Office of the West Seneca Town Supervisor
Hon. Gary A. Dickson

Memorandum

To: Honorable Town Board
From: Gary Dickson, Town Supervisor
Date: December 28, 2020
Subject: Blue Collar Arbitration Decision

Dear Fellow Town Board Members,

Attached please find the recent arbitration decision stemming from a CSEA Blue Collar bargaining unit grievance concerning pay during the COVID-19 state of emergency period. As you can see, the arbitrator decided in the town's favor.

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In the Matter of Arbitration

between

Town of West Seneca

and

CSEA Local 815, Unit 6713-01

Opinion

and

Award

PERB Case No. A2020-080

* *

This arbitration was heard on October 15, 2020, at the Community Center in West Seneca, New York. The undersigned was appointed to arbitrate the controversy through the procedures of the New York State Public Employment Relations Board. Upon submission of post-hearing briefs by both sides on December 15, 2020, the record was closed.

APPEARANCES

For the Employer:

Heather A. Giambra, Attorney
Brian Adams, Superintendent of Highways
Gary A. Dickson, Town Supervisor

For the Union:

Jason Jaros, Attorney
Brian Cummins, President

THE ISSUE

Did the Town violate Section 4.9(i) of the Collective Bargaining Agreement (CBA) when it failed to pay members of the bargaining unit the overtime rate set forth in that section for all hours worked from approximately March 17, 2020, through June 15, 2020, the period that was declared a state of emergency by the Town? If so, what shall the remedy be?

BACKGROUND

The facts of this controversy are undisputed. On March 16, 2020, Town Supervisor Gary Dickson declared a State of Emergency "due to emergency conditions produced by public health crisis caused by the Coronavirus Disease (COVID-19)." A news release issued the same day stated that the Emergency Declaration was "for the purpose of broadening the Town's access to resources during the Coronavirus health crisis." The State of Emergency lasted until June 15, 2020. During this period, various groups of bargaining-unit members were affected in different ways. Some employees continued to work their normal shifts. Some employees, especially those based in buildings and parks that were closed, worked only a fraction of their scheduled shifts. And some employees, particularly those in the Highway Department, worked every other week, largely in response to a directive from the Governor requiring municipalities to thin out their workforces. All employees were paid their regular salaries at straight time, and all work was performed within the employees' regular shift schedules.

On April 27, 2020, the Union filed a grievance stating as follows:

> On March 16, 2020, the Town Supervisor Gary Dickson declared a State of Emergency. The Town has not paid the affected employees the proper rate of wages according to the CBA.

The contractual provisions at issue are found in Section 4.9 of the CBA, titled "Overtime Callouts and Emergencies." Paragraph (i) of that section reads as follows:

> If the Town (the Town Highway Superintendent) declares an emergency, thereby implementing the provisions of Subparagraph (a) above, the Town will pay time and one-half (1-½) for all hours worked during the emergency, except for Sundays for which the employees are paid at double time. If an employee works more than sixty (60) hours during the same continuous emergency, the employee will be paid double time for all hours worked in excess of the first sixty (60) hours during that same continuous emergency. In any event, however, there will be no pyramiding of overtime rates.

The foregoing reference to Subparagraph (a) clearly invokes the following portion of that provision:

> Overtime work shall be voluntary, and there shall be no discrimination against any employee who declines to work overtime, except in case of emergency. In such a circumstance, the Department Head is authorized to direct employees to work overtime for reasonable periods. Emergency shall mean snow control, ice control, flooding, and other similar acts of nature.

The record contains evidence of four prior declarations of emergency by the Town, specifically by the Town Supervisor, dating back to 2001. In February 2001, an emergency was declare due to ice-jam flooding. On Christmas Eve 2001 or 2002, an emergency was declared because of a major snowstorm. In October 2006, an emergency was declared during the "October Surprise," a heavy snowfall that brought down many trees and power lines. And in November 2014, an emergency was declared during the "Snovember" storm that dropped prodigious amounts of snow on the Town. In all these cases employees received overtime pay pursuant to Section 4.9(i) of the CBA.

The CBA contains an Appendix A, executed on January 18, 2018, whose "intent and purpose" is to "set forth the basic agreement covering wages and terms and conditions of employment for the Sanitation Department to be observed between the parties." Appendix A, at Section 1.3, further provides that "any and all references to Sanitation, Sanitation Department or Sanitation Service in the principal body of the Blue Collar Contract shall be deemed deleted and all of the contract terms therein will only apply to the Highway Department employees and the Buildings and Grounds Department employees." Appendix A contains no language similar to that in Section 4.9(i) of the "principal body" of the CBA.

