

**BEFORE
EDWIN H. BENN
ARBITRATOR**

In the Matter of the Arbitration

between

CITY OF CHICAGO

and

TEAMSTERS LOCAL 700

CASE NOS.: L-MA-10-002
Arb. Ref. 10.341
(Interest Arbitration
SPCO Unit)

SUPPLEMENTAL OPINION AND AWARD

APPEARANCES:

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For the Union: Kevin P. Camden, Esq.

Place of Hearing: Chicago, Illinois

Date of Hearing: January 20, 2015

Dates Briefs Received: March 16, 2015

Date of Award: April 3, 2015

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I. FACTS

A. Background

This dispute arises in the City of Chicago’s Office of Emergency Management and Communications (“OEMC”) and involves a bargaining unit of Supervising Police Communications Officers (“SPCOs”) organized and represented by Teamsters Local 700 and its predecessor locals (“Union”).

By Opinion and Award dated January 9, 2013, I issued an interest arbitration award (“*Award*”) under authority of Sections 7 and 14 of the Illinois Public Labor Relations Act, 5 ILCS 315 (“IPLRA”), resolving disputed terms for the parties’ initial collective bargaining agreement (“*Agreement*”) for the Union and the City of Chicago (“*City*” or “*Employer*”) with the following result (*Award* at 26-27):¹

1. Wages:

The Union’s wage offer is adopted, retroactive to January 1, 2008.

2. Work Outside Of Scheduled Workweek (Overtime):

The parties are in agreement for the Section 4.6 language. The *status quo* is maintained for Section 4.7’s provisions for use of compensatory time.

3. Acting Up:

The parties are in agreement on the pay aspect for acting up. The City’s proposal for assignment of employees to act up is adopted.

4. Holiday Pay:

The parties are in agreement over holiday observance. Changes, if any, sought by the Union to holiday pay are rejected and the City’s offer is adopted.

5. Prior Tentative Agreements:

All prior tentative agreements are incorporated into this award.

¹ The history of the dispute is discussed in the *Award* at 3, note 2. The *Award* is published at: www.state.il.us/ilrb/subsections/pdfs/arbitrationawards/L-MA-10-002.pdf

6. Retained Jurisdiction

The matter is now remanded to the parties for the drafting of language consistent with the provisions of this award. With the consent of the parties, I will retain jurisdiction to resolve any disputes which may arise concerning the drafting of that language.

The parties drafted the Agreement and on April 10, 2013, the Agreement was ratified by the City Council.²

B. The Issues In This Case

There are four areas of dispute in this case:³

First, are Sections 4.8 (Acting Up), 4.5 (Call-in) and 6.2 (Holiday Observances) retroactive to January 1, 2008?

Second, are SPCOs to be compensated at time and one-half when they are called in to the worksite outside of their regular working hours for meetings at which their attendance is required and, if not, does Section 4.5 or 4.6 apply for computing their compensation for such meetings?

Third, how are SPCOs to be compensated for a regular day off (“RDO”) which falls on a holiday which is not worked?

Fourth (and as a part of the holiday pay question), how are SPCOs to be compensated when they have to work on an RDO that falls on a holiday?

² Joint Exh 4; Tr. 12.

³ The parties did not completely agree upon the framing of the issues in dispute or upon the number of issues. Tr. 4-5; Joint Exh. 6; Union Brief at 1; City Brief at 4. My framing of the issues and the discussion which follows fairly sets forth the disputes between the parties.

II. DISCUSSION

A. The Scope Of This Proceeding

No hearing was held prior to issuance of the *Award* as arguments were made by the parties in their written submissions and submitted exhibits.⁴ After issuance of the *Award*, drafting of the contract language by the parties and ratification of the Agreement by the City Council, the disputes in this matter arose and the parties deemed that further proceedings were necessary.

A hearing was held on January 20, 2015 followed by the parties' submission of post-hearing briefs.

