

---

In the Matter of the Arbitration Between

CITY OF CARIBOU

-and-

Grievance:  
Vacation accrual

NEW ENGLAND POLICE BENEVOLENT  
ASSOCIATION, LOCAL 605

---

Arbitrator: James M. Litton, Esq.

Appearances:

Anne M. Freeman, Esq. - for the City of Caribou

Peter J. Perroni, Esq. - for the New England Police  
Benevolent Association, Local 605

OPINION AND AWARD

Stipulated Issue:

Is the City violating the collective bargaining agreement by the manner in which it is calculating the vacation accrual of bargaining unit members? If so, what shall the remedy be?

Relevant Provision of the Parties' 2013-2015 contract:

ARTICLE 8 - HOURS OF WORK - WORK WEEK -  
WAGES

Section A

The normal work week for all employees covered by this Agreement shall be forty (40) hours per week which shall be guaranteed each week provided the employee reports for work each day of his/her schedule. A shift shall be defined as 8 hours worked within a 24-hour day.

...

Relevant Provisions of the Parties' 2016-2018 contract:

ARTICLE 8 - HOURS OF WORK - WORK WEEK -  
WAGES

Section A

The normal work week for all employees covered by this Agreement shall be forty (40) hours per week which shall be guaranteed each week provided the employee reports for work each day of his/her schedule. A shift shall be defined as 8 hours worked within a 24-hour day.

...

Section AA

Effective May 6, 2016, the normal work week for all employees covered by this Agreement shall be an average six-week cycle of forty-two (42) hours per week which shall be guaranteed each week provided the employee reports for work each day of his/her schedule. A shift shall be defined as twelve (12) hours worked within a 24-hour day.

...

The regular work tour shall be twelve (12) hours for those members assigned to a patrol function, unless changed by the Chief of Police. The two (2) daily work shifts shall be: 6:00AM to 6:00PM and 6:00PM to 6:00AM.

...

This schedule (Section AA) shall have a one (1) year trial period the parties shall meet and confer on any issues with the schedule and if the parties wish to continue the twelve (12) hour schedule. If in the year following the trial period, with a minimum

30-day notice to the union, the city finds it necessary to discontinue this program, the city shall have the right without bargaining, after consultation with the union, to revert back to the schedule listed in section A. The Parties agree to meet every six (6) months during the trial period to discuss any issues that may arise with the schedule.

#### Section 10. Holiday Pay

...

The parties agree to continue the current practice of all holiday pay staying at 8 hours per day for officers not on shift on the actual holiday.

#### ARTICLE 12 - LEAVES OF ABSENCE

...

##### Section 4. Vacation

The following vacation schedule is available to regular full-time employees:

After six months of service the employee will receive 1 workweek.

After 1 year of service the employee will receive 1 additional workweek.

...

#### Relevant Provision of the Parties' 2019 contract:

#### ARTICLE 8 - HOURS OF WORK - WORK WEEK - WAGES

##### Section 1a. 8-hour Shift Cycle

The normal work week for all employees covered by this Agreement shall be forty (40) hours per week which shall be guaranteed each week provided the employee reports for work each day of his/her

schedule. A shift shall be defined as 8 hours worked within a 24-hour day.

...

#### Section 1b. 12-hour Shift Cycle

Effective May 6, 2016, the normal work week for all employees covered by this Agreement shall be an average six-week cycle of forty-two (42) hours per week which shall be guaranteed each week provided the employee reports for work each day of his/her schedule. A shift shall be defined as twelve (12) hours worked within a 24-hour day.

...

The regular work tour shall be twelve (12) hours for those members assigned to a patrol function, unless changed by the Chief of Police. The two (2) daily work shifts shall be: 6:00AM to 6:00PM and 6:00PM to 6:00AM.

...

The schedule provided in section 1b is the currently accepted schedule of shift duties after having been through a one (1) year trial period (2016) and having passed a one (1) year administration discretionary reversion period (2017). Hereafter, bargaining and consultation with the Union is necessary, to revert back to the schedule listed in section 1a or institute any other shift schedule.

#### Section 10. Holiday Pay

...

The parties agree to continue the current practice of all holiday pay staying at 8 hours per day for officers not on shift on the actual holiday.

## ARTICLE 12 - LEAVES OF ABSENCE

...

