stated that there was no requirement that AFSCME members be offered third party overtime before it could be offered to a SENA supervisor. Mr. [redacted] testified that in 2012, he was promoted to Supervisor of Plumbing and Gas, and became a member of the SENA bargaining unit. Mr. [redacted] testified that he continued to be offered third party overtime from a single rotating list

until the Winter of 2022. Mr. [redacted] testified that prior to March 2022, he performed four to five third party overtime inspections per week, but since then has been offered and performed only four third party plumbing and gas inspections in the past year.

[redacted] began working for the City as an electrical inspector in 1995, and was then a member of the IBEW bargaining unit. Mr. [redacted] stated that he also served as the IBEW shop steward for many years. Mr. [redacted] testified that the IBEW steward offered both inspectors and the SENA supervisor third party overtime electrical inspections from a single rotation list. Mr. [redacted] testified that when was promoted to Supervisor of Electrical Inspections in 2017, he then became a member of SENA, and he continued to be included on the third party overtime rotation list with the electrical inspectors. Mr. [redacted] explained that until this practice changed in March 2022, there was no requirement that IBEW inspectors be offered third party overtime before it could be offered to the SENA supervisor.

Mr. [redacted] testified that on average, there are 2,500 third-party requests for off-hours electrical inspections per year and that he typically performed five to seven third party overtime opportunities per week. Mr. [redacted] explained that now he is only offered third party overtime when no IBEW inspector is available and in the last year has performed just 10-15 off-hours inspections.[2]

[2] Introduced into evidence was a 2016 Arbitration Decision between SENA and the City. There was no dispute that SENA supervisors were included on the third party overtime rotation list at that time, and the issue had to do with the appropriate rate of pay to be paid to SENA employees when they performed the third party overtime work.

II. Change in Administration of third-party overtime.

In February 2022, the City notified SENA, and the other Unions representing employees in ISD, that it wanted to centralize management of the various ISD overtime distribution lists. On February 11, 2022, the parties met to discuss the proposed change. SENA President [redacted], and [redacted], Union Steward from ISD, were present on behalf of the Union. [redacted], ISD's Human Resources Director, and Attorney [redacted] from the Office of Labor Relations, were present on behalf of the City.

Mr. [redacted] testified that Ms. [redacted] explained that there had been grievances filed by various employees claiming that overtime distribution was unfair and subject to undue favoritism. Mr. [redacted] testified that Ms. [redacted] stated that the City wanted to centralize management of the overtime lists by assigning it to an employee in ISD's personnel department. Mr. [redacted] stated that he specifically asked Ms. [redacted] whether having the City take over the third party overtime list would have any impact on SENA members' third party overtime eligibility. Mr. [redacted] testified that Ms. [redacted] assured him and Mr. [redacted], that the only change would be who distributed the overtime and that SENA members' third party overtime would not be affected. Mr. [redacted] stated that, based on Ms. [redacted]'s assurances, SENA had no objection to the change.

On March 14, the City's Office of Labor Relations wrote to Mr. [redacted] confirming what had occurred at the meeting. The letter stated in pertinent part:

> As we discussed at that meeting, the Department will maintain the overtime lists and handle distribution of

all overtime for SENA and all other ISD bargaining units. This change will take place as of March 21, 2022. ISD has created a new position in its HR department to maintain the overtime lists, distribute all overtime (including third party), and handle payout for all overtime work. ISD will maintain the overtime lists via Google Sheets, and all SENA ISD employees will have access to view the list at all times. The goal is to have this process be entirely transparent and equitable. Please see attached for further information on the details of how the overtime process will work.

I believe we answered all of the questions you raised at our February 11 meeting, and you did not object to the change. If you have any outstanding questions or would like to discuss this further, please let me know by March 18, 2022. Please also reach out to me or ISD directly if any issues or concerns arise as this process commences. We are committed to working with SENA and all other ISD bargaining units to ensure fairness and transparency throughout this process.

ISD then prepared a notice to employees with respect to overtime that stated:

OVERTIME CONTACT INFORMATION FORM

Effective March 21, 2022, the Department will maintain the overtime lists and handle distribution of all overtime for all ISD bargaining units. Personnel will maintain the overtime lists via Google Sheets, and all employees will have access to view the list at all times. Please provide your preferred form of contact for overtime opportunities.

Employees will have thirty (30) minutes to respond before moving on to the next employee in the rotation. Overtime will be distributed daily between 2:00PM-3:00PM.

Please have the forms submitted to personnel no later than Friday March 18, 2022.