The parties agree that this is a hybrid dispute insofar as the ultimate resolution of some or all of the issues may require clarification of the *Award* (making this an interest arbitration) or interpretation of the Agreement (making this a contract dispute).⁵

B. The Standards And Burdens

For any interest arbitration issues that have to be decided, the question will be whether the *Award* resolved the specific dispute. If clarification is necessary (a question that is also in dispute), the applicable statutory provisions of Section 14 of the IPLRA will be applied along with burdens used in interest arbitration

⁴ Tr. 10.

⁵ Tr. 5:

ARBITRATOR BENN: ... From the discussion with the parties, although this was framed to me as a clarification of my January 9, 2013, award, there appear to be grievance aspects of this that would be resolved by a grievance arbitrator as opposed to a strict interest arbitrator.

Rather than standing on formality, the parties have agreed that it's in front of me and I will apply the appropriate standard as to what I see as the interest arbitration dispute as opposed to a grievance arbitration dispute.

proceedings.⁶ For contract issues, the burden falls on the Union to demonstrate a violation of the Agreement, with the first inquiry being whether clear language resolves the dispute. If clear language does not resolve the dispute, I can then turn to the rules of contract construction, examination of bargaining history to determine if there was a “meeting of the minds” during negotiations and past practice – all in an effort to ascertain what the disputed language means.⁷

⁶ *Award* at 4-5 (quoting provisions from Section 14 of the IPLRA) and 19-20 (setting forth the burden in interest arbitrations) .

⁷ See *The Common Law of the Workplace* (BNA, 2nd ed.), 55 (“In a contract interpretation case, the union is ordinarily seeking to show that the employer violated the agreement by some action it took; the union then has the burden of proof”); *Tenneco Oil Co.*, 44 LA 1121, 1122 (Merrill, 1965) (in a contract case, “... [t]he Union has the burden of proof to establish the facts necessary to make out its claim.”); *I-T-E Imperial Corp.*, 67 LA 354, 355 (Weiss, 1976) (“The threshold question in this case is whether the language of ... the collective bargaining agreement is so clear and unambiguous that I need go no further to resolve the issue herein”); Elkouri and Elkouri, *How Arbitration Works* (BNA, 5th ed.), 470 (“If the words are plain and clear, conveying a distinct idea, there is no occasion to resort to technical rules of interpretation and the clear meaning will ordinarily be applied by arbitrators”); *id.* at 501, 504 (“Precontract negotiations frequently provide a valuable aid in the interpretation of ambiguous provisions ... [however] if an agreement is not ambiguous, it is improper to modify its meaning by invoking the record of prior negotiations”); *Gill Studios, Inc.*, 52 LA 506, 510 (Madden, 1969) (“... [T]here must be clearly established the specific nature of the agreement that was reached, and the presence of mutual acceptance of the terms of that agreement ... [i]t is not enough to show that one side believed an agreement had been reached, for mutual acceptance means that it must be proven by supporting evidence that the other side knew it was entering into the same agreement ... [f]urthermore, the burden of proof rests with the party claiming the existence of the agreement”); *How Arbitration Works, supra* at 507 (“One of the most important standards used by arbitrators in the interpretation of ambiguous contract language is that of custom or past practice of the parties”); *Penberthy Injector Co.*, 15 LA 713, 715 (Platt, 1950) (evidence of past practice “... is wholly inadmissible where the contract language is plain and unambiguous”).

C. The Disputes

1. Are Sections 4.8 (Acting Up), 4.5 (Call-in) and 6.2 (Holiday Observances) Retroactive to January 1, 2008 Under The Award?

The parties agree that the issue concerning retroactivity of the three benefits in issue is to be analyzed only as a question of whether the *Award* should be clarified – *i.e.*, an interest arbitration analysis.⁸

The Union argues that Sections 4.8 (Acting Up), 4.5 (Call-in) and 6.2 (Holiday Observances) are retroactive to January 1, 2008.⁹ The City argues that the benefits provided in those sections are not retroactive and no clarification of the *Award* is necessary.¹⁰

I agree with the City's position.