POSITION OF THE UNION

The Union contends that the language of Section 4.9(i) of the CBA is crystal clear in requiring the Town to pay overtime for all hours worked during a declared emergency. Hence

the Town's refusal to do so in this case constitutes a violation of that provision. Further, Section 24.3 of the CBA provides that the Arbitrator is without authority "to add to, amend, modify or delete any of the provisions" of the CBA. Thus the Agreement must be enforced as written.

Although the Town states that the provision at issue requires that an employee be directed to work overtime to receive premium pay, argues the Union, Section 4.9(i) makes no mention of employees having to be so directed. Neither is there anything in Section 4.9(a) to suggest that employees shall be paid overtime only if they are directed to perform overtime. Moreover, although the CBA states that the overtime provision is triggered when an emergency is declared by the Highway Superintendent, pervious emergencies, during which employees were paid overtime, were declared by the Town Supervisor.

The Union further asserts that there is no requirement in the CBA that an emergency declaration be weather-related, as the Town suggests. Section 4.9(a) defines an emergency as "snow control, ice control, flooding, and similar acts of nature." An act of nature has been defined to include "all natural phenomena that are exceptional, inevitable, and irresistible, the effects of which could not be prevented or avoided by the exercise of due care or foresight." By this definition the COVID-19 pandemic is clearly a natural phenomenon.

In addition, contends the Union, there is no requirement in the CBA that overtime pay applies only to employees whose duties during the emergency are addressing the cause of the emergency. During previous states of emergency, all unit members who worked received premium pay, regardless of whether their work addressed the causes of the emergencies. An emergency is an emergency, regardless of the nature of the work actually performed or the impact on unit members. The only triggering mechanism is that an emergency is declared by the Town.

For all of the foregoing reasons, the Union urges that the grievance be granted and the affected employees receive their overtime premiums.

POSITION OF THE TOWN

The Town contends, in summary, that there is no circumstance under which employees in the Sanitation Department are ever entitled to overtime pay under Section 4.9(i) of the CBA; and that in any event such pay is required only when employees are called upon to work overtime in order to respond to an emergency situation. These conditions did not obtain in the present case.

Specifically, the Town argues that the language of Section 4.9(i) does not apply to Sanitation Department employees. By the express terms of Appendix A, nothing in the principal body of the CBA applies to these employees. The terms and conditions of employment for Sanitation Department employees are set forth in Appendix A, which has no provision for special overtime pay during emergencies. The only time a Sanitation employee has received such pay is when the Sanitation Department was shut down and the employee was assigned to the Highway Department. In the present case, employees in the Sanitation Department continued to perform their regular duties.

The Town further asserts that the plain language of the CBA does not require special pay unless employees are called upon to work overtime during an emergency. Section 4.9(i) is by its terms triggered when an emergency declaration implements the provisions of Section 4.9(a), under which special overtime pay is due. Section 4.9(a) relates specifically to overtime, and the relevant language permits the Town to mandate overtime, in exchange for which employees receive premium pay. If the mere declaration of a state of emergency triggers the obligation for premium pay, regardless of whether any overtime is actually

worked, the phrase "thereby implementing the provisions of Subparagraph (a) above" would be rendered meaningless.

In addition, argues the Town, the COVID-19 pandemic does not fit the definition of an emergency as used in the CBA. Under the CBA, emergencies comprise snow control, ice control, flooding, and other similar acts of nature. By this language the "other" acts of nature are in a class with the weather-related events specified. This class does not contemplate illness, disease, pandemic or plague. Indeed, it is questionable whether the pandemic is even an "act of nature."

The Town further notes that in all prior instances in which Section 4.9(i) has been triggered several conditions prevailed that are not present here. These included a weather-related emergency; a need for employees to respond to the emergency; a significant amount of extra work by employees, far beyond their normal volume; conditions of work that were difficult and stressful; and a relatively short duration. All of these are consistent with the interpretation that special pay is required only when employees are called upon to respond to the emergency and work extra hours. In this regard it is also notable that the provision of special pay is included in a section with "Overtime Callout" in the title.