[redacted], Chief of Staff for ISD, testified that initially there were minor snags in the implementation of the new overtime distribution process, but the plan was in place by March 24. Mr. [redacted] stated that ISD's intent was to distribute all overtime in accordance with the applicable collective bargaining Agreement for all the respective units[3], and Google sheets would be prepared and available to employees to review the distribution within each bargaining unit. [redacted], Director of Labor Relations for the City, explained that after the Department took over the distribution of the lists, SENA members were not on the overtime distribution lists for AFSCME plumbing inspectors and IBEW electrical inspectors, which also included third-party overtime opportunities.

Mr. [redacted] stated that sometime at the end of March, the supervisory inspectors in the SENA bargaining unit called to complain that they were no longer being offered third party overtime. [redacted], Union Steward, explained that he emailed Ms. [redacted] in April and explained that SENA bargaining unit members were not being offered any third party overtime work. Mr. [redacted] testified that on April 20th he spoke with Ms. [redacted] by phone, and

[3] Article 10 Hours of Work and Overtime, Section 5 of the AFSCME Agreement states, "Overtime work shall be distributed as equitably as possible. A list of all eligible employees shall be posted in a conspicuous place, and kept up to date, by the City. For the purpose of a regular rotation of overtime opportunities, but for such purpose only, overtime work refused shall be considered as overtime actually worked."

Article X Hours of Work and Overtime Section 5 of the IBEW CBA states that "Overtime work shall be distributed as equitably as possible. A list of all eligible employees shall be posted in a conspicuous place and kept up to date by the City. For the purpose of a regular rotation of overtime opportunities, but for such purpose only, overtime work refused shall be considered as overtime actually worked."

she told him that she did not know what the problem was, and she asked for some time to look into the matter.

The Union and City met on April 27, 2022. Mr. [redacted] stated that Ms. [redacted] explained that when the City centralized management of all the ISD overtime lists, it placed SENA members on a separate list for third party overtime requests that required a supervisor on site. Mr. [redacted] and Mr. [redacted] testified that they explained that SENA supervisor inspectors have always been on the third party overtime list, rotating with the other non-supervisory inspectors for all the third party overtime, and that it was not limited to situations that needed to have a supervisor present. Mr. [redacted] testified that the Union told the City at this meeting that in February it had agreed to change who managed the overtime lists, but not that SENA employees would be eliminated from the third-party overtime opportunities. Both Mr. [redacted] and Mr. [redacted] testified that Ms. [redacted] acknowledged the City's error, and that she would inform both AFSCME and IBEW representatives of the mistake and correct the matter going forward.

On May 4, 2022, Mr. [redacted] sent an email to Ms. [redacted] asking if there was any update. In his email, Mr. [redacted] stated that he spoke with representatives from both AFSCME and IBEW, who confirmed that SENA supervisors were previously included on the third party overtime distribution list. [redacted] [redacted] had become the new Director of the City Office of Labor Relations and she now became involved in the issue of third party overtime. Ms. [redacted] responded:

[redacted] and I just spoke to AFSCME representatives [redacted] and [redacted] regarding 3P overtime lists. AFSCME is not agreeable to having [redacted] continue on the list. It sounds like [redacted] may have not understood the issue when he talked to you previously. If AFSCME objects to [redacted] being on the list, the City is unable to include him. I am open to continue to try to resolve issues with the administration of overtime as they arise, but currently it appears that the City is correctly administering this list with respect to AFSCME.

We have another call with IBEW that was re-scheduled.

Mr. [redacted] responded the same day to Ms. [redacted] stating that it had been a long-standing practice for SENA employees to perform the third party work, that AFSCME had no right to change this practice of employees from SENA having opportunities to perform this work.

On May 17 Ms. [redacted] again wrote to the Union stating:

We just spoke to IBEW - [redacted] and [redacted]. They do not have a problem with [redacted] continuing to be on the electrical OT list. They agreed that when they cannot fill the calls, the calls can go to [redacted]. So that seems fine.

My suggestion with AFSCME is to see if they would agree to grandfather only [redacted] into this plumbing list since he did it before the City took over administering the list.

On May 18, Mr. [redacted] emailed Ms. [redacted] informing her that when the change was announced in February for the City to administer the third party overtime, the Union was told that there would be no substantive change in third party overtime eligibility. On May 18 Ms. [redacted] responded:

> Since the City was not previously administering the OT, past practice is not going to apply in this case. The City cannot be responsible for practices outside the contract when it is not even a party to the practice. In other words,you are barking up the wrong tree. If you get anywhere with AFSCME, keep me posted.

Both Mr. [redacted] and Mr. [redacted] sent additional emails to Ms. [redacted], and indicated that the Union would be filing a grievance over the matter.

On May 18, 2022, the Union filed a grievance claiming that the City changed a past practice in violation of Article 10, Section G. The Department did not respond, and SENA Vice President [redacted] moved the grievance to Step 2 on May 31, 2022.

Relevant Provisions of the Collective Bargaining Agreement

Article 10 – Grievance Section C. Procedures for Filing A Grievance

> The Union or any member of members of the bargaining unit having a grievance, as defined above, shall seek its resolution only in accordance with the grievance procedure set forth in this Article.
>
> STEP 1: APPOINTING AUTHORITY/DESIGNEE
> Save as is provided in Section 1, a grievant shall initiate the grievance procedures of this Article by filing with the Appointing Authority or his/her designee, during the term of this Agreement or an extension thereof, a grievance form that a grievance exists. No such notice may be filed more than ten (10) days from the date of occurrence of the event upon which the grievance is based or from the date when the grievant has or should have had knowledge of the event upon which the grievance is based or the grievance shall be waived. …
>
> Article 10 - Grievance Section F. Waiver, Admission, And Termination

Waiver - Failure of a grievant to comply with any of the provisions of this Article shall be deemed to be a waiver of the rights to seek resolution of the grievance under the terms of this Agreement. In determining whether there has been any such failure to comply with any of the provisions of this Article, time shall be deemed to be of the essence, and any failure of the grievant to comply with any of the time limits prescribed herein shall be deemed to be such failure to comply with the provisions of this Article; provided, however, that the time limits prescribed herein may be extended in any specific instance by mutual written agreement of the parties.

Article 10 - Grievance Section G. Past Practice

Except as specifically amended by other provisions of this contract, established personnel policies and practices shall remain in effect for the duration of this Agreement subject to the union's right to grieve and arbitrate any change meeting the following criteria:

1. the past practice must have been uniformly and consistently applied;
2. the past practice must affect a substantial benefit to the bargaining unit;
3. the past practice must be a mandatory subject of bargaining under M.G.L. c. 150E.
4. the change in past practice was made without good reason.

Position of the Parties

Summary of the Union's Arguments

I. Procedural Arbitrability

The Union first maintains that the grievance is procedurally arbitrable. The Union contends that it has long been recognized that a party can waive the right to challenge the timeliness of a grievance if it does not raise this issue at the appropriate time. The Union maintains that the City failed to raise a timeliness defense

in response to the Union's Step 1 grievance at the Step 2 grievance hearing. Instead, the first time the City raised a timeliness objection was when it answered the Step 2 grievance, and the Union never had the opportunity to respond to the City's objection prior to arbitration.

Moreover, the Union argues that the City's argument at arbitration was was different from what it raised in its Step 2 grievance decision. Previously, the City claimed that the grievance was untimely at Step 2 because it was forwarded to the Office of Labor Relations on May 18, 2022, past the 20-day window for submitting grievances at Step 2. At arbitration, however, the City argued – for the first time – that the grievance was untimely at Step 1 because it was filed more than ten days after the City centralized management of the ISD overtime lists on or about March 21, 2022. The Union argues that the City, by its actions, has waived its ability to now contend that the grievance is not procedurally arbitrable, and that the Arbitrator must therefore proceed to consider the merits of the case.

The Union also disputes that a grievance had to be filed within ten days from when the City first implemented the new overtime process. Specifically, the Union states that it is not the fact that the City has taken over administration that is the genesis of the grievance, but rather, it that SENA supervisors could no longer were assigned the third party work that caused the dispute. The Union states that it was told that with the change in administration there would be no change in who received the third party overtime, that it would continue in the same manner as before, and SENA members would still be offered third party overtime. It was only after SENA members

realized that the eligibility for the third party work had changed and SENA members would not have access to overtime that gave rise to the present grievance.

The Union maintains that immediately after SENA leadership brought the issue to the City's attention, the parties met and discussed the issue on April 27. The City asked for additional time to discuss the issue with AFSCME and IBEW, and SENA agreed because it fully expected that the City would simply notify the other unions that it was rectifying its mistake. On May 13, 2022, the City notified SENA for the first time that it had no intention of going back to the past practice without the agreement of the other unions. The Union then filed a grievance on May 18, well within the ten working day period required by Article 10. Accordingly, the Union concludes that the grievance is procedurally arbitrable.

II. Merits of the Grievance.

The Union contends that for over thirty years, SENA supervisors were included in the third party overtime rotation list with inspectors. The Union states that Article 10, Section G, provides that "established personnel policies and practices shall remain in effect for the duration of this Agreement subject to the union's right to grieve and arbitrate any change". The Union claims that the City's failure to include SENA supervisors on the third party overtime distribution list when it centralized management of all ISD overtime lists, violated Article 10 Section G. The Union states that a grievance is defined as "an allegation by the Union or by a member or members of the bargaining unit that an express provision of the Agreement has been breached in its application to it, him, or them,

respectively." The Union thus asserts that this is a dispute that is covered by Article 10 Section G, and therefore, the grievance arises under the terms of the parties' Agreement and is substantively arbitrable. The Union also contends that the City's reliance on prior arbitration awards that the grievance is not substantively arbitrable is not relevant, as this dispute is under a different contract, and involves contract language that was not at issue in the other arbitrations.

The Union argues that the City's refusal to include SENA supervisors on the third-party overtime list violates Article 10, Section G of the parties' Agreement. The Union contends that Article 10, Section G protects established past practices (1) that have been uniformly and consistently applied; (2) affects a substantial benefit to the bargaining unit, (3) is a mandatory subject of bargaining under G.L. c. 150E; and (4) that the change in past practice was made without good reason. The Union maintains that the third-party overtime practice meets all four of these conditions.

First, the Union states that the evidence demonstrates that SENA supervisors were uniformly and consistently offered third party overtime from the same list as inspectors for decades, and there can be no dispute that the Department knew of this practice. The Union states that the AFSCME Arbitration Award, introduced by the City, on the issue of unfair distribution involved a regular overtime assignment, and not third party-overtime. Second, the Union claims that there can be no dispute that the third party overtime is a substantial benefit for SENA employees, who testified that in the past they often worked

third party overtime opportunities. The Union also contends that overtime opportunities have long been recognized as a mandatory subject of bargaining by the Massachusetts Labor Relations Commission.

The Union further argues that the City had no good reason to eliminate SENA members from having the opportunity to receive third party overtime. The Union states that the City wanted to centralize the distribution of overtime, and claimed that there had been disputes in the past that overtime was not being fairly distributed. The Union states that Department representatives told SENA Officers that this change would have no impact on SENA members but was only a procedural change, and then after SENA members lost the opportunity to work third party overtime the Department acknowledged that it was a mistake and would revert to the existing practice. The Union states that the City cannot point to any disputes between the Unions on the distribution of third party overtime; and that the Awards submitted addressed regular overtime opportunities, which have never been shared work.

The Union further argues that the grievance is not a work jurisdiction dispute; that SENA employees are not trying to gain work that they had never worked or that belonged exclusively to another bargaining unit, as the evidence demonstrates the third party overtime was not regular overtime but extra work, similar to private paid details, where SENA, IBEW and AFSCME workers all worked. The Union states that third party overtime is shared work that has been assigned from a single, rotating list of both inspectors and SENA supervisors for decades. The Union also contends that there is nothing in any of the job

descriptions or the collective bargaining agreements that establishes that these types of inspections are exclusively committed to one bargaining unit over another, or that gives AFSCME/IBEW inspectors the right of first refusal to these inspections.

The Union concludes that the City violated the parties' collective bargaining agreement by unilaterally changing a past practice that was protected by Article 10, Section G. The Union requests that the Arbitrator sustain its grievance, direct the City to return to the status quo, and make all affected employees whole in all respects. Further, the Union requests that the Arbitrator retain jurisdiction in the event the parties are unable to agree on appropriate damages owed.

Summary of the Employer's Arguments

I. Procedural Arbitrability

The City first contends that the grievance is not procedurally arbitrable. The City points to Article 10, Section C of the Agreement that provides "[n]o such notice may be filed more than ten (10) days from the date of occurrence of the event upon which the grievance is based or from the date when the grievant has or should have had knowledge of the event upon which the grievance is based or the grievance shall be waived". The City further points to Article 10 Section F that states "[f]ailure of a grievant to comply with any of the provisions of this Article shall be deemed to be a waiver of the rights to seek resolution of the grievance under the terms of this Agreement." Finally, the City states that Article 10 states that "time shall be deemed to be of the essence, and any failure of the grievant to comply with any of the time limits prescribed

herein shall be deemed to be such failure to comply with the provisions of this Article."

The City argues that the parties clearly and unambiguously agreed to language that required a grieving party to follow specific time lines, and that any deviation of the time periods requires dismissal of the grievance. In the present case, the City states that the Union was clearly on notice in February 2022 that the City was changing the process for distributing all overtime, and the implementation date of the change occurred on March 28, 2022.

The City maintains that the Union did not file this grievance until May 18, 2022, thirty-seven days after the change went into effect. Moreover, the City states that what occurred is not some event about which the Union had no knowledge, as the Union began receiving complaints from SENA employees soon after the change went into effect, yet the Union waited more than the contractual ten day time period to file its grievance. The City thus concludes that the grievance was not filed until well beyond the ten day time period required by the parties' Agreement, and thus the grievance is not arbitrable, and must be dismissed.

