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*In the Matter of the Arbitration between* \*

NEPBA, LOCAL 19 \*

-AND- \*

TOWN OF SHREWSBURY, MA \*

AAA CASE NUMBER 01-17-0003-5171 \*

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ARBITRATION OPINION & AWARD

GRIEVANCE: OVERTIME

DATE: JANUARY 26, 2018

**INTRODUCTION**

The undersigned Arbitrator, mutually selected by the above-named parties in accordance with the terms of their collective bargaining agreement and appointed by the American Arbitration Association, held a hearing on November 19, 2017, at the Shrewsbury Town Hall, 100 Maple Avenue, Shrewsbury, Massachusetts. Gary Nolan, Esq., represented the Union and [REDACTED] Esq., represented the Town. The Arbitrator received the parties' briefs on December 27, 2017.

**STIPULATED ISSUES**

The parties stipulated to the following issues:

Whether the Town violated the collective bargaining agreement when it prohibited the grievants from working a day (7:00 A.M. to 3:00 P.M.) patrol overtime shift following an overnight patrol regular shift (11:00 P.M. to 7:00 A.M.)?

If so, what shall be the remedy?

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**RELEVANT CONTRACT PROVISIONS**

The parties' July 1, 2016 through June 30, 2019 collective bargaining agreement provides in pertinent part (JX-1):

**ARTICLE 6 – GRIEVANCE PROCEDURE**

A. A grievance is hereby defined as any complaint, misunderstanding, or dispute arising as to the interpretation or application of any of the provisions of this Agreement. It is mutually agreed that any such complaint shall be settled in the following manner:

\* \* \* \* \*

**STEP THREE**

If the grievance cannot be resolved at the previous step, then either party may within thirty (30) days notify the other that it invokes grievance arbitration by filing a Demand for Arbitration with the American Arbitration Association. Any grievance arbitration proceeding shall be conducted in accordance with the Voluntary Labor Arbitration Rules of the American Arbitration Association then in effect.

The jurisdiction of such arbitrator shall be limited strictly to the interpretation and application of the terms of this Agreement. The arbitrator shall arbitrate only the questions submitted for arbitration. The arbitrator shall not have any authority to alter, modify, or amend this Agreement. The decision of the arbitrator within the scope of the arbitrator's jurisdiction shall be final and binding upon the parties. The fees and expenses of the arbitration proceeding shall be shared equally by the parties to this Agreement.

**ARTICLE 7 – WORK SCHEDULE AND OVERTIME**

A. The regular hours of duty of the members of the Police Department of the Town of Shrewsbury shall not exceed a yearly average of 37 1/3 hours per week except in the case of public emergency or of any unusual demand for services of the Police in Town.

\* \* \* \* \*

D. Except in case of public emergency, or any unusual need for police services in the judgment of the Chief of Police, an officer's hours shall be scheduled so that he shall have four (4) consecutive full days on and two (2) consecutive full days off in a period of six (6) consecutive days.

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\* \* \* \* \*

**G. Unscheduled Overtime:**

When shifts become vacant, supervisors will use the following procedure:

1. A supervisor will fill out a "shift vacancy report" using the overtime board as it currently stands.
2. Officers will be offered the shift based on seniority, location on overtime board, and availability.
3. Patrolmen will fill for Patrolmen.
4. Specialized positions will be filled at the discretion of the Chief of Police.
5. Special assignments will be filled at the discretion of the Chief of Police or the Supervisor in charge of the assignment.
6. When an officer accepts an overtime shift, the date, shift, and supervisor's initials will be placed in the appropriate box.
7. At no time shall an officer be more than three (3) boxes behind the lead officer's box.

**ARTICLE 12 -- SPECIAL PAID DETAILS**

- K. Except with the permission of the Police Chief, or his designee, no employee of this bargaining unit shall be permitted to work more than forty (40) hours of the combined total of special paid details and overtime within a (1) week period. In addition thereto, no employee of the bargaining unit shall be permitted to work more than eighteen (18) hours in a twenty-four hour period.

**BACKGROUND**

The Town of Shrewsbury's Police Department allocates voluntary overtime and detail opportunities to officers based on their seniority, placement on the board that tracts who is next entitled to first refusal and availability to accept the assignment. The Town of Shrewsbury Police Department has had a long-standing past practice that officers working the overnight/midnight shift are marked on the board as "Not Available" (NA) for a day shift overtime opportunity immediately following their shift. The Union did not contest this practice until 2017, when the

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instant grievance was brought, following the April 4, 2017 ratification of the parties' July 1, 2016 through June 30, 2019 collective bargaining agreement.

