

**THE NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD**

IN THE MATTER OF ARBITRATION

between

**UNIFORMED FIREFIGHTERS
OF COHOES**

and

**THE CITY OF COHOES,
NEW YORK**

PERB Case: A2022-115

Issue: Recall /Overtime

**Opinion and Award
of**

**Timothy W. Gorman,
Arbitrator**

Appearances:

For the Union: Thomas J. Jordan
 Attorney for the Uniformed Firefighters of Cohoes

For the City: Brian Kremer,
 Corporation Counsel, City of Cohoes

Also Present: James P. Hogan
 George E. Primeau
 Rob Wattsman, Jr.

Date of Hearing: March 24, 2023

Date of Briefs: April 27, 2023

Date of Award: May 26, 2023

INTRODUCTION

In accordance with their Collective Bargaining Agreement, the above-named parties submitted a dispute for arbitration to the New York State Public Employment Relations Board. On March 24, 2023, an arbitration hearing was held at the Cohoes City Hall in Cohoes, New York. At this hearing both sides were given full opportunity to present opening statements, along with oral and documentary evidence. In lieu of closing arguments, the parties chose to brief the issue. These briefs were to be submitted by the parties no later than April 27, 2023. Upon receipt of these briefs, I declared the hearing closed.

ISSUES

1. Did the City violate the Collective Bargaining Agreement as alleged in the grievance dated June 7, 2022?
2. If so, what shall the remedy be?

BACKGROUND INFORMATION

The Employer is the City of Cohoes, New York (hereafter the City), the Union is the Uniformed Firefighters of Cohoes (hereafter the Union). Cohoes is a city located in upstate New York and the Uniformed Firefighters of Cohoes is the exclusive representative of the City's Firefighters.

On June 7 and June 8, 2022, Firefighter Lieutenant George Primeau was the only officer working at the Cohoes Fire Department due to the Captain calling in sick. On these dates Lieutenant Primeau along with other Cohoes Firefighters were called to give mutual assistance to the neighboring city of Watervliet. The City then called in the Fourth Platoon to cover the City's needs while the other firefighters were rendering mutual aide. Neither the Fourth Platoon Captain nor the Lieutenant reported to work for this coverage.

Believing that the City violated the Collective Bargaining Agreement (CBA) when it did not call in Captain James Hogan to cover for Lieutenant George Primeau's rendering of mutual aid to Watervliet on either June 7 and/or June 8, 2022, the Union filed two grievances. The parties were unable to settle these issues and have submitted them for binding arbitration.

LIST OF EXHIBITS

Joint Exhibits

- J-1 Labor Agreement between the City of Cohoes, New York, and the Uniformed Firefighters of Cohoes, dated January 1, 2019 – December 31, 2022
- J-2 Demand for Arbitration dated July 19, 2022, including grievance forms

Union Exhibits

- U-1 Cohoes Fire Department Daily Roster and Duty Roster, dated March 14,

2023
U-2 Cohoes Fire Department Duty Roster and Daily Report, dated June 7,
2022

City Exhibits

None

RELEVANT CONTRACT LANGUAGE

ARTICLE XI WAGES AND ECONOMIC PROVISIONS

C. Officers, Officer Replacement and Out-of-Grade Assignments:

1. There shall be one Captain and one Lieutenant on each platoon.
2. One Captain and one Lieutenant shall be assigned to each platoon. The present practice of having a Captain on duty at all times is discontinued. In the absence of the regularly scheduled Captain, the Lieutenant shall be the officer in charge of the shift and the City shall not be obligated to call in another Captain. In the absence of the regularly scheduled Lieutenant, the Captain shall be the sole officer and the City shall not be obligated to call in another Lieutenant. In the absence of both the regularly assigned Captain and Lieutenant, a Captain and/or Lieutenant will be called in to be the officer in charge of the shift. All Captains and Lieutenants shall be on the same "overtime wheel" and all such overtime opportunities shall be distributed equitably and in the same manner as overtime is presently distributed among firefighters.
6. In the event that a Captain and Lieutenant are not available for duty on a given platoon, the Chief may recall to duty a Captain or Lieutenant. In the event there is no available Captain or Lieutenant, the Chief shall place the senior man on the platoon to be in charge of the platoon.
7. The provision above which provides that the senior firefighter may be assigned in lieu of a Captain and Lieutenant (C.6 above) will not be applicable unless

there are 8 men on duty (which shall include firefighters permanently assigned to that shift, firefighters on duty because of an "exchange" of shifts, and no more than 1 firefighter on overtime) on the day that the City seeks to assign the senior man in lieu of the Captain, i.e., the 8 members assigned shall not include more than one member assigned on an overtime basis. The "senior man" shall be selected for assignment as the out of title Captain, on a seniority basis, only from among the members permanently assigned to the Platoon on duty that day, provided, however, that no member shall be ordered to perform the assignment unless all senior members have refused it.