The only retroactivity issue specifically discussed in the *Award* concerned wages – with the culminating finding that “Wages are retroactive to January 1, 2008” – which was the Union's position that prevailed over the City's position that wages should retroactive only to the date of ratification.¹¹ As a result of that successful argument by the Union on wages, SPCOs received between \$23,000 and

⁸ According to the Union, “Mr. Arbitrator, from the Union's perspective, specifically we think you need to wear your interest arbitrator hat for the first issue, which is whether retroactivity to the certification of the bargaining unit applied for the economic components of acting up pay, which is Section 4.8, call-in pay, which is Section 4.5, and finally holiday observances, which is Section 6.2.” Tr. 6. According to the City, “So the first one, the first issue, which is retroactivity, is pure interest arbitration clarification.” Tr. 49. *See also*, Union Brief at 5 (“The first issue arises from the parties interest arbitration proceeding, as both parties made clear on the record.”).

⁹ Union Brief at 5-8.

¹⁰ City Brief at 2, 13-18.

¹¹ *Award* at 7-8, 12-13, 17, 26.

in excess of \$50,000 for retroactive wages, with the majority receiving the higher amounts.¹²

The *Award* did address acting up and holiday pay, but unlike wages, there was no discussion concerning retroactivity for these benefits.¹³ Likewise, although there was specific discussion in the *Award* concerning work outside of the scheduled workweek, there was no specific discussion in the *Award* concerning retroactivity for call-in pay.¹⁴ The *Award* followed those paths of discussion because retroactivity for these three benefits was not made an issue before me in the proceedings leading to the *Award*. As an interest arbitration proceeding, the *Award* did not impose retroactivity for the three benefits in dispute.¹⁵ Those benefits are therefore not retroactive to January 1, 2008.¹⁶

¹² Tr. 37-39. The distinction in retroactive wage payments was due to differing pay levels of the SPCOs. *Award* at 5-17.

¹³ *Id.* at 20-27.

¹⁴ *Id.* at 17-20.

¹⁵ At the hearing in this matter, the City presented Director of Labor Relations Donald O'Malley who testified that he participated in negotiations for the Agreement on behalf of the City and the Union never requested retroactivity for the three benefits, but there was extensive discussions concerning retroactivity for wages. Tr. 60-65. The Union presented SPCO David Newell who participated in the negotiations on behalf of the Union and he basically agreed with O'Malley, but with a different perspective ("We never had a discussion of these issues at the table beyond the City saying they would not discuss them."). Tr. 30. Given that *Award* did not address retroactivity for these benefits as the matters were not presented to me, what went on in negotiations on the various issues does not change the result.

¹⁶ In prior interest arbitration awards that I have issued where there was to be a retroactive application of benefits, retroactivity was specifically addressed (which was not the case here). See e.g., the following recent awards [emphasis added]:

Village of Barrington and Illinois Fraternal Order of Police Labor Council, S-MA-13-167 (2015) at 18, note 32 ("... full retroactivity to May 1, 2013, on all hours compensated to current and former bargaining unit members " or "[i]ncreases shall apply to all current, eligible bargaining unit members (and shall include those who have retired or resigned in good standing or been promoted during the term of this successor agreement)" to be worked out by the parties if there is a dispute as to meaning, with retained jurisdiction):

www.state.il.us/ilrb/subsections/pdfs/ArbitrationAwards/S-MA-13-167.pdf

[footnote continued on next page]

2. Compensation For SPCOs Called In For Meetings Outside Of Their Regular Work Hours

The Union contends that SPCOs called in for mandatory meetings outside of their regular work hours should be compensated at time and one-half.¹⁷ The City argues that SPCOs are not entitled to time and one-half as requested by the Union for such meetings and that Section 4.5 specifically governs payment for such meetings (compensatory time in 15 minute segments at the straight time rate with a two hour minimum).¹⁸

I agree with the City's position.