While negotiations for the 2016-2019 contract were underway, the Union severed its relationship with its former union, the International Brotherhood of Police Officers, Local 426, and affiliated with the New England Police Benevolent Association. Negotiations were temporarily put on hold while this transition was made, but resumed once the NEPBA became the authorized representative of "All full-time Police Officers employed by the Town." (Article 1, Definition of Employee Unit, JX-1, p. 2.) The parties ultimately reached agreement and the new contract was ratified. The subject of voluntary overtime was discussed, but did not lead to any language changes.

During their contract talks, the parties did negotiate changes to Article 7, H, "Ordering an Officer to Duty." Union President David Faucher testified that the Union sought the new language because there was a problem with officers being ordered in too often. He said that the Union sought language that provided that officers could not be ordered in to cover a day shift if they had worked an overnight shift, but that they did want to preserve the opportunity to volunteer to work a day shift following an overnight shift.

The parties did not make any changes in Article 7, G, "Unscheduled Overtime," or voluntary overtime. According to Faucher, the parties briefly discussed the longstanding past practice not allowing officers who worked the overnight shift to volunteer to work the day shift. Chief of Police James Hester said that the past practice of not allowing contiguous overnight-daytime shifts grew out of safety concerns for the officers and the community. The Union ultimately decided not to negotiate but, according to Faucher, it did inform the Town that it would probably grieve the past practice because there was clear contract language going back to at least

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the 2004-2007 Agreement that provided that officers could work no more than 18 hours in 24 and as far as the Union was concerned, this language was clear and unambiguous and constituted the only cap on an officer's availability for overtime assignments.

On April 16, 2017, a day-shift became available. Officers Kevin Caviston, Sean Maynard and Lawrence Napolitano, all of whom had worked the midnight shift, were marked as NA for this overtime opportunity. On April 19, the three filed a grievance, objecting to the fact that the shift went to an officer below them in seniority on the vacancy board. The grievance stated in pertinent part (JX-3):

The current contract between the Town of Shrewsbury and the New England Police Benevolent Association Local 19 dated July 1, 2016 to June 30, 2019 does not indicate that an Officer cannot voluntarily elect to work a day shift after working a midnight shift. Article 7 Section G #2 states that officers will be offered the shift based on seniority, location on the overtime board, and availability. Availability is restricted by Article 12, Section H #12 which states that no employee of the bargaining unit shall be permitted to work more than eighteen (18) hours in a twenty-four (24) hour period. Therefore, marking officers as "Not Available" violated the contract as the contract is silent of the topic of Officers electing to work a day shift after a midnight shift.

The grievants offered that a reasonable resolution would be that all officers be deemed eligible to work all shifts.

Chief James J. Hester, Jr. denied the grievance, writing in pertinent part (JX-5): "I have discussed this matter with my division commanders and we are all in agreement that this long standing past practice is both in the interest of officers' safety and public safety and will not be altered." At the arbitration hearing, Chief Hester stated that the past practice has been in effect for the 30 years that he has been with the department. He said that the nature of day shift work, such as patrol duties, responding to 911 calls, and so forth, make him not want to change the practice. He noted that he had less concern about officers on other shifts working consecutive shifts because

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there was less chance that their sleep patterns would be disturbed. Chief Hester acknowledged that officers coming off a midnight shift can be ordered to report to court duty, which they would do on an overtime basis and even day shift patrol duty. However, under the contract now in effect, the officer could not be required to work past 12 noon. He also acknowledged that it was common for an officer working a midnight shift to go directly to an 8-hour detail.

In support of his position, Chief Hester cited a March 30, 2008 incident in which an officer fell asleep while driving a police cruiser and hit a light pole, causing damage to the pole and the cruiser. This officer had worked four consecutive midnight shifts prior to the shift on the evening of March 30 and had also worked an 8-hour paid detail on March 27, from 7:00 A.M. to 3:00 P.M. The offending officer was denied paid details, overtime shifts and shift swaps for a period of approximately two weeks and required to take a remedial driving course conducted by the Massachusetts State Police.

### **POSITIONS OF THE PARTIES**

#### **The Union**

The Union contends that the Town's denial of overtime is unreasonable and a violation of the parties' collective bargaining agreement. Asserting that it is well established that if contract language is clear and unambiguous, it will be given its plain and ordinary meaning and arbitrators will refuse to consider evidence of past practice that is inconsistent with that language. According to the Union, the contract clearly states the circumstances under which an officer becomes ineligible for overtime shifts. In addition, Article 12, Section K addresses specifically the amount of overtime an officer can work before the Chief's permission is required and limits to eighteen (18) the number of hours an officer can work in any 24-hour period. While the contract requires

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that overtime be otherwise distributed equitably, the Town did, through bargaining, reserve the right to deny such overtime in certain specifically expressed instances. The denial of overtime to officers who worked an overnight shift was not one of those circumstances.