ARTICLE XII A

HOURS OF EMPLOYMENT, VACATION, SICK LEAVE, LEAVE OF ABSENCE, ETC.

A. Vacations:

9. Upon request in writing to the Chief, a member will be entitled to receive vacation pay for all weeks he is scheduled to be absent. This vacation payment shall be made on the regularly selected payroll date immediately preceding the vacation period. Said payment shall not extend beyond December 31st of the current year to encompass two fiscal years of the City.

B. Sick Leave:

3. A firefighter who is to be absent on sick leave will notify his supervisor of such absence and the reason therefore on the first day of such absence and within two (2) hours before the beginning of his tour of duty, if possible. The Chief shall take whatever actions are necessary in order to verify any employee's application for sick leave before absence for personal illness may be charged against accumulated sick leave credits.

6. In the event that a Captain and Lieutenant are not available for duty on a given platoon, the Chief may recall to duty a Captain or Lieutenant. In the event there is no available Captain or Lieutenant, the Chief shall place the senior man on the platoon to be in charge of the platoon.

7. The provision above which provides that the senior firefighter may be assigned in lieu of a Captain and Lieutenant (C.6 above) will not be applicable unless there are 8 men on duty (which shall include firefighters permanently assigned to that shift, firefighters on duty because of an "exchange" of shifts, and no more than 1 firefighter on overtime) on the day that the City seeks to assign the senior man in lieu of the Captain, i.e., the 8 members assigned shall not include more than one member assigned on an overtime basis. The "senior man" shall be selected for assignment as the out of title Captain, on a seniority basis, only from among the members permanently assigned to the Platoon on duty that day, provided, however, that no member shall be ordered to perform the assignment unless all senior members have refused it.

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 unreasonably withheld. However, in no event will leaves of absence be granted to more than three Association representatives at any one time.

SUMMARY OF THE PARTIES' POSITIONS

The Union

The Union asserts that the City of Cohoes violated the Collective Bargaining Agreement (CBA) when it did not call in Captain James Hogan to cover for Lieutenant George Primeau's rendering of mutual aid to Watervliet on June 7 and June 8, 2022. In its case-in-chief and brief it makes the following arguments in support of its assertion.

It is a longstanding practice for the City to have Platoon 4 called in due to Lieutenant Primeau's rendering of mutual aid to Watervliet, but neither the Captain nor the Lieutenant for this platoon reported for this duty, therefore, the City should have called in Captain Hogan on June 7 and June 8 as Officer in Charge (hereafter OIC) as he was the next officer to be contacted.

The City violated Article XI, Section C, paragraph 2 of the CBA which states "In the absence of both the regularly assigned Captain and Lieutenant, a Captain and/or Lieutenant will be called in to be the officer in charge of the shift." Since Captain Dufresne was out sick and thus absent and Lieutenant Primeau was rendering aid to a neighboring city and was also absent, the City was left with no OIC, therefore the City should have called in Captain Hogan as OIC.

The Chief's explanation to Hogan was that he used his discretion and did not call him in because Primeau was "not available" as opposed to "absent." However, not being available is different than being absent. An employee would be not available if he/she were, for example at training in which case the Chief could end the training or pull the employee back to be the OIC. Primeau was absent and he could not be pulled away from the fire he was fighting in Watervliet.

Lieutenant Primeau testified that he was called to Watervliet to render mutual aid on a fire. He stated that the Chief could not be the OIC on the days in question because he was also at the same fire. Primeau also stated that the Chief would not have been the OIC on the days in question because per the duty roster he (Primeau)

was the OIC.

For the above reasons, the Union asks the arbitrator to sustain its grievance, and find that the City violated the CBA as alleged in the grievance dated June 7, 2022. It asks the arbitrator to award Captain James Hogan four (4) hours of overtime pay (two hours each day) because it failed to call him in to cover as OIC while Lieutenant George Primeau was rendering mutual aid to the city of Watervliet on June 7 and June 8, 2022.

The City

The City asserts that it did not violate the Collective Bargaining Agreement (CBA) when it did not call in Captain James Hogan to cover for Lieutenant George Primeau's rendering of mutual aid to Watervliet on either June 7 or June 8, 2022. In its case-in-chief and brief it makes the following arguments in support of its assertion.

Article XI (C) (2) of the CBA specifically states that "in the absence of the regularly scheduled Captain, the Lieutenant shall be the officer in charge of the shift and the City shall not be obligated to call in another Captain." It further states that "in the absence of both the regularly assigned Captain and Lieutenant, a Captain and/or Lieutenant will be called in to be the officer in charge of the shift." (City's emphasis). Captain Dufresne was sick and absent on June 7, 2022, and the City was not required to call in another Captain because Lieutenant Primeau was the OIC.