Village of Oak Lawn and Oak Lawn Professional Firefighters Association, Local 3405, S-MA-13-033 (2014) at 49-52 (proposal containing language "Retroactivity shall apply to all aspects of pay"):

www.state.il.us/ilrb/subsections/pdfs/arbitrationawards/S-MA-13-033.pdf

Village of Lansing and Illinois Fraternal Order of Police Labor Council, S-MA-12-214 (2014) at 29-31 ("Wage increases are retroactive on all compensated hours ..."):

www.state.il.us/ilrb/subsections/pdfs/ArbitrationAwards/S-MA-12-214.pdf

Village of Oak Park and Illinois Fraternal Order of Police Labor Council, S-MA-14-105 (2014) at 1 ("Retroactive payments shall be made by August 29, 2014 on all compensable hours ..."):

www.state.il.us/ilrb/subsections/pdfs/arbitrationawards/S-MA-14-105.pdf

Village of Richton Park and Illinois FOP Labor Council, S-MA-13-229 (2014) at 1 ("Wages are fully retroactive on all compensable hours ..."):

<http://www.state.il.us/ilrb/subsections/pdfs/ArbitrationAwards/S-MA-13-229.pdf>

Village of Skokie and Skokie Firefighters Local 3033, IAFF, S-MA-10-197 (2014) at 46 ("... with economic provisions retroactive to the appropriate dates"):

www.state.il.us/ilrb/subsections/pdfs/arbitrationawards/S-MA-10-197.pdf

Village of Calumet Park and Illinois FOP Labor Council, S-MA-12-312 (2013) (specific retroactive effective dates for benefits provided):

www.state.il.us/ilrb/subsections/pdfs/arbitrationawards/S-MA-12-312.pdf

The *Award* established wages, benefits and working conditions for an initial contract pursuant to Section 7 of the IPLRA. There was no prior collective bargaining agreement that continued into a new contract. While it did take a long time from the organizing to finalization of the terms of the Agreement (due to litigation over the propriety of the certification of the Union as the bargaining representative, the negotiations and the interest arbitration proceedings), nevertheless, this was an initial contract. Because retroactivity was only designated for wages in this case, the City is correct that the *Award* did not intend that the other benefits were also to have retroactive application.

¹⁷ Tr. 7-8; Union Brief at 8.

¹⁸ Tr. 18-20; City Brief at 21-25.

a. The Award

From the interest arbitration analysis, the *Award* did not specifically address compensation for these meetings. While the *Award* focused on the issue of work outside of scheduled work time, these meetings were not a specific topic of presented in the interest arbitration.¹⁹ Therefore, on this issue, there is nothing for me to clarify from the interest arbitration aspect.

b. The Agreement

Using the contract analysis, the relevant language of the Agreement provides:

**ARTICLE 4
WAGES AND ALLOWANCES**

* * *

Section 4.5 Call-in

Employees called in to the Employer's work site for work outside their regular working hours, including for meetings at which attendance of the employee is required, shall receive compensatory time at their regular straight time rate of pay, on an hour for hour basis, computed on the basis of completed fifteen (15) minute segments, with a minimum of two (2) hours of straight time compensatory time. This section shall apply only to situations where an employee is called into work during hours which are outside of the employee's scheduled work shift, and shall not refer to any situation where the employee is called in to work, or required to stay at work, during periods which are contiguous to his/her scheduled work shift.