The Union asserts that it has not waived its right to enforce the clear language of the contract. According to the Union, it is a matter of arbitral doctrine that a party's failure to grieve past violations of clear contract language does not bar that party from doing so at a future time, provided that the party first puts the violator on notice that it intends to insist on compliance with the clear language of the contract going forward. The Town's contention that the Union waived its right to enforce the contract's overtime provision when it ratified the current contract is misplaced. During the negotiations, the Union made clear that it felt the Town's interpretation and application of the collective bargaining agreement was incorrect and that it would grieve the next violation. Thus, the grievance was filed only after the successor agreement was finalized and the Town denied the three grievants the opportunity to work the daytime shift on April 16 and instead gave it to a more junior officer on the overtime board in violation of the clear language of the contract.

The Town's actions were arbitrary and a violation of the contract's clear and unambiguous overtime provisions, the Union asserts. Although it argues that the denial of overtime to officers assigned to the overnight shift was prompted by safety concerns, the Town presented no evidence to support this assertion, other than a single incident of an officer who fell asleep at the wheel and damaged a police cruiser and town property. According to the Union, this officer's hours of work prior to the accident were in excess of what would result from proper application of the contract's overtime provisions.

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Asserting that the grievance should be sustained, the Union asks that the Arbitrator order that all affected members be made whole, with interest. It also requests that she retain jurisdiction as to the implementation of her award and remedy.

#### The Town

The Town contends that the Union has not met its burden to establish a contract violation. Acknowledging that it is the case that the unscheduled overtime clause does not expressly define all possible scenarios involving overtime "availability" for officers, the Town argues that it is clear that the parties have historically understood that the clause grants management the right to disqualify officers based on officer and public safety concerns related to this fact pattern. Additionally, the overtime constraint has not resulted in any lost earning opportunities, as the officer working the midnight shift maintains his/her position on the overtime board for the next overtime opportunity.

The Town asserts that it has established the existence of a long-standing and unambiguous past practice with respect to its prohibition on the day shift patrol overtime eligibility following an overnight shift and eligibility for an overnight shift preceding a regularly scheduled day shift. It cites the testimony and written exhibits it presented at the arbitration hearing that establish the Town's long-standing practice that an officer is "not available" for a voluntary overtime day shift if he or she worked the overnight shift. Not only has this practice existed for ten years and over three collective bargaining agreements, but the "Overtime Shift Fill List" (JX-8) and the "Overtime Board" (JX-9) establish that the union has been an active and knowing participant in the process all along and yet never grieved it.

According to the Town, its rejection of the Union's inquiry about the past practice during negotiations for the successor agreement that is Joint Exhibit 2 further supports its contention that



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the grievance should be denied. The Town asserts that at no point during the pendency of this matter has the Union claimed that the overtime availability process is not embodied in the agreement and past practice. As is its right, the Union made an inquiry about the process during negotiations, but this inquiry was not intended to clarify ambiguous language or murky practice. The purpose of the inquiry was to gut management's ability to review and approve overtime requests and to mandate overtime without consideration for officer and public safety. This grievance, filed shortly after the parties reached a successor contract, essentially mirrors the change the Union was seeking to gain through collective bargaining. It is a well-established principle that a party should not be allowed to gain at arbitration that which it could not obtain in negotiations. The Union's grievance should be denied because the Town's denial of day patrol overtime did not violate the collective bargaining agreement and was consistent with at least ten years of established past practice.

#### OPINION

The question the parties presented at arbitration was whether the Town violated the collective bargaining agreement when it prohibited the grievants from working a day (7:00 A.M. to 3:00 P.M.) patrol overtime shift following an overnight patrol regular shift (11:00 P.M. to 7:00 A.M.). As the record of the hearing established, the Town has a 30-year past practice that officers who work the 11:00 P.M. to 7:00 A.M. overnight/midnight shift are automatically listed as "not available" to work a contiguous daytime patrol shift on a voluntary overtime basis. The question for the arbitrator, therefore, is whether the practice is, indeed, binding.

It is a well-established principle of contract interpretation that clear and unambiguous language overrides a past practice, no matter how longstanding the practice may be. It is also a

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well-established principle that the failure of a party to grieve a perceived contract violation in the past does not preclude it from doing so at some later point in time.

In the present case, the parties' contract provides that when a shift becomes vacant, officers will be offered the opportunity to fill that vacancy based on three criteria: (1) seniority, (2) location on the overtime board and (3) availability. The Town does not dispute that the grievants had greater seniority and a higher location on the overtime board than the officer who was awarded the April 16 day shift. It insists, however, that the three were "not available" because they had worked the immediately preceding midnight shift.

