

1st Circuit tosses \$8.3M awarded in Wage Act case

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differential, the officers alleged in their lawsuit that deduction of the 10-percent administrative fee resulted in a lower payout for details than what they bargained for and thus violated the Wage Act.

The city countered that the provision unambiguously did not include the additional wage enhancements, and, accordingly, the officers still received a higher payout than contemplated by the CBA.

A U.S. District Court judge found the relevant provision ambiguous. After considering extrinsic evidence, the judge adopted the officers' interpretation of the provision and ruled that they were entitled to multiple damages and attorneys' fees.

He additionally found that even if the city had overpaid the officers, it violated the Municipal Finance Law, G.L.c. 44, §53C, by deducting an administrative fee from their wages.

But the 1st Circuit reversed. "In other sections of the CBA, wage augments are explicitly listed when they are applicable to a given rate," Judge Lara E. Montecalvo wrote, regarding the interpretation of the detail pay provision. "When reading the contract as a whole, it becomes clear that the Detail rate does not include any wage augments beyond the night differential. The term 'maximum patrolman's rate of pay including night differential' entitles an officer to the highest base salary for a patrolman plus the night differential wage augment and nothing more."

The 1st Circuit panel also found that even after deducting the administrative fee, the officers had been paid \$11 more an hour than the CBA required.

The 20-page decision is *Owens, et al. v. City of Malden*, Lawyers Weekly No. 01-213-23. The full text of the ruling can be found at masslawyersweekly.com.

Abuse of the Wage Act?

Pointing out that a detail board comprised entirely of union officers had set their rate of detail pay themselves for years, the city's attorney, Barry J. Miller of Boston described the case as an abuse of the Wage Act and the treble damages provided for under the statute.

"The city is grateful that the 1st Circuit rejected the plaintiffs' claims in their entirety and corrected an erroneous judgment that would have cost taxpayers at least \$8.3 million," he said.

Boston attorney Joseph A. Padolsky who represented the officers, could not be reached for comment prior to deadline.

But Joseph L. Sulman, who handles labor and employment disputes involving police officers and other public employees, said the case provides a good lesson that contracts need to be drafted carefully.

Owens, et al. v. City of Malden	
THE ISSUE	Were Malden police officers entitled to an \$8.3 million Wage Act judgment based on a 10-percent "administrative fee" the city deducted from wages they received for paid details?
DECISION	No (1st U.S. Circuit Court of Appeals)
LAWYERS	Joseph A. Padolsky of Louison, Costello, Condon & Pfaff, Boston (plaintiffs) Barry J. Miller of Seyfarth Shaw, Boston (defense)

"You cannot just hope that a court will find ambiguous language and then add or reformulate terms to your favor," the Waltham lawyer said. "If contract language

Gary G. Nolan of North Chelmsford, who represents police unions, said the union's original claims were legitimate, since taking a 10-percent fee out of officers' pay rather than charging it to a third-party vendor for whom they were performing the detail is clearly wrong.

Still, he, too, said parties to a CBA, particularly in the public sector, should not rely on courts to piece together the

Details may be requested either by a city department or a private third party that has contracted for such services.

The Municipal Finance Law allows the city to charge an additional 10-percent administrative fee to the private third parties.

A detail board made up of representatives and members of the officers' unions maintains exclusive direction and control of the organization of the detail process and calculates the detail pay rate without the city's input.

The CBA dictates that compensation for details is "one and one half times the maximum patrolman's rate of pay including



You cannot just hope that a court will find ambiguous language and then add or reformulate terms to your favor. If contract language is clear, then it means what it says.

— Joseph L. Sulman, Waltham



meaning and intent of contractual provisions negotiated by different people, often over decades.

Likening public safety CBAs to patchwork quilts, Nolan described them as containing numerous seemingly unrelated pieces, old and new, stitched together to make a whole.

"Asking a court to discern what one piece means by looking at another — particularly without evidence of the parties' intent — can be a bit of a legal fiction, and the parties may very well end up with an interpretation that neither intended," he said. "Nobody wants that."

Ambiguous provision?

The CBA in question allows officers to provide, on a voluntary basis, public safety services during off-hours in return for additional compensation.

night differential."

Additionally, Article 30 of the CBA, which describes all the factors that contribute to an officer's maximum compensation, states that in addition to a base salary, the officer may be entitled to night differential and other wage augments such as hazard, longevity and educational incentive pay.

For purposes of the detail provision, the detail board calculated the "maximum patrolman's rate of pay including night differential" to include a maximum base salary, the night differential, and the other three wage augments.

To account for the administrative fee associated with private details, the board would reduce its calculation by 10 percent and set that number as the detail rate.

Then, when invoicing third parties, the city would add 10 percent on top of that rate in order to collect the city's

administrative fee.

Shortly before filing suit, the officers' unions started investigating whether application of the administrative fee for private details reduced officers' overall wages.

A few days later, the officers brought a class action in U.S. District Court alleging that the 10-percent deduction violated the Wage Act.

Following a bench trial, Young ruled that the contract provision in question was ambiguous and entitled the officers to the rate they claimed and that the city improperly deducted the administrative fee from their wages.

Including treble damages and prejudgment interest, the award totaled more than \$8.3 million plus attorneys' fees and costs.

The city appealed.

Judgment reversed

Reversing the judgment, the 1st Circuit panel found that the provision regarding detail compensation was, in fact, unambiguous in the city's favor.

The panel drew that conclusion by relying on the principle of *expressio unius est exclusio alterius*, which stands for the proposition that when parties list specific items in a document, any item not listed is thought to be excluded.

In support of that conclusion, Montecalvo noted that another provision in the CBA, Article 16, §3, which sets the pay rate for officers who go to court as witnesses, uses essentially identical language to the detail pay provision.

Meanwhile, she noted that the drafters took care to write an additional provision to explicitly fold Quinn Bill educational incentives into court time for those officers who qualified.

The officers' interpretation of the contract would render the command to include educational incentives meaningless, she said.

"Standing alone, perhaps the contract term would conjure up enough ambiguity to necessitate a turn to extrinsic evidence, but '[a]ccepted canons of construction forbid the balkanization of contracts for interpretive purposes,'" Montecalvo said, quoting *Smart v. Gillette Co. Long-Term Disability Plan*, a 1995 1st Circuit decision. "When reading the contract as a whole, it becomes clear that the Detail rate does not include any wage augments beyond the night differential."

The panel also found that even after a 10-percent deduction from the officers' interpretation of the hourly rate for details, the plaintiffs were paid what the CBA required.

"As such, there is no Wage Act violation for an improper reduction of wages," Montecalvo wrote. [MLW](#)