Section 4.6 Work Outside of Scheduled Workweek

Where an employee worked his or her full scheduled workweek, and was required to work additional hours (a) before the employee's scheduled start time, or after the employee's scheduled quitting time, on any work day during that workweek; or (b) on the employee's scheduled days) off at the end of that workweek; the employee shall be compensated for such additional hours worked in the form of compensatory time at one and one-half (1.5) times the employee's regular rate of pay,

¹⁹ *Award* at 17-20.

computed on the basis of completed fifteen (15) minute segments. Solely for the purpose of determining whether the employee worked his or her full scheduled workweek within the meaning of this section, hours “worked” shall be deemed to include all hours actually worked, as well as the following types of absences, but only where such absence was excused by the Employer: paid Holidays and personal days; unpaid holidays pursuant to the terms of the “Holidays” side letter appended to this Agreement; scheduled vacation days; scheduled compensatory time; paid sick leave, and paid time off under Sections 17.6, 17.7 and 17.8 of this Agreement. No other absence from work shall be considered hours “worked” for purposes of application of this section. No time compensated under the terms of Section 4.5 of this Agreement shall be considered for any purpose under this section.

* * *

First, the clear language of Section 4.5 determines this issue. Section 4.5 states in no uncertain terms that when SPCOs are called in “... including for meetings at which attendance of the employee is required ... ” they “... shall receive compensatory time at their regular straight time rate of pay, on an hour for hour basis, computed on the basis of completed fifteen (15) minute segments, with a minimum of two (2) hours of straight time compensatory time.” Because of that clear language “... I need go no further to resolve the issue herein.”²⁰ To find otherwise would require that I ignore the clear language of Section 4.5 and literally read that provision out of the Agreement. I do not have that authority. *See* Section 12.2(d)(D) of the Agreement (“The arbitrator shall have no power to amend, add to, subtract from, or change the terms of this Agreement ...”).

Second, I will give the Union the benefit of the doubt and assume there is an ambiguity in the language which therefore allows me to use the rules of contract

²⁰ *See* note 7, *supra*, quoting *I-T-E Imperial Corp.*, 67 LA at 355.

construction.²¹ Even assuming an ambiguity in the language exists, use of the applicable rules of contract construction does not change the result.

The Union keys upon the language in Section 4.6 of the Agreement seeking the time and one-half compensation for these meetings.²² Section 4.6 does provide for time and one-half compensation for work outside of the scheduled workweek. However, a fundamental rule of contract construction is that specific language governs general language.²³ Under this rule of contract construction, the specific payment provisions in Section 4.5 providing that “Employees called in to the Employer’s work site for work outside their regular working hours, including for meetings at which attendance of the employee is required, shall receive compensatory time at their regular straight time rate of pay, on an hour for hour basis ...” is specific and must take precedence over the more general time and one-half provisions for work outside of the scheduled workweek found in Section 4.6.

Third, another fundamental rule of contract construction is that ambiguous language should be interpreted so that relevant clauses have meaning.²⁴ As noted, Section 4.5 specifically addresses compensation for these meetings. Further,

²¹ See note 7, *supra*.

²² Union Brief at 8-9.

²³ *How Arbitration Works, supra* at 498 (“Where two contract clauses bear on the same subject, the more specific should be given precedence.”).

²⁴ *How Arbitration Works, supra* at 493 quoting *John Deere Tractor Co.*, 5 LA 631, 632 (Updegraff, 1946):

If an arbitrator finds that alternative interpretations of a clause are possible, one of which would give meaning and effect to another provision of the contract, while the other would render the other provision meaningless or ineffective, he will be inclined to use the interpretation which would give effect to all provisions. ...

It is axiomatic in contract construction that an interpretation which tends to nullify or render meaningless any part of the contract should be avoided because of the general presumption that the parties do not carefully write into a solemnly negotiated agreement words intended to have no effect.

Section 4.6 specifically carves out these meetings from Section 4.6 compensation with the sentence “No time compensated under the terms of Section 4.5 of this Agreement shall be considered for any purpose under this section.” If SPCOs were to receive compensation under Section 4.6 and not Section 4.5 as the Union urges, the meