

IN THE MATTER OF
GRIEVANCE ARBITRATION
BETWEEN

NEW ENGLAND POLICE
BENEVOLENT ASSOCIATION,
LOCAL 8 AND 8B

-AND-

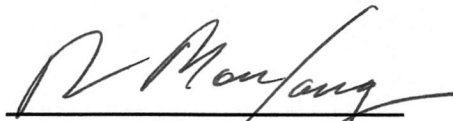
TOWN OF TYNGSBOROUGH

AMERICAN ARBITRATION ASSOCIATION
CASE NO: 01-19-0000-3258

AWARD

The Town violated Article 18, Section G of each party's CBA when it did not pay the time and one-half detail rate for details that occurred on Kendall Road on or around November 10, 12, and 17, 2018. Patrol Officers and Superior Officers who worked Kendall Road details on or around November 10, 12, and 17, 2018 are entitled to be paid at the Article 18 Section G time-and-one-half detail rate, and shall be made whole forthwith at the statutory rate of interest.

Dated: 2/28/20


/s/ Richard G. Boulanger, Esq.
Arbitrator

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CASE NO: 01-19-0000-3258**

The grievances were heard by Arbitrator Richard G. Boulanger, Esq. on September 13, 2019 at the Tyngsborough Town Hall, Tyngsborough, MA.

New England Police Benevolent Association, Local 8 (Patrol Officers and Communications Specialists) and Local 8B (Superior Officers) (both Union) were represented by Mr. Gary Nolan, Esq.. The Union called the following individuals as witnesses: Patrol Officer and Union President, Daniel Whitman; Sergeant Cindy Shay; Mr. [REDACTED], Esq.; and James Hustins, Highway Department-Senior Foreman.

The Town of Tyngsborough (Town) was represented by Mr. [REDACTED], Esq.. Town Administrator Matt Hanson and Ms. Kim Morrison, Executive Assistant to the Police Chief, were called as witnesses by the Town.

The parties were given full opportunity to present evidence and make arguments.

Witnesses were sworn

The parties' stipulated issue is as follows:

Did the Town violate Article 18 Section G of each party's CBA when it did not pay time and one-half the detail rate for details that occurred on Kendall Road on or around November 10, 12, and 17, 2018? If so, what shall be the remedy?

I. COLLECTIVE BARGAINING AGREEMENT

A. **ARTICLE 8:** **EMPLOYEE GRIEVANCE PROCEDURE**

B. **ARTICLE 10:** **COMPENSATION**

C. **ARTICLE 18:** **EXTRA PAID DETAILS**

D. **ARTICLE 31:** **STABILITY OF AGREEMENT**

II. SUMMARY OF THE CASE

In the negotiations that led to the 2014-2017 collective bargaining agreement, the parties altered the detail provision to provide for a time and one-half detail rate for non-Town funded details which occur during off-shift hours, or during an emergency. In November, 2018, the Town did not pay the time and one-half detail rate for such details that were financed by state Chapter 90 funds, after paying that rate before November, 2018.

The Union argues that based on the newly negotiated provisions, and the parties' past practices, Police Officers working such off- hours, state-funded details should have received the time and one-half detail rate.

The Town contends that the time and one-half detail rate was not payable in such circumstances because Chapter 90 funds were utilized as Town funds for road maintenance and construction projects in November, 2018.

The arbitrator ruled that Police Officers were entitled to the time-and-one-half detail rate for off-hours details in November, 2018 because c. 90 funds are State and not Town funds.

III. FACTUAL BACKGROUND

In the bargaining that led to the 2014-2017 collective bargaining agreement, the Union proposed a time and one-half detail rate benefit (premium detail rate) for non-regular shift, off-shift and emergency details. (See Joint Exhibits #1-#4, #18, #20-#21.) The Town counter-proposed an exception to the time and one-half detail rate for those details funded by the Town. (See Joint Exhibits #1-#4, #21.) Following the inclusion of the premium detail rate into the collective bargaining agreement, and prior to November, 2018, Patrol Officers and Superior Officers (Police Officers) were paid the premium detail rate when they worked off-shift, state-funded details. (See Joint Exhibits #16-#17.) Police Officers were compensated at the time-and-one-half the highest Sergeant rate for all other details (regular detail rate). Ms. Kim Morrison, Police Department Executive Assistant since 2004, testified that premium detail rate payments were mistakenly made due to a failure in the detail tracking system that inaccurately identified details that were Town funded.

