

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of the Contract Arbitration Between

UNIFORMED FIREFIGHTERS OF COHOES,
LOCAL 2562,

Grievant,

-and-

**OPINION
and
AWARD**

CITY OF COHOES,

Employer.

PERB Case No. A2021-308

(Re: Union Release Time-Otto Madsen)

BEFORE: Timothy S. Taylor, Esq., Arbitrator

APPEARANCES:

For: Uniformed Firefighters of Cohoes, Local 2562
Law Office of Thomas J. Jordan, Esq.
By: Thomas J. Jordan, Esq.

For: City of Cohoes:
Goldberger and Kremer
By: Brian S. Kremer, Esq.

PRELIMINARY STATEMENT

The Uniformed Firefighters of Cohoes, Local 2562 (“Union”), and the City of Cohoes (“City”) are parties to a Collective Bargaining Agreement covering July 1, 2019, through June 30, 2021 (“CBA” or “Agreement”) (Joint Exhibit.1)¹. On November 29, 2021, the Union filed a grievance alleging the City violated the CBA when Cohoes Fire Chief Joseph Fahd (“Fahd”) denied release time for Captain

¹ J_ refers to Joint exhibits, C_ refers to City exhibits, and U_ refers to Union exhibits.

Jamie Hogan (“Hogan”), a Union member. The latter was a witness in an arbitration proceeding. The Union asserts the City would have required Captain Otto Madsen (“Madsen”) to work 4.5 hours of overtime had the request for release time been granted. The Union alleges the City violated Article XIIA, Paragraph F of the CBA. (J.2, p.31).

The City denied the grievance, and on February 1, 2022, a Demand for Arbitration was filed. The parties selected Arbitrator Timothy S. Taylor, Esq., to hear and decide the matter. A hearing was held at Cohoes City Hall on July 21, 2022. The parties had a full and fair opportunity to present testimony; submit documentary evidence; call and cross-examine witnesses, and argue to support their respective positions. The parties’ closing briefs and supporting materials were received on or about August 29, 2022, and as of that date, the record was closed.

Issues

The parties stipulated these issues:

Did the City of Cohoes violate Article XIIA, Paragraph F of the collective bargaining agreement, as alleged in the grievance dated November 29, 2021? If so, what shall the remedy be?

RELEVANT CONTRACT PROVISIONS

Article XIIA, Paragraph F of the collective bargaining agreement states,

F. Leaves of Absence for Association Representatives:

Association officers, representatives, and delegates will be allowed all necessary release time with pay to participate in negotiations with the Employer, adjustment of grievances, arbitration hearings, and other functions relative to the operation of this Agreement. They will also be given leave with pay to attend Association and Executive Board Meetings, and to participate in and attend conferences and conventions of affiliated associations and

organizations. Leave to attend conferences and conventions will be authorized in advance by the Fire Chief, but such authorization may not be unseasonably withheld. However, in no event will leaves of absence be granted to more than three Association representatives at any one time.

FACTUAL BACKGROUND

On November 8, 2021, Union President Robert M. Wattsman ("Wattsman") emailed Cohoes Fire Chief Joseph Fahd requesting time off for Lieutenant George Primeau ("Primeau") and Hogan to prepare for and attend an arbitration hearing scheduled for the morning of November 9, 2021. Wattsman testified that Fahd told him "No" because it would "drop staffing to five (5) and it would create overtime."

Primeau was given the requested release time, but Hogan was not. Fahd advised Wattsman that Hogan could meet with the Union's attorney, and if he was on-call when the Union needed his testimony, the parties could delay the hearing until he returned from the call. To the extent the Union's request was for Hogan to be granted leave to meet with the Union's attorney, wait to testify, and eventually testify, causing overtime, Fahd denied the request.

Wattsman testified the Union was asking for release time for both Primeau and Hogan to testify on behalf of the Union. They were to be Union representatives testifying on behalf of the Union and be Union witnesses. Wattsman testified that during the three (3) four (4) arbitrations he had been involved in, the City granted release time to Union members called as witnesses.

President Wattsman testified that the City grants Union members who testify release time so that the arbitration hearing may proceed uninterrupted by

emergency callouts. If the arbitration were delayed or postponed, the party's cost for attorneys, arbitrations, or fees would be higher. Wattsman testified the Union president's authority to designate representatives is broad. Had the City followed the CBA, it would have granted Hogan release time, and Madsen would have received overtime.

Past Union president Tim Fiffe testified he has served as chief negotiator and executive board member for several years. As president, he requested release time for members testifying at arbitrations, and the City granted release time for Union members who were not Union officers for many activities.

Hogan testified that he was not an officer of the Union and did not serve on any committees. The Union did not call him to testify in any Union role or capacity on November 9, and he was solely a witness to underlying events subject to the grievance arbitration hearing.

UNION'S POSITION

The Union argues that the cumulation of three (3) union members on release time was not an issue, and the denial of release time to Hogan violated the Agreement. The Union maintains the word "representatives" has a broad meaning based on the parties' past practice. The past practice is for Union members who are witnesses to be granted release time, and the Union chooses their representatives at arbitrations.

The Union insists the language of paragraph F is clear. The City will give Union representatives the necessary time off to participate in arbitration hearings

if it is for three (3) representatives or less. Because release time is mandatory, the City violated Paragraph F of the Agreement when the City denied Hogan release time.