### Section 4. Vacation

The following vacation schedule is available to regular full-time employees:

After six months of service the employee will receive 1 workweek.

After 1 year of service the employee will receive 1 additional workweek.

...

### Facts Presented:

#### Background

The City of Caribou (City or Employer) and the New England Police Benevolent Association, Local 605 (Union) were parties to a collective bargaining agreement effective for the period January 1, 2019 through December 31, 2019 (Agreement). The Agreement set forth the wages, hours, terms and conditions of employment of certain patrol officers of the City's Police Department (Department).

Historically, the Department assigned its patrol officers to a workweek which consisted of five 8-hour days. In their 2016-2018 collective bargaining agreement, however, the parties agreed to establish a new schedule on a trial basis. Specifically, the parties agreed to a new, trial schedule which consisted of a "normal work week for all employees covered by this Agreement" which "shall be an average six-week cycle of forty-two (42) hours per week." The parties agree that during the negotiations for the contractual inclusion of the "trial basis" average 42-hour workweek, there was no discussion concerning any change to the rate of vacation accrual.

Historically, the vacation accrual rate had been based upon a 40-hour workweek.

After ratification of the 2016-2018 collective bargaining agreement, bargaining unit members continued to accrue vacation time based on a 40-hour workweek. Stubs attached to paychecks which the City issued to bargaining unit members at the end of pay periods during the effective period of the 2016-2018 contract reflected the amount of accrued vacation time during the pay period and -- at the end of each year -- a running balance of each employee's accrued vacation time. The Union filed no grievance in protest of the vacation accrual rate during the effective period of the 2016-2018 contract.

The parties negotiated a successor to their 2016-2018 collective bargaining agreement -- the one year (2019) Agreement. During these negotiations the parties again engaged in no discussion related to the issue of vacation accrual.

Bargaining unit members continued to accrue vacation at a rate based on a 40-hour workweek without filing a grievance until June 2020. In June 2020, however, the Union filed a grievance which protested the vacation accrual rate which was based on a 40-hour workweek. That grievance results in this arbitration.

Opinion:

Position of the Union:

The position of the Union is that the City is violating the Agreement by the manner in which it is calculating the vacation accrual of bargaining unit members. The Union argues that since the advent of the parties' 2016-2018 contract, bargaining unit

members have been working a schedule based on six-week cycles during which the workweek averages 42 hours. Specifically, it argues that pursuant to the 2016-2018 contract a "shift" was defined as lasting 12 hours as distinguished from the 8-hour shifts in prior contracts. The Union argues that "employees continue to accrue vacation primarily by 'workweek'." It offers the following contractual example: "after six months of service the employee will receive 1 workweek."

The Union argues that "although (1) the 'workweek' has been amended in the contract to an 'average' 42 hours to account for the 6-week schedule rotation and (2) the contract continues to provide that vacation is accrued by 'workweek', the Town has continued to credit employees with only 40 hours of vacation per workweek." It argues that "put another way, despite the fact that employees are to be credited with vacation by workweek and the workweek is defined as 42 hours, the Town continues to only provide employees with vacation at a rate of 40 hours per workweek." It argues that "when, for instance, an officer earns a workweek of vacation after six months' service, he or she is provided only 40 hours." It argues that "the upshot" of the provision of 40 hours' vacation "is that vacation time is credited to officers in amounts insufficient to provide a 'workweek' worth of vacation because an officer (on average) will require 42 hours to take a workweek of vacation but the Town has only been crediting the officer with 40 hours."

The Union argues that "the Town's actions are contrary to the plain language of the contract." Specifically, it argues that "pursuant to the schedule adopted by the parties in 2016, the officers work 'an average six-week cycle of 42 hours per week'." It argues that "during some Sunday to Saturday periods officers work four days with three days off, while on other

weeks they work three days with four days off." The Union argues that "nevertheless, the parties have expressly agreed that the normal 'workweek' averages 42 hours." It argues that "pursuant to Article 12, Sec. 4, employees accrue vacation by 'workweek'." It argues that "accordingly, in order for the employee to accrue vacation time sufficient to equal an Article 12 'workweek' the employee must necessarily be provided with the average 42 hours of vacation provided for in the Article 8 'workweek'." It argues that "by only crediting the officers with 40 hours of vacation time, the employer generally precludes the employee from taking a full week off because (on average) taking such a vacation will require 42 hours of accrued time."