On November 10, 12, and 17, 2018, Police Officers assigned to Kendall Road off-shift details that were funded by State c. 90 monies, were not paid the premium detail rate. The Kendall Road rehabilitation work was performed by Newport Construction Company. Mr. James Hustins, Town Highway Department Senior Foreman, is responsible for filing Department of Transportation (DOT) Town documents relative to road maintenance projects during, and at the completion of the project work. (See Joint Exhibits #22-#25.) The documents indicate that the Kendall Road projects, on which off-shift details were worked, were paid with c. 90 funds. (See Joint Exhibits #22-#25.) Town Administrator Matt Hanson testified that he considers State c. 90 funds to be Town funds for the purposes of funding road maintenance and construction projects.

The Union grieved the Town's failure to pay the premium detail rate for off-shift details financed by c. 90 funds in November of 2018. (See Joint Exhibits #6-#7.) The grievances were not resolved during the course of the parties' grievance procedure, and they were appealed to arbitration. (See Joint Exhibits #5, #5a, #6a, #8-#10.)

IV. SUMMARIES OF THE PARTIES' ARGUMENTS

A. UNION:

The Union contends that the plain meaning of Article 18 §G terms supports its position that Police Officers working the November, 2018 Kendall Road project were entitled to the premium detail rate for overnight work. Although the Town inappropriately seeks, through the arbitration process, an addition to the contractual exceptions to the premium detail rate, c. 90 funds are not included in Article 18 §G as an exclusion. The only exception to the premium detail rate is the use by the Town of its Departmental funds to subsidize the construction work on a road project. In the Town's filings with the state, it certified that no municipal funds were being used to fund the Kendall Road project. Rather, the Kendall Road project was financed 100% by state funds. As the Kendall Road project was completely financed by state funds, the premium detail rate was due and payable to Police Officers who worked details on that project. Town and state funds are distinguishable. The Town cannot argue that state funds are considered municipal funds regarding financing road construction costs.

If the arbitrator determines that Article 18 §G terms are unclear and ambiguous, he may resort to the parties' past practices which support the Union's interpretation of Article 18 §G. Prior to the Kendall Road project, and the disputed details in November, 2018, the Town has paid the premium detail rate on similar details since the parties' December, 2014 MOA was executed. The Town's detail payment practices clearly reveal that the Town considered c. 90 funds distinguishable from municipal money. Town officials have certified to the state that on such road construction projects that no Town funds were utilized, and the Town relied solely on state funds to finance the road work. Moreover, the submission by Police Officers of signed detail slips by the contractor to Ms. Morrison, as here, is the procedure specified in the collective

bargaining agreement for state-funded details.

The Union argues that the grievances should be upheld, and adversely impacted Police Officers should be made whole with interest relative to the premium detail rate. It requests that the arbitrator retain jurisdiction of the case in the event the parties are unable to determine and implement the remedy.

B. TOWN:

The Town asserts that the grievances must be denied because the Town did not violate the collective bargaining agreement when it paid regular detail rates on the Kendall Road project in November, 2018. Police Officers who worked detail hours on the Kendall Road project were not entitled to the premium detail rate because those details were financed by Town funds. Upon receiving c. 90 funds from the Commonwealth, such funds become Town funds, and cannot thereafter be utilized by the state. They must be used by the Town for road construction projects and associated services. Town meeting authorization to accept c. 90 funds, and the authority of the Board of Selectmen to spend such funds, support the concept that c. 90 funds are for all purposes considered Town funds. Bargaining history evidence supports the Town's view that c. 90 funds become Town funds, and may only be used for road improvement projects. The Town properly paid the regular detail rate rather than the premium detail rate because the December, 2018 Kendall Road project was financed by c. 90-Town funds.