The Union contends Fahd never mentioned denying release time because Hogan was not a representative of the Union. The Chief's rationale is not a valid reason under Paragraph F for denying release time. The Union requests the grievance be sustained, and Madsen awarded 4.5 hours of overtime.

CITY'S POSITION

The City contends that only duly elected or appointed officers or "representatives" could get release time. Hogan was not a Union officer, representative, or delegate as of November 2021. Hogan was actually "released" with pay to meet with the Union's attorney and testify. There has been no violation of Article XIIA, Paragraph F. Hogan was "released" from duty with pay. He met with the Union's attorney and testified without charging his accrued leave time. He suffered no reduction in pay. There is no violation of Article XIIA, Paragraph F, because he was allowed all necessary release time with pay to participate.

The City argues Hogan was not placed "on leave" during this period. Had he been "on leave," the City would have had to call in another captain to work overtime. Paragraph F grants such persons a "leave with pay" and/or a "leave of absence" to attend conferences and conventions. However, Paragraph F distinguishes between the requirement that personnel is granted "release time with pay" for certain activities in connection with the operation of the

Agreement, like an arbitration hearing, and the requirement that personnel be given “leave with pay” and/or a “leave of absence” to attend conferences and conventions.

The City asserts had the parties intended that personnel required to testify at an arbitration hearing be treated the same way as personnel attending conferences and conventions, they would have included the same language in Paragraph F. However, the parties used different language in their Agreement addressing attendance at arbitration hearings. That language does not require that the City grant a “leave of absence” under the circumstances. Paragraph F requires that the appropriate officer, representative, or delegate be given “release time with pay” to participate.

The Union has failed to prove a past practice of granting leave with pay under these circumstances. While several emails involving requests for “union business” were admitted into evidence as U.1., there is no proof that such requests were granted or that they were granted for persons who were not officers of the Union. Or that the City granted a request under circumstances that would result in overtime.

Paragraph F requires the appropriate officer, representative, or delegate to be given release time with pay to participate. The City argues that should the Union prevail, the proper remedy is clarifying the parties’ rights and responsibilities under Paragraph F. The City request the grievance be denied.

OPINION

The dispute is a contract grievance. The essence of the argument is whether

the Agreement's plain language mandates that Union members be allowed release time with pay to testify on behalf of the Union at arbitration hearings. In the opinion of this Arbitrator, although the language here is plain, its meaning is subject to interpretation. However, it is not the interpretation that the Arbitrator would give this plain language that determines its meaning; instead, it is the Arbitrator's task to determine what the parties understood the words to mean when they agreed to them.

The parties' interpretation of the contract language controls the meaning. Here the parties' customs and past practices are instructive in understanding how the parties have applied the phrase "representatives." That custom and past practice is uniform and established. The word "representative" includes Union members who testify on behalf of the Union at arbitration hearings.

The parties agree the central issue is whether the contract language is unambiguous. If the language is unambiguous, I must apply the ordinary meaning of the words used.

Here Article XIIA Paragraph F. reads,

Association officers, representatives, and delegates will be allowed all necessary release time with pay to participate in negotiations with the Employer, adjustment of grievances, arbitration hearings, and other functions relative to the operation of this Agreement.

The relevant term is "representatives." Webster's dictionary defines "representative" in multiple ways. The series of words, officer, delegate, and representative, clarify that its use here is not restricted to elected officials with

delegated authority. The definition that most fits is “to act or speak on behalf of.” The parties have interpreted the term “representative” to mean testifying on behalf of the Union at an arbitration proceeding. This definition follows the standard definition and applies to the dispute. The City must allow necessary release time for Union members to testify on behalf of the Union at arbitrations. Release time is duty-free and cannot be conflated with “on call” or “on leave.”

The City violated Article XIIA Paragraph F when it denied Hogan release time to testify at the November 9, 2021, Arbitration. Insufficient evidence supports the Union’s claim that the City pay Madsen 4.5 hours of overtime. The Union failed to convince me that Madsen would have had to work overtime to cover for Hogan. Hogan is entitled to release time, but Madsen’s claim to 4.5 hours of overtime falls short of convincing proof.

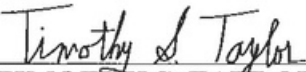
The appropriate remedy is reaffirming the long-standing practice of granting release time to Union members who need to testify at an arbitration. Whether overtime results is a factual determination unsupported by this record.

Upon consideration of the record, relevant portions of the CBA, the arguments presented and consistent with the procedures of the parties, the Arbitrator makes the following:

AWARD

1. The City of Cohoes violated Article XIIIA, Paragraph F of the collective bargaining agreement, as alleged in the grievance dated November 29, 2021.
2. The grievance is sustained. The City shall cease and desist from violating Article XIIIA, Paragraph F of the parties' CBA. Insufficient evidence supports the Union's claim that the City pay Madsen 4.5 hours of overtime.

DATED: October 3, 2022

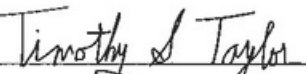


TIMOTHY S. TAYLOR, ESQ.
ARBITRATOR

STATE OF NEW YORK)
COUNTY OF ALBANY) ss:

I, Timothy S. Taylor, do hereby affirm upon my oath as Arbitrator that I am the individual described herein and who executed this Instrument, which is my Award.

DATED: October 3, 2022



TIMOTHY S. TAYLOR, ESQ.
ARBITRATOR