State of Connecticut
State Board of Mediation and Arbitration

In the Matter of	:	Case No. 2023-A-0079
City of Norwalk	:	Date of Award: January 31, 2024
-and-	:	Date of Hearing: November 29, 2023
AFSCME Co. 4, Local 2405	:	

AWARD

PANEL MEMBERS:

Dennis C. Murphy, Esq., Chair and Public Member
Peter Carozza, Labor Member
Philip White, Management Member

Robert Montuori, representing the Union
Tina Fogel, representing the City

Procedural History and Issue

This is a dispute between the City of Norwalk (City), and AFSCME Co. 4, Local 2405 (Union), concerning the distribution of overtime.

After due notice a hearing was heard virtually on November 29, 2023, wherein the parties had opportunity to present evidence and witnesses and to cross examine same. The parties filed post hearing briefs.

The issue for determination is as follows:

Did the City violate the collective bargaining agreement by denying two bargaining unit members an overtime assignment on August 6, 2023?

If so, what shall the remedy be?

Relevant Collective Bargaining Provisions

Section 1.1 The City hereby recognizes that the Union is the sole and exclusive representative of all employees in the Department of Public works, parks, recreation, custodians, fleet services and dispatchers who are not elected and who do not have the authority to hire and fire and/or to assigned and direct work, for the purpose of bargaining with respect to wages, hours of work, and conditions of work.

Section 12.1 The City shall have the right to employ up to twenty (20) temporary employees without restriction in Recreation and Parks provided it does not hire these employees to replace laid off full-time bargaining unit members. In the event that the city defunds or eliminates any full-time position from this bargaining group during the term of this contract then there will be a corresponding reduction in the number of temporary employees. These limits shall not include temps employed under Articles 29, 30 and 33.

Section 16.3 The City of Norwalk agrees that only those equipment operators whose usual duties are closely associated with work required to be performed beyond their regular hours of employment shall be used for extra work. For the purpose of this section extra work shall include emergency work and snow removal. If the regular employees of the department are not available to do extra work, the authorized supervisor shall call other qualified employees. Until normal resources are exhausted, no person other than the employees of the Operations Division shall drive or work on any piece of a City-owned equipment for extra work but DPW may draw from other employees in Local 2405 if they are qualified.

16.5 The City of Norwalk agrees to equitably distribute over time assignments to the available employees who can do the work without further training on a rotating schedule based on seniority and job classification. At the Highway Section the following jobs are the accepted job classifications: Traffic signal technician/mechanic, Masons, Heavy Equipment Operators, Drivers and Laborers. At Fleet Services, accepted classifications are automotive Store Clerk, Class 1 Mechanic and PM mechanic. The accepted job classifications at Park and Recreation are Park Maintainer I, II, III, Carpenter, Plumber/Pipefitter and Maintenance Trades worker.

Section 16.11 The City shall have the right to require overtime work of employees. An employee shall be excused from required overtime if on approved leave as defined herein. In the event over time is required the seniority list shall first be exhausted and if there are no volunteers the least senior employee within the classification shall be ordered in. Mandatory overtime in dispatch shall be covered in Article 44.

Findings of Fact

1. The City employs members of the Union in its Recreation and Parks Department and Public Works Department. These employees have the title of Park Maintainer I, II, and III, and Public Works Maintainer I Laborer, II Driver, and III Heavy Equipment Operator. The City also employs up to 20 temporary workers in the Recreation and Parks Department.

2. The city posted an overtime announcement for work to be performed Saturday August 6 2022. The two individual grievants, Adrian Ibarrondo and Michael DelMonte signed the sheet to work the overtime. These two individuals were Heavy Equipment Operators in the Public Works Department.

3. The overtime work was to be performed at Pine Island Cemetery, a historic cemetery in Norwalk. Certain areas of the cemetery cannot be mowed due to perennial plantings and the headstones are brittle and fragile and cannot withstand excess contact in any way. There are also semi buried headstones. The cemetery is managed by the Norwalk Historical Society. The city provides on-site training to employees who mow and trim the cemetery. The two grievants here have not received that training. (Test. of Kenneth Hughes, Superintendent of Public Properties and Parks; Test. of Ibarrondo and DelMonte).

4. Rather than offer the work to the two grievance here, the city contacted 2 temporary employees to perform the work. These employees have worked at the cemetery approximately 10 times per year and have been trained concerning the special needs.

5. A prior grievance in 2018 concerning overtime elicited a response from the then Director of Personnel and Labor Relations, Ray Burney, in a letter dated April 25, 2018, which states in part: "As a general rule, these part time/seasonal employees are not scheduled to work overtime, especially when they are performing functions that would arguably accrue to full time employees." (Joint Ex. 3).

6. The prior grievance was resolved in an e-mail dated May 1, 2018, from the former Director of Personnel and Labor Relations. This e-mail states in part:

"Without conceding any contractual arguments or interpretations by either the City or the Union, we agree to institute the following process on a trial basis to address the situation:

The Recreation and Parks Department will distribute required overtime assignments to full time employees who work in that department first. To the extent that the full time employees in Recreation and Parks do not fill all of the required overtime assignments, Recreation and Parks management will notify Scotty Schuler, the 2405 Union rep in Recreation and Parks, of the number of overtime assignments that are unfilled. Union rep Schuler will contact the DPW local 245 Union rep Terrence Fuller of the availability of overtime assignments in the Recreation and Parks Department that are available to be filled by full-time DPW employees. Notification by the Union regarding which DPW employees will work the Recreation and Parks overtime assignment must be given to Ken Hughes (or his designee) that same day in order to set up the work in a timely manner." (Union Ex. 1).