The Union's reliance on past practice evidence is misplaced, and does not result in a ruling that the Town improperly paid the regular detail rate in November, 2018 for the Kendall Road project. Article 31 of the collective bargaining agreement, the anti-waiver provision, requires the Town to pay the detail rate in accordance with the terms of Article 18 §G, irrespective of its past payment practices. If the arbitrator determines that the Town mistakenly

paid the premium detail rate in the past, that conduct does not preclude the Town from applying the correct, regular detail rate to subsequent details for which Town funds are utilized. Furthermore, the instances cited by the Union as to past practices do not satisfy the elements of a binding past practice as that principle is defined and commonly applied.

The Union's grievances must be denied for all of the reasons specified above.

V. FINDINGS AND OPINION

A. CONTRACT STANDARD

During the bargaining for the 2014-2017 contract, the following premium detail rate provision was added to Article 18. (See Joint Exhibits #1-#2.) It includes the following terms:

- G. Employees who report for work shall receive not less than four (4) consecutive hours pay. Employees who work road/utility details shall be paid in four (4) hour blocks, example: details in excess of four (4) hours will be guaranteed eight (8) hours pay. Employees who work road/utility details, in excess eight (8) hours, will be paid on an hourly basis, and any portion of an hour shall be considered the full hour. All hours worked in excess of eight (8) hours shall be paid at the rate of time and a half (1 1/2).

The four (4) hour minimum shall be paid in case of cancellation by the party requesting, unless the employee is notified at least two (2) hours in advance. Detail rate to be paid at time and one half for construction road jobs on holidays, weekends, between 6:00 p.m. and 6:00 a.m., and during a state of emergency, provided said detail is an outside detail that is not paid for in anyway by any Town, Highway, Sewer or School Department funds.

The Article 18 §G terms are clear and unambiguous, and there is no need to resort to parole evidence. The most accurate manifestation of the parties' intent in writing a contract article is the words used by them, and codified in their collective bargaining agreement. The newly negotiated Article 18 provision clearly expresses the parties' intent that unless an off-shift detail is Town-funded, the premium detail rate applies. The Town argues that c. 90 funds received from the state to finance Town road and maintenance projects are considered Town funds. Article 18 §G terms do not so provide. There is no exception to the premium detail rate for road projects financed by c. 90, or other state funds. The only exception to the off-shift premium detail rate is a non-outside detail that is financed by Town, Highway, Sewer or School Department funds. If the parties had intended to define c. 90 funds as Town, Highway, Sewer or School Department funds, they would have expressly done so in Article 18.

Per §18G, the detail rate itself is based solely on the source of the funds financing the detail. State funds are primarily derived from the Commonwealth's income, sales, and excise taxes. The local real estate tax, permits and fees are the bases for municipal finances. Moreover, unlike its role in Town budgetary formation, the Town's Board of Selectmen decides whether or not to accept state c. 90 monies:

Article 14: **Authorization to Accept Chapter 90 Funds.** To see if the Town will vote to accept the State Grant of Chapter 90 Highway Funds and authorize the Board of Selectmen to expend said funds for Highway purposes in accordance with the terms of said grants; or take any other action relative thereto. (See Joint Exhibit #11.)

Simply stated, State funds are not Town funds for c. 90 road construction projects.

Significantly, the parties not only expressly excluded the payment of the premium detail rate when Town funds in general were financing the detail, but also when Highway, Sewer and School Department funds were used to pay for the detail. By identifying not only the Town in general, but also the Town departments specifically, the parties clearly manifested their intent that details paid only with Town, Highway, Sewer or School Department funds would result in payment of the regular detail rate even if they otherwise qualify for the premium detail rate (i.e., holidays, weekends, 6:00 pm-6:00 am). While the parties could have also contractually excluded details paid for by state (c. 90) funds, available to and accepted by the Town, from the Town's premium detail rate obligation, they did not do so.

1. **CHAPTER 90 FUNDS; KENDALL ROAD**

In the Town's FY19/FY20 Road Paving Estimates, it distinguishes between Town budgeted funds and State c. 90 funds in the following fashion:

2019 Road Paving Estimates

<u>Road Name</u>	<u>Length</u>	<u>Type of Repair</u>	<u>Estimated Cost</u>
Kendall/Winslow		paving/electrical	\$680,000.00
Frost Road	10,661 ft.	MLO, LO and CS	\$385,816.87
Norris Road	4,022 ft.	MLO	\$342,777.18
Lawrence Road	1,796 ft.	MLO and RCLMTN	\$286,307.19
Buckhill Road	targeted	RCLMTN	\$300,000.00
Total			\$1,994,901.24

FY19 Op Budget	\$50,000.00
FY20 Op Budget	\$100,000.00
Complete Streets Grant	\$351,831.00
FY19 Remaining CH90	\$305,000.00
FY20 CH90	\$432,389.00
FY20 Overlay Release	\$250,000.00
Dracut Water Contr.	\$206,000.00
<u>ATM BAN/ FY19 Free Cash</u>	<u>\$300,000.00</u>
Total	\$1,995,220.00

Difference \$318.76

Remaining CH90 (reserve) ~ \$100,000
(See Joint Exhibit #15.)

Mr. Hustins testified that in most cases, state c. 90 funds completely finance a project and no local tax money is needed. (See Joint Exhibits #16, #23-#24.) It is clear from the documents submitted by Mr. Hustins to DOT that the November, 2018 road projects, including Kendall Road, were totally financed by c. 90 funds, and no municipal funds were utilized. (See Joint Exhibits #21-#24.) The c. 90 Roadway Drilling and Resurfacing Kendall Road project was approved in the amount of \$525,000 by the state on August 22, 2018. (See Joint Exhibit #25.) In the Town's expansive Pavement Management Plan for Project Year 2018, there are four (4) Kendall Road project segments with a cost of \$324,966 identified, with c. 90 specified as the "Funding Source." (See Joint Exhibit #12.) Unlike the Worden Road-01 project, there is no local funding earmarked for the Kendall Road job. (See Joint Exhibit #12.) Sixty-Nine Thousand Two

Hundred Forty-Two local funding dollars (\$69,242) were targeted for the Worden Road-01 work, but no local financing was specified for the Kendall Road job. (See Joint Exhibit #12.) Worden Road-02/03 work was financed by c. 90 funds in the amount of \$73,776. (See Joint Exhibit #12.)

On March 18, 2019, Mr. Hustins, submitted a Kendall Road Chapter 90 Partial Reimbursement Request to the State. (See Joint Exhibit #25.) The Reimbursement Request was for \$371,647.03, the amount expended by the Town as of March 19, 2019 at the approved reimbursement rate of 100%. (See Joint Exhibit #25.) Mr. Hustins testified that when the final request is filed with the state, no municipal funds will have been expended on the Kendall Road project like the Mascuppic Trail request which did not require an expenditure of any municipal funds. (See Joint Exhibit #24.) While I acknowledge the Town's argument that it considers c. 90 funds to be Town funds, ultimately state funds, not Town funds, financed the November, 2018 Kendall Road project as evidenced by the documentary and testimonial evidence. (See Joint Exhibit #25.)

My role as the grievance arbitrator is limited to interpreting but not altering contract provisions by the following terms of Article 8:

The parties are agreed that no restrictions are intended on the rights and powers of the Town except those specifically and directly set forth in express language in specific provisions of this Agreement. The arbitrator shall arrive at his decision solely upon the facts, evidence and contentions as presented by the parties during the arbitration proceedings. The arbitrator shall not have the authority to add to, subtract from or alter any provision of this Agreement.

Consequently, when the Town itself files documents with the State DOT indicating that no Town funds were expended to finance the Kendall Road construction project in November of 2018, I am not permitted to interpret state funds as Town funds, Highway, Sewer or School Department

finances. Consequently, Police Officers who work off-shift details that are financed by c. 90, or other non-Town, Highway, Sewer or School Department funds are entitled to the premium detail rate as identified in Article 18 §G. Police Officers did not receive the premium detail rate for the c. 90 Kendall Road job in November, 2018. However, they were entitled to the premium detail rate for such outside, c. 90 funded details. They shall be made whole forthwith at the time-and-one-half detail rate with the statutory rate of interest applied.

The Town violated Article 18, Section G of each party's CBA when it did not pay the time and one-half detail rate for details that occurred on Kendall Road on or around November 10, 12, and 17, 2018. Patrol Officers and Superior Officers who worked Kendall Road details on or around November 10, 12, and 17, 2018 are entitled to be paid at the Article 18 Section G time-and-one-half detail rate, and shall be made whole forthwith at the statutory rate of interest.