II. Merits of the Grievance

The City contends that the Union's grievance is not substantively arbitrable. The City states that the Arbitrator's authority only extends to matters that are covered by the SENA Agreement. The City argues that the third party overtime work at issue is work performed by inspectors covered by the AFSCME and IBEW Agreements. The City states that there is no provision, nor is it possible to have any provision in the SENA Agreement, which could grant employees work performed by workers in another

bargaining unit. The City states that since this is a claim for work outside of the SENA bargaining unit, the Arbitrator has no authority over disputes about work performed by other bargaining units, and it must be concluded that the grievance is not substantively arbitrable.

The City points to a number of prior arbitration awards in which Arbitrators have denied a Union's claim to overtime work that has been performed by workers in other bargaining units. Specifically, Arbitrator Bloodsworth concluded that contract language provides that '[o]vertime work shall be distributed as equitably as possible…' can only mean as amongst bargaining unit employees." AFSCME and City of Boston, AAA 1139-0882-78 (May 16, 1979); In James Vitale Walsh, LRC 382-14.2012 (Feb. 24, 2017) Arbitrator Michael C. Ryan also concluded that a Union had no contractual right to overtime performed by another bargaining unit, and that terms in one Union's Agreement cannot reach out and decide rights of another bargaining unit. The City states in the present case that SENA is attempting to claim work that is not bargaining unit work, and thus its grievance is outside of the parties' grievance arbitration clause, and the grievance is not substantively arbitrable.

The City also maintains that there is no past practice on the subject of third party overtime. Specifically the City contends that it was never involved in the distribution of overtime, thus, what had occurred cannot be considered as a mutually accepted practice by both the City and the Union. Further, if a past practice did exist, the City states that the practice was properly ended when the

City notified the Union, the Parties then met, and the Union agreed that the Department should take over the distribution of the overtime from the Union.

The City further contends that Article 10 Section G protects certain past practices only if they satisfy four conditions. The City states that Article 10, Section G protects established past practices only (1) if the practice has been uniformly and consistently applied; (2) it affects a substantial benefit to the bargaining unit, (3) is a mandatory subject of bargaining under G.L. c. 150E; and, (4) that the change in past practice was made without good reason. The City maintains that the Union has not satisfied the criteria to meet the standards of a past practice required under Article 10, Section G.

First, the City states that the Union did not prove that there was a uniform and consistent practice for SENA Supervisory Inspectors to receive the same amount of third party overtime opportunities as the AFSCME and IBEW inspectors. The City also states that testimony shows that the Plumbing Division had a ledger but would not always enter details of the work performed. The Electrical Division employees, on the other hand, would just rely on a call from the IBEW shop steward for when their turn came up and provided no testimony as to how or whether a list was maintained to ensure how the work was distributed. The City thus argues that there was no consistent and uniform practice as required by the Agreement.

The City also contends that the fourth criteria allows the City to change a practice when there is good reason to do so. The City argues that the evidence shows that in the past there were grievances over the distribution of

overtime in ISD, and that it was appropriate to devise an equitable and transparent system to distribute the overtime work. The City also states that the Union was notified in advance of the change in how all overtime would be distributed in the past. The City maintains that it is now distributing all overtime and third party overtime in a manner that is in compliance with all the labor agreements for the employees that work in ISD. The City concludes that the grievance must be dismissed.

Discussion

I. Procedural Arbitrability

The Employer initially claims that the Association did not file its grievance in a timely manner. As a general matter, when a grievance has not been filed within the contractual time limits, the claim will be dismissed. The establishment of time periods for filing grievances reflects the parties' intent to resolve disputes in a prompt and efficient manner. The time periods are as much a part of the Agreement as any other terms. It is, therefore, inappropriate to ignore procedural requirements simply to respond to the merits of a grievance.

Article 10 of the parties' Agreement establishes the process and time periods for filing grievances. Article 10, Section C of the Agreement provides that "[n]o such notice may be filed more than ten (10) days from the date of occurrence of the event upon which the grievance is based or from the date when the grievant has or should have had knowledge of the event upon which the grievance is based or the grievance shall be waived". As stated above, the Union was notified of the proposed change in the method of how all overtime was to be distributed for departments in ISD.

In addition, the actual implementation of the change occurred at the end of March. The Union's grievance was filed on May 18, 2022.