Arguments of the Union

The Union argues that it has had an ongoing problem with overtime work being performed by non-bargaining unit employees. It cites the resolution of the grievance in 2018 as demonstrating that the City agreed to offer overtime to full time employees before part-time or seasonal employees. It breached that agreement here, it argues, by turning these employees down and giving the assignment to seasonals.

Further, the Union argues, the City maintains no record of any formal training being required for the work performed in the cemetery. Nor did the City offer any evidence that it offered training to the two grievants here.

The Union addresses the language in Article 12, Section 12.1, by arguing that the clear intent was to allow for temporary employees in the Recreation and Parks Department but only to the extent they do not supplant full-time employees.

Arguments of the City

The City argues that the settlement of the 2018 grievance specifically did not concede any contractual arguments or interpretations, and was only agreed to on a trial basis. This language was not inserted into the collective bargaining agreement entered into on July 1, 2020. (Joint Ex. 1). The City also points out that the specific language concerning the unrestricted use of up to 20 temporary workers was not amended.

Discussion

The Union has the burden to demonstrate by a preponderance of the evidence that the City violated the terms of the collective bargaining agreement by failing to offer the two grievants in Public Works the overtime opportunity in Parks mowing and tending to the cemetery. For us to answer that, our obligation is to discern what the agreement between the parties was at the time of the alleged violation.

Arbitrators are creatures of contract. We draw our authority and limitations from the collective bargaining agreement. Here, "The Arbitrator's jurisdiction to make an award shall be limited by the submission and confined to the interpretation and application of the provisions of this Agreement. The arbitration shall not have jurisdiction to make an award which has the effect of amending, altering, enlarging or ignoring the provisions of the Agreement in effect at the time of the occurrence. The decision of the arbitrator shall be final and binding upon both parties, provided it is in accordance with law." (Joint Ex. 1, Section 37.8 at 32).

The parties here negotiated a process by which the collective bargaining agreement may be modified: "Section 42.1. This agreement may be altered or modified only by the mutual written agreement of the parties hereto. Section 42.2. No individual employee in the bargaining unit or representative of the Union, agent or employee or the City may enter into any separate agreement or understanding which shall be inconsistent with the terms of this Agreement. Any such separate inconsistent agreement will not be binding upon the parties hereunto unless expressly adopted in writing and mutually agreed upon between the City and the Union." (Id. at 36).

The Union here complains that the City used two temporary employees to fill an overtime opportunity, rather than two full time members in the Public Works who expressed an interest. We are faced with clear language in the Agreement where the Union agreed that "The City shall have the right to employ up to twenty (20) temporary employees without restriction in Recreation and Parks provided it does not hire these employees to replace laid-off full time bargaining unit members...." (Id., Section 12.1 at 8). There is no suggestion here that temporary employees replaced laid-off full time employees.

The Union bases its claim on an email from the then Director of Human Resources which offers an arrangement to settle a grievance. This settlement is not in writing and executed by both parties, and it explicitly is "Without conceding any contractual arguments or interpretations by either the City or the Union, we agree to institute the following process on a trial basis..." The email goes on to outline a process by which Recreation and Parks Department employees, then Public Works employees by notifying named Union representatives who are no longer in those positions. This arrangement was not in writing and executed by both parties as required by Section 42.1.

As the City points out, subsequent to this apparent settlement, the parties negotiated a new collective bargaining agreement and failed to incorporate this arrangement

into the new agreement. And the parties' agreement on the "unrestricted" use of temporary employees is clear language that, should we grant the Union's grievance, we would undoubtably be "amending, altering, enlarging or ignoring", something we are forbade from doing. The 2018 settlement reached, by not being executed by both parties, by clearly stating it was on a trial basis and did not concede any contractual language, and by not appearing in the renegotiated agreement, all demonstrate it fails to rise to the level of a clear, firm and permanent meeting of the minds required for us to ignore the clear unrestricted use of temporary employee language.

The City's testimony at the hearing on this matter seemed to primarily base its failure to provide the overtime opportunity to the Public Works employees on the fact that they were not trained on the cemetery site with respect to caution to be used around the historic headstones and certain plantings. The City's 2018 arrangement contained a strong recognition and willingness to utilize full time employees for overtime opportunities. This is commendable and certainly fosters agreeable employee and labor relations. Section 10.4 of the Agreement states a strong willingness on the part of the City to offer training to those employee who seek it. The City has an opportunity this Spring to train the grievants to this matter, and others who express interest, with on-site training at the cemetery concerning proper equipment usage and special awareness required in maintaining the historic cemetery so that they may be qualified to fill overtime slots there.

AWARD

The City of Norwalk did not violate the Local 2405 contract when it allowed temporary employees the opportunity to work overtime on Saturday, August 6, 2022 and not two (2) full time union members who placed their names on the sign-up list for the overtime work.

Case No. 2023-A-0079

By the Panel

/s/ Dennis C. Murphy, Esq.
Dennis C. Murphy, Esq.
Chair and Public Member

/s/ Peter Carozza
Peter Carozza (dissenting)
Labor Member

/s/ Philip White
Philip White
Management Member