The Union has claimed that Primeau was absent on June 7, 2022. However,

the CBA uses the word absence to mean not working. Lieutenant Primeau was working on the day in question. The word absence is used throughout the CBA to mean an employee being off sick, or on Union leave, or injured on the job and therefore absent. As defined throughout the CBA Primeau was not absent when on the days in question, he was in Watervliet providing mutual aid for a fire.

Article XI (C) (6) (7) also provides an exception to any requirement that a Captain or Lieutenant be called in on overtime in the absence of both regularly assigned officers. These sections permit the City to place a senior man in charge of the platoon if a Captain or Lieutenant are not available and there are eight people working on a shift. On June 7, 2022, there were eight people working when the Fourth Platoon was called in on overtime, therefore the City was not required to call in an officer even if Lieutenant Primeau was providing mutual aid.

The Union will argue that past practice supports its contention. However, it only provided one other time when the City called in an officer in to work when the only other officer was away from the City providing mutual aid. The Union's argument does not support any long-standing past practice.

The City asserts that it did not violate the Collective Bargaining Agreement in this matter. It states that the Association's grievance is without merit and asks the arbitrator to deny it in its entirety.

ARBITRATOR'S DISCUSSION AND OPINION

The facts of the instant matter are not in dispute. On June 7 and June 8, 2022, Firefighter Lieutenant George Primeau was the only officer working at the Cohoes Fire Department due to the Captain calling in sick. On these dates Lieutenant Primeau along with other Cohoes Firefighters were called to give mutual assistance to the neighboring city of Watervliet. The City then called in the Fourth Platoon to cover the City's needs while the other firefighters were rendering this mutual aid. Neither the Captain nor the Lieutenant for this platoon reported for work. The arbitrable question is: did the City violate the CBA when, after the failure of the Fourth Platoon Captain or Lieutenant to report for work, it did not call in Captain James Hogan to function as the Officer in Charge (OIC)? I believe that it did.

The crux of the issue lies in two related items, the language of Article XI, Section C, and the meaning of the word "absence" in this article. Article XI, Section C, paragraph 2 of the CBA states "In the absence of both the regularly assigned Captain and Lieutenant, a Captain and/or Lieutenant will be called in to be the officer in charge of the shift" (J-1). The Union asserts that Lieutenant Primeau was absent on June 7 and June 8, 2022, as he was rendering mutual aid to a neighboring city. The City asserts that in the CBA the word absence is used to mean an employee being off sick, or on Union leave, or injured on the job, and therefore not working. It claims

that Lieutenant Primeau was not absent, he was working rendering mutual aid to another city.

Since both parties relied on the word absence when presenting their case, a dictionary definition is useful in the present matter. The definition of absence is “a failure to be present at a usual or expected place.”¹ The City gave the word “absence” a much more nuanced and narrower meaning, stating that “absent” as opposed to “not available” meant not at work due to sickness, leave etc. I found this argument to be unpersuasive in the present matter as I believe Article XI, Section C’s meaning and intent was to ensure that there was an OIC on duty regardless of the reason, whether it be the rendering of mutual aid to another city, or an officer out sick or on some other type of leave, or any other reason. If the parties wished to delineate between “absent” and “not available” as argued by the City, I believe Article XI, Section C of the CBA would reflect this. It does not. Using the plain definition above, Lieutenant Primeau failed to be present at a usual or expected place, which was the City of Cohoes. It was clear from the record that he was simply absent on June 7 and 8, 2022, as he was rendering mutual aid to the city of Watervliet.

The City also argued that Article XI (C) (6) (7) provides an exception to any requirement that a Captain or Lieutenant be called in on overtime in the absence of both regularly assigned officers. It claimed that these sections permit the City to place

¹ www.merriam-webster.com/dictionary

a senior man in charge of the platoon if a Captain or Lieutenant are not available and there are eight people working on a shift, and that there were eight people working on the fourth platoon on June 7, 2022. However, the City never entered any evidence establishing the number of people that were working on June 7, 2022.

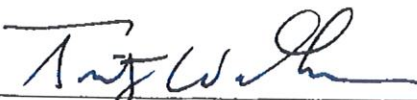
The Union has met its burden in the instant matter. The City of Cohoes did violate the Collective Bargaining Agreement as alleged in the grievance dated June 7, 2022.

AWARD

The Union's grievance is sustained. Upon receipt of this award the City of Cohoes will pay Captain James Hogan four (4) hours of overtime pay (two hours for each day) because it failed to call him in to cover as OIC while Lieutenant George Primeau was rendering mutual aid to the city of Watervliet on June 7 and June 8, 2022.

In the event the parties cannot agree on the application of this award, I shall retain jurisdiction for 90 days to hear only this issue.

Date: 5/24/23

Signed: 
Timothy W. Gorman, Arbitrator