Finally, asserts the Town, adopting the Union's interpretation of the language would lead to an unreasonable, harsh, nonsensical, and inequitable result.

For these reasons, the Town urges that the grievance be denied in its entirety.

FINDINGS AND OPINION

The task in this grievance is to apply the language in Paragraph 4.9(i) to the undisputed facts of the case. As it is well established in labor arbitration that language in a CBA should be interpreted as a whole, Paragraph 4.9(i) must be read in the context of the broader purpose of Section 4.9. By the Union's construction, if an emergency is declared,

everyone is on overtime for all hours worked during the full period of the emergency, whether or not any overtime is actually worked. Unfortunately for the Union's position, however, there is much language in Section 4.9 that is at variance with this construction.

First of all, it must be noted that Section 4.9 is titled "Overtime Callouts and Emergencies." There is thus the strong suggestion that everything in the section has to do with overtime callouts, including those that are occasioned by an emergency. The clear purpose of the clause as a whole is to tell us what happens generally when overtime is needed, and more specifically when it is needed because of an emergency.

Then in Paragraph 4.9(i) itself, the language refers to an emergency that is declared by the Town Highway Superintendent. Now on the record it cannot be said that an emergency called by the Town Supervisor is *ipso facto* not covered by the paragraph, but the fact that the Town Highway Superintendent is invoked in the language surely tells us something about the kind of emergency that the drafters of the language contemplated. If what they had in mind is an emergency over which the Highway Superintendent had some special purview, then that would seem to suggest a clear distinction between a major snowstorm and a pandemic. Put otherwise, whoever declares the emergency, it seems clear that the impact is going to be focused on the Department overseen by the Highway Superintendent.

Third, as the Town points out, Paragraph 4.9(i) refers not only to the declaration of an emergency, but also *thereby* to the implementation of Paragraph 4.9(a). Yet everything in Paragraph 4.9(a) refers to *overtime work* and the rules surrounding it. Clearly overtime work refers to work beyond the employee's regular hours. If there is no overtime work, then it cannot be said that Paragraph 4.9(a) has been "implemented," nor can it be said that the payment language of Paragraph 4.9(i) has been triggered.

Fourth, Paragraph 4.9(a) contains a definition of an emergency as it is contemplated in Section 4.9. Emergencies include snow control, ice control, flooding, and "other *similar* acts of nature" (emphasis added). Here the Union makes the point that the pandemic is an act of nature, and there is surely appeal to that argument, but it is hard to see how this act of nature is *similar* to the other acts of nature specified in the language. If a pandemic is said to be similar to a snowstorm, an ice storm, or a flood, it is hard to see what kind of declared emergency would ever be excluded from the reach of Section 4.9. It is hardly accidental, moreover, that the emergencies set forth in the language are ones that will occasion the need for employees to work well beyond their normal hours.

Beyond the clues contained in the specific language cited above, the Town's allusion to the overarching point of Section 4.9 is persuasive. As noted, its purpose is to set forth rules for overtime callouts. The primary rule is that overtime is voluntary, with an exception carved out for emergency situations, in which case overtime may be mandated. However, the *quid pro quo* for allowing management to mandate overtime is that employees forced to work overtime during an emergency get extra pay for not only their overtime hours but also their regular hours. But the antecedent to all this is that there is an overtime callout and overtime is worked. The idea is not simply to pay additional money to employees, but to compensate them for the extra burdens they are asked to shoulder, on behalf of the citizens of the Town, during an emergency.

The Union is clearly correct to point out that the CBA precludes the Arbitrator from adding to, subtracting from, or modifying the terms of the contract. The construction here, however, does none of these things, but rather applies the language of the contract itself to the unanticipated circumstances involved in this grievance.

For these reasons, it is the finding here that the emergency declared because of the COVID-19 pandemic was not an emergency within the meaning of its use in Section 4.9 of the CBA. Given this finding, the question of whether Paragraph 4.9(i) applies at all to Sanitation workers is moot and need not be addressed here.

AWARD

The Town did not violate Section 4.9(i) of the CBA when it failed to pay members of the bargaining unit the overtime rate set forth in that section for all hours worked from approximately March 17, 2020, through June 15, 2020, the period that was declared a state of emergency by the Town. The grievance is denied.

STATE OF NEW YORK} SS:
COUNTY OF ERIE }

I, Howard G. Foster, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my award.

December 28, 2020 Howard G. Foster