Arbitrators will not bar a grievance because of late filing if conduct by management representatives makes it unjust or unreasonable to do so on the grounds of estoppel. Fairweather, Practice and Procedure in Arbitration 2nd ed. 1983 p. 104. Similarly, it has also been held that "late filing will not result in dismissal of the grievance if the circumstances are such that it would be unreasonable to require strict compliance with the time limits specified by the Agreement." Elkouri and Elkouri, How Arbitration Works, 6th ed. p 221.

It is understandable as to why the Union did not file a grievance after the City first met with Union officials and told them the Department was going to be changing the process of how overtime was going to be distributed. Mr. [redacted] and Mr. [redacted] credibly testified that at this meeting they were told that there would be no substantive changes; the only change was that there would be a centralized process to administer overtime, and that SENA employees would still receive third party overtime as they had for many years. At the time of the meeting there was no reason to file a grievance, as nothing had occurred, and the Union was not put on notice that there would be any impact on its employees with respect to third party overtime.

The implementation of the new overtime distribution occurred at the end of March, and soon thereafter the Union received complaints that SENA inspection supervisors were no longer being offered third party overtime assignments.

This was not a situation in which the Union sat on its hands; once the Union learned that SENA inspector supervisors were no longer receiving third party overtime it immediately notified ISD that its members were no longer being offered third party overtime, and this was different than what was discussed in the February meeting. A meeting occurred with the Union, and the Department asked for time to investigate the matter. After a series of emails and discussions, the City claimed that there was no mistake, and that it would not revert to the prior practice in which SENA supervisors were offered third-party overtime assignments. It was then when there appeared to be no resolution of the issue, and the Union then submitted the present grievance. The Employer representatives, all along, knew that the Union was intent on pursing this matter.

In the instant case, based on these specific facts and circumstances, it was not unreasonable for the Union to wait until the end of the discussions between Employer and Union representatives before it filed a formal grievance. I find that the Employer was not harmed by the Union waiting until May 18, 2022 to formally files its grievance because there was clear knowledge by both parties that this issue was being vigorously pursued by the Union. Accordingly, considering the totality of circumstances in the present case, the grievance is procedurally arbitrable.

II. SUBSTANTIVE ARBITRABILITY

The dispute in the present case is over the distribution of what is known as third party overtime. The City claims that this is a work jurisdiction dispute between three bargaining units, IBEW, AFSCME and SENA, and that SENA is attempting to work these third party

assignments that, in reality, is not work that is within the recognition clause of SENA's Agreement. The City contends that since this work is not bargaining unit work, the grievance is over work that is not covered by the parties' Agreement; hence the grievance is not substantively arbitrable.

I agree with the City that if the Union was claiming or seeking work that was outside its recognition clause or that there was no colorable claim under SENA's contract that it shares in the third party overtime, the grievance would not be arbitrable. SEIU Local 888 and City of Boston, also involved a dispute between two unions over overtime work. Arbitrator Ryan, adeptly explained that, even though the matter was a dispute between two unions over overtime work, this did not mean that the issue was not substantively arbitrable. Arbitrator Ryan stated:

> I conclude that the City's primary arbitrability argument, regarding work jurisdiction … is properly characterized as a contention about the substantive interpretation of the CBA. In other words, it is an argument on the merits, not of arbitrability. So long as the claimed interpretation presents a colorable argument, it is substantively arbitrable. If cited contract language does not support the claim, however, then it fails on the merits, not because it was not arbitrable. Put another way, if the arbitrator has to interpret the contract language in order to decide on the merits of the claim based thereon, then the case is decided on the merits, not because it is not arbitrable.

In the present case there is a dispute over the interpretation and application of Article 10 Section G of the parties' Agreement. Accordingly, the grievance is substantively arbitrable.

III. MERITS OF THE GRIEVANCE

Third party overtime is different than regular overtime assignments in which the work is assigned within the bargaining unit, and for which the City pays overtime for this work under the terms of the Agreement. All of the Agreements, SENA, AFSCME and IBEW have contract provisions that describe those situations when employees are to be paid overtime by the City. A review of these three Agreements, however, shows that there is no language that addresses third party overtime work. Third party overtime is comparable to police details; it is extra work that is outside of an employee's regular work hours. For these third party details the work, although performed by City employees, is paid for by private vendors, not the City. Such work is not regulated by the parties' overtime language.[4] Therefore it cannot be stated that having SENA employees perform these third-party paid details conflicts with the overtime provisions of the AFSCME and IBEW overtime provisions.[5]

On the other hand, although there is no provision in either the IBEW or AFSCME Agreements addressing these third party or paid details, this does not mean that SENA employees must share in these assignments. SENA's contract language must be considered to determine whether they have a contractual claim to this third party overtime work. SENA does not claim this work by virtue of the overtime language

[4] The arbitration decisions submitted by the City dealt with disputes over the distribution of regular overtime work, not this third party work.

[5] Even if it could be said that SENA's claim to the work might impinge upon the contractual rights of AFSMCE and IBEW employees, this does not mean that SENA does not have the right to grieve what it believes to a contractual right to share this work with other bargaining units.

in its Agreement. Rather, SENA claims the right to this third party overtime pursuant to Article 10, Section G, which reads:

> Article X Section G reads:
>
> G. PAST PRACTICES
>
> 1. Except as specifically amended by other provisions of this contract, established personnel policies and practices shall remain in effect for the duration of this Agreement subject to the union's right to grieve and arbitrate any change meeting the following criteria:
>
> > 1. the past practice must have been uniformly and consistently applied;
> >
> > 2. the past practice must affect a substantial benefit to the bargaining unit;
> >
> > 3. the past practice must be a mandatory subject of bargaining under M.G.L. c. 150E;
> >
> > 4. the change in past practice was made without good reason.
>
> 2. In determining whether a past practice shall remain in effect, the arbitrator must consider whether the specific enumerated rights listed in Article 7, Section 2, exclusive of the last phrase beginning "and in all respects…" applies.
>
> 3. In the event the Union seeks to present an issue grieved under this Article to the Massachusetts Department of Labor Relations, all rights to further process the grievance shall cease.

1. <u>The past practice must have been uniformly and consistently applied.</u>

The evidence demonstrates that there was a consistent and uniform practice that SENA supervisory inspectors were offered third party overtime in the same rotational manner

as the AFSCME Inspectors. Specifically, Mr. [redacted] started working for the City as a plumbing and gas inspector in 1992 and at that time was a member of AFSCME's bargaining unit. Mr. [redacted] testified that either the AFSCME steward or, if the AFSCME steward was unavailable, the SENA supervisor, offered both inspectors and the SENA supervisor third-party plumbing and gas inspections from a single rotation list. Mr. [redacted] testified that this practice continued after he was promoted to SENA supervisory inspector.

[redacted] began working for the City as an electrical inspector in 1995, and was a member of the IBEW bargaining unit. Mr. [redacted] stated that he also served as the IBEW shop steward for many years. Mr. [redacted] testified that the IBEW steward offered both inspectors and the SENA supervisors the third party overtime electrical inspections from a single rotation list. Mr. [redacted] testified that when he was promoted to Supervisor of Electrical Inspections in 2017, he continued to be included on the third-party overtime rotation list with the electrical inspectors.

The City contends that since these third party opportunities were overseen by the Unions and not the City, it was not a party to this practice. Employees who performed this third party overtime are paid by the City, the payments are processed by ISD's payroll department, and employees receive payment for the third party work in their City pay checks. The City bills the third parties for the work. This practice occurred for so many years that it is difficult to accept the City's argument that it was unaware of the long-existing practice. Indeed, in a 2016

Arbitration, City of Boston and SENA (LRC 285-14), which involved the rates of pay for third party overtime, Arbitrator Robert O'Brien, in his decision, remarked that for at least twenty years prior to 2010, both Inspectors and the Building Supervisors "were assigned off-hour inspections from a single rotating list."[6] (Page 7 of the Award). It is implausible that the City was unaware of the long-standing practice. In sum, there can be no doubt that this practice of SENA supervisory inspectors and the AFSCME and IBEW inspectors being offered the third party overtime from the same rotational list was consistent and uniformly applied over the years.

2. The past practice must affect a substantial benefit to the bargaining unit.

This criterion needs little discussion. These third party overtime opportunities are an important and significant benefit for bargaining unit members. The fact that the work is paid by an outside vendor is immaterial. There can be no question that prohibiting SENA Inspection Supervisors from earning a substantial amount of this third party overtime unquestionably reduced their overall compensation. See eg. City of Boston and Boston Police Patrolman's Association, 26 MLC 144 (2010).

3. The past practice must be a mandatory subject of bargaining under M.G.L. c. 150E

M.G.L. Chapter 150E is the Massachusetts Collective Bargaining Law, and the Division of Labor Relations, formerly known as the Labor Relations Commission, is

[6] The off hours overtime referenced in Arbitrator O'Brien's Decision was third party overtime.

statutorily charged with administering the law. Section 6 of the Law, requires public employers to negotiate with employee organizations "in good faith with respect to wages, hours … and any other terms and conditions of employment". Wages, hours and other conditions of employment are what is known as mandatory subjects of bargaining, and the Labor Board over the years has determined what working conditions are mandatory subjects of bargaining. Overtime opportunity and the distribution of overtime have long been held to be mandatory subjects of bargaining.

In the present case what makes the issue somewhat unique, is that the work at issue is not regular overtime, it is work outside of regular hours of work that is paid for by a third party. As stated above, the work is the equivalent of a private paid detail, a situation often occurring for police officers. For many years the issue of paid details, these extra work assignments, has been considered by the Labor Relations Board to be a mandatory subject of bargaining. Town of Winthrop, 28 MLC, 200 (20020; Town of Hudson, 25 MLC 143 (1999).

What complicates this issue even more is that the work opportunities go beyond just one bargaining unit. In particular, this case involves work opportunities that over the years have been offered and shared by three bargaining units, AFSMCE, IBEW and SENA. Despite the fact that there is more than one bargaining unit involved in performing these shared work opportunities, this too is a subject matter that has been considered to be a mandatory subject of bargaining. Matter of Town of Burlington and AFSCME, Council 93, Local 1703; Burlington Police Patrolmen's Association; International Brotherhood of Police Officers,

Local 532, 35 MLC 2008), was a Labor Board decision, similar to the dispute in the present case, involved a dispute over the assignment of private details among different bargaining units. The Labor Board concluded that work opportunities that impacted other bargaining units was a mandatory subject of bargaining. The Board ruled that "although the [Union] cannot bargain over the rights of individuals who are not unit members, it may bargain over mandatory subjects of bargaining affecting members within its unit, even if those subjects also happen to impact members of other units" (Page 20). In other words, shared work opportunities among other bargaining units is a mandatory subject of bargaining.

Moreover, when work is shared by bargaining unit members and non-unit employees, the Commission has determined that the work will not be recognized as exclusively bargaining unit work belonging to just one bargaining unit. Higher Education Coordinating Council, 23 MLC 90, 92 (1996) (citing City of Quincy/Quincy Hospital, 15 MLC 1239, (1988)). The Labor Board concluded that it is a mandatory subject of bargaining "if there is a calculated displacement" of the existing pattern of work assignments. Higher Education Coordinating Council, 23 MLC at 92. In the present case, denying SENA equivalent third party overtime opportunities, as has been the long history, unquestionably displaced SENA employees from these third party assignments. There can be little question that under the precedent of the Massachusetts Labor Relation Board, this type of third party work assignment is a mandatory subject of bargaining.

4. The change in past practice was made without good reason.

The final criteria under Article 10 Section 6 concerns the rationale for the change. The City contends that there were good and legitimate reasons to have made the change to the existing practice. I agree that there was a legitimate reason to change the process for administering overtime distribution including third party overtime. The City rationale was that a unified process would establish a transparent process for how overtime and all extra work assignments would be distributed in the future.[7] Indeed, the Union had no objection to change the process for administering third party work opportunities. It was explained to the Union that this change would not impact the current practice of SENA inspectional supervisors continuing to be on the list for third party work assignments.

What occurred, however, was not simply a change in how third party overtime would be managed, but rather a substantive change in who would now be offered this third party work. SENA employees were now denied equivalent opportunities to work this third party work. The City offered no legitimate reason why SENA employees had to be denied this third party work.

First, it must be stated that there is no evidence that any prior grievances involved the distribution of third party work.[8] More importantly, the fact that the City

[7] If this is all that occurred, there would be no merit to the Union's grievance.

[8] The work at issue in the cases involved disputes over regular overtime assignments as defined by the parties' Agreements and not third party work assignments, the issue in the present case.

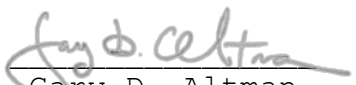
was now overseeing the distribution of all overtime, including third party overtime, would have permitted the City to ensure that this third party overtime would be assigned in a transparent manner among all eligible employees.

The City implementing a centralized process to oversee the distribution of overtime was not a legitimate reason to bar SENA Inspection Supervisors from participating in this third party work. The evidence demonstrates that the work at issue was for many years shared work among all the inspectors; both supervisors and non-supervisor inspectors. This third party work did not belong exclusively to just one union. The City could and should have established a rotational list that included inspectors and supervisory inspectors in these third party work opportunities. Such action would have preserved the long standing work practice, as mandated by Article 10 Section G.

Conclusion

Based on all the factors, it must be concluded that City violated Article 10, Section 6 of the parties' Collective Bargaining Agreement. The City must return to the status quo, and make all affected employees whole. The Arbitrator shall retain jurisdiction for ninety days should there be any disputes over the appropriate remedy.

June 8, 2023
Boston, Massachusetts



Gary D. Altman