Chief Hester testified that he was not open to changing the practice because he believed doing so would endanger officer and public safety. He cited a 2008 accident in which an officer fell asleep at the wheel and crashed his cruiser into a light pole, causing damage to the cruiser and the pole. This single incident, however, does not establish that eliminating the past practice would endanger officer and public safety, in part because a single incident neither establishes nor justifies a past practice and in part because the fact pattern of the 2008 accident does not reflect the number of shifts and details the grievants would have worked, had one of them been allowed to fill the April 16 day shift vacancy. The officer involved in the 2008 accident had worked four consecutive midnight shifts prior to the March 30 accident plus an 8-hour detail on March 27 from 7:00 A.M. to 3:00 P.M. The officer acknowledged that he had violated department policy by not informing his supervisor that he was too tired to adequately perform his March 30 duties. Chief Hester cited no other incidents that informed his opinion regarding the need to preserve the past practice and the Town offered no studies or other data to support the legitimacy of its officer and public safety rationale for maintaining the practice.

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The parties' Agreement sets forth a number of circumstances in which an officer may be deemed not available for assignment to an overtime opportunity. They need not be listed here. The significant fact is that working the midnight shift is not one of them.

Arbitrators have long held that a party seeking to end a past practice and enforce what it deems as clear and unambiguous contract language must give notice to the other party before seeking enforcement. In its brief, the Town described the parties' discussion of Article 7, G. during negotiations as an "inquiry." It was more than a simple inquiry. I find credible Union President Faucher's testimony that he clearly informed the Town of the Union's view that the contract was clear and that if the Town continued with its past practice of marking as "not available" officers who had worked the midnight shift, the Union would file a grievance. Thus, the Union did give the Town the notice required to then seek enforcement of the contract if future violations occurred. Such a violation occurred on April 16, when all three of the grievants were listed as not available for working the day patrol overtime shift that was available.

Contrary to the Town's contentions, the Union has met its burden to establish a contract violation. Evidence presented at the November 19, 2017 arbitration hearing establishes that the Town violated the collective bargaining agreement when it prohibited the grievants from working a day (7:00 A.M. to 3:00 P.M.) patrol overtime shift following an overnight patrol regular shift (11:00 P.M. to 7:00 A.M.).

Going forward, the Town shall deem all officers eligible to work all shifts unless made ineligible by specific contract language. For example, if being assigned said shift would lead to the officer working more than 18 hours in a 24-hour period, the officer would be unavailable pursuant to Article 7, Section K.

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Further, the Town shall make whole the grievant most likely to have successfully bid for the April 16 day patrol overtime shift, as well as any officers who have subsequently lost an overtime opportunity after being marked as "not available" merely because they had worked the midnight shift prior to a day patrol overtime shift. As with the grievants, for any single overtime opportunity that may have been improperly denied after April 16, 1997, only one officer is entitled to be made whole. I recognize that had the Town followed the contract and not its past practice, additional senior officers might have become eligible for day shift overtime shifts sooner, but I do not believe that it is in the interests of either party to now litigate a series of potential moves on the overtime board.

The Union's request for interest is denied. Except in compelling circumstances, such as intentional discrimination or flagrant disregard for potential harm, arbitrators rarely award interest as part of a make-whole remedy. The circumstances of this case do not reach that standard. While it is true that the Town violated the parties' contract even after it was put on notice by the Union, the evidence does not establish that it intentionally acted in bad faith.

As requested by the Union, I will retain jurisdiction for a period of 60 days from the date of this Opinion and Award for the limited purpose of resolving any disputes that may arise from the implementation of the Award.

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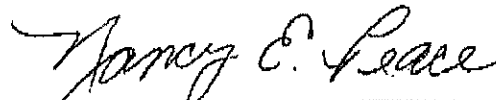
**AWARD**

The Town violated the collective bargaining agreement when it prohibited the grievants from working a day (7:00 A.M. to 3:00 P.M.) patrol overtime shift following an overnight patrol regular shift (11:00 P.M. to 7:00 A.M.).

Going forward, the Town shall deem all officers eligible to work all shifts unless made ineligible by specific contract language.

Further, The Town shall make whole the grievant most likely to have successfully bid for the April 16 day patrol overtime shift, as well as any officers who have subsequently lost an overtime opportunity after being marked as "not available" merely because they had worked the midnight shift prior to a day patrol overtime shift. As with the grievants, for any single overtime opportunity that may have been improperly denied, only one officer is entitled to be made whole.

As requested by the Union, the Arbitrator will retain jurisdiction for a period of 60 days from the date of this award for the limited purpose of resolving any disputes that may arise from the implementation of this award.



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Nancy E. Peace, Arbitrator  
January 26, 2018