The Union also argues that the immediately above conclusion "is buttressed by the language of the MOA signed by the sergeants to incorporate the new work shift into their contract in 2016." It argues that "at the time the agreement to amend the schedule of the patrol officers was reached, it became necessary to also amend the sergeants' agreement because the ranks work the same general schedule." The Union argues as follows:

The sergeants' MOU, signed after the sergeants had already completed negotiations on all other terms, sets forth the parties contemporaneous understanding that "[o]ne work-week of vacation accrual shall equal 42 hours of vacation." The Chief testified clearly that the sergeants did not give up or bargain anything of value to obtain some different, or more favorable term than the patrol officers.

The Union argues that the MOU thus reflects "the plain language" of the "patrol CBA" that "officers should accrue 42 hours of vacation leave -- and not 40 hours -- where the CBA provides for a 'workweek' for vacation to accrue."

The Union further argues that "the 2016 CBA indicates that the parties were aware that the new shift schedule may impact accrual rates and limited the reach of the change where they intended." It argues that "the 2013-2016 CBA allowed for holidays to be paid as an 8-hour shift which was the obvious practice when the officers worked five 8-hour shifts per week." It argues that "with the new 12-hour shift, 6-week cycle schedule adopted in 2016, the parties added the following language to the holiday provision:

The parties agree to continue the current practice of all holiday pay staying at 8-hours per day for officers not on shift on the actual holiday.

The Union argues that "it is clear that the parties were aware that the change in schedule may have an impact on benefit time accrual and specifically limited the reach of the change to the extent that they wished to do so." It argues that "the lack of a similar adjustment or limitation regarding vacation time is further strong evidence that the parties intended to adhere to the new accrual amount compelled by the change in the definition of workweek."

The Union also argues that "faced with this obvious conclusion, the City predictably attempts to assert that the Union's objection was not timely." It argues, however, that the City cannot carry its burden of proving that the grievance is "untimely" because "the alleged violation is continuing in nature"; that "a new and distinct violation occurs each time an officer is under-credited vacation time."

The Union argues that "the failure to properly award accrued vacation time was not obvious or easily discovered because, often, time is credited at the new year and it would

therefore require the officer to know exactly how much time he or she had 'in the bank' to determine what new time was actually credited." It argues that Officer LeMoine became aware of the issue after he took over the presidency of the Union." It argues that LeMoine thereafter "discussed the matter with the City Manager and was under the impression that it would be corrected going forward. It argues that "LeMoine immediately filed the instant grievance on June 2, 2020." It argues that "the violation remains ongoing and, at the very least, the Union is entitled to a remedy correcting the vacation accrual back to that date and moving forward."

#### Position of the City

The position of the City is that the grievance "lacks merit and should be dismissed." The City argues that "the record conclusively establishes that the CBAs between the City and NEPBA from 2016-2018 and 2019 are ambiguous as to what 'workweek' vacation accrual is based on." It argues that "in light of this ambiguity, the parties' past practice of basing vacation accrual on a 40-hour workweek -- which is plainly evident in light of the record -- controls." The City also argues that "even assuming arguendo that there is no ambiguity as to what 'workweek' vacation accrual is based on in the CBAs - - which the City vehemently denies -- this established past practice amends and supplements the CBAs' language as to vacation accrual."

The City argues that "Articles 8 and 12 of the CBAs -- which define the unit's hours of work, workweek, and wages -- include references to two different 'normal work week[s]'." It argues that "moreover, neither CBA's vacation provision defines or refers to which 'workweek' it uses for accrual calculations."

It further argues that "notably, however, the CBA's vacation provision bases part of its accrual calculations on an 8-hour rather than a twelve (12) (sic) workday, indicating that a 'workweek' for accrual purposes is a 40-hour workweek."

The City argues that "even if this is not by itself conclusive proof that vacation accrual is based on the 40-hour workweek, it undoubtedly illustrates that the CBAs are at minimum ambiguous as to which workweek vacation accrues upon." It argues that "in turn, the parties' past practice of accruing vacation based on the 40-hour workweek controls." It argues that "the record demonstrates that since 2016, vacation has accrued for patrolmen based on the 40-hour workweek and until mid-2020 there was no dispute as to that calculation." It argues that, thus, for the past four years, patrolmen have received pay stubs each pay period indicating their accrued vacation amount based on the 40-hour workweek, and raised no issues." The City argues that "this is separate and apart from the fact that at the beginning of each year patrolmen received an updated summary as to the total amount of vacation they have accrued, all of which was and is based on the 40-hour workweek." It argues that "this calculation method went through two negotiations and ratifications between the parties and through each proceeding, vacation accrual continued to be on the 40-hour workweek."

Finally, the City reiterates its argument that "even assuming arguendo that there is no ambiguity as to what 'workweek' vacation accrual is based on in the CBAs, the parties' past practice supplants the CBAs' language." Specifically, it argues that "the record objectively demonstrates that the parties' conduct over the course of multiple years, negotiations, and different CBAs, all of which

used and relied on accruing vacation based on a 40-hour workweek, supplants any contractual language to the effect that the patrolmen's vacation is based on 42-hour workweek."

### Discussion

I conclude that the City is violating the Agreement by the manner in which it is calculating the vacation accrual of bargaining unit members. Article 8, Sec. 1b of the Agreement establishes the "normal" workweek for bargaining unit members to be "an average six-week cycle of forty-two (42) hours per week." Article 12 of the Agreement establishes that vacation leave is based on the "workweek." Thus, the language of Article 8 and Article 12 -- when read together -- is clear and unequivocal: the workweek is the contractual basis for the calculation of the accrual of vacation time, and the workweek is on average 42 hours -- not 40 hours as it has been contractually mandated in the past.

The City argues that the workweek language is not clear and unequivocal. Rather, it argues that Article 8 and Article 12 refer to two distinct workweeks -- thereby instilling some confusion concerning vacation accrual rates. I disagree. Although the Agreement may refer to two distinct workweeks, the bargaining unit members have been consistently working only one workweek for some time -- the new 42-hour workweek. The parties in no way modified the word "workweek" in the Agreement, so it must be assumed that it refers to the workweek which is actually being worked: a 42-hour workweek.

There is additional language in the Agreement which supports the conclusion that the parties intended to base vacation accrual on a 42-hour workweek. When the parties

negotiated the 42-hour workweek with 12 hour shifts they must have understood that its adoption would have some impact on contractual benefits. Specifically, they must have understood that its adoption could have caused some confusion with respect to holiday pay. Accordingly, they negotiated a provision which continued "the current practice of all holiday pay staying at 8 hours per day for officers not on shift on the actual holiday." If the parties had intended to continue the then-current practice of basing vacation accrual on a 40-hour workweek, they could have done so. They did not do so.

The City also argues that there is a consistent and acknowledged practice in this case of its having calculated contractually allowable vacation time on the basis of a 40-hour workweek. The Union does not challenge the practice. Because of my conclusion that the contractual language is clear and unambiguous on its face, there is no need to examine the practice as an aid to contract interpretation.

Remedy:

I agree with the City that it has calculated the vacation allowance based on 40-hour workweeks since the contractual adoption of the 42-hour average workweek in the 2016-2018 contract. I also agree that notwithstanding the City's attachment to the pay checks of bargaining unit members of pay stubs which if sufficiently scrutinized could have disclosed that the City was not calculating vacation allowance on the basis of 42-hour workweeks as the 2016-2018 contract and the Agreement require. Such agreement with the City, however, does not require a remedy which would be retroactive to the commencement of the 42-hour workweek. On the other hand, such agreement with the City does not preclude all remedial action.

I agree with the Union that the contract violation found in this case is in the nature of a continuing violation. That is to say, the City commits a new violation with each issuance of a paycheck which reflects the accrual of vacation allowance based on a 40-hour workweek. Thus, the monetary remedy in this case shall be limited in time retroactive to the filing of the grievance.

Award:

The City is violating the collective bargaining agreement by the manner in which it is calculating the vacation accrual of bargaining unit members.

The City shall immediately recalculate the accrued vacation allowance of each member of the bargaining unit retroactive to the date of the grievance in this case. The City shall base its recalculations on a 42-hour workweek. Upon completion of its calculations, the City shall immediately credit any additional accrued vacation leave in excess of that which it initially credited to the accrued vacation account of each bargaining unit member.

/S/ James M. Litton

---

James M. Litton  
Arbitrator

Dated: April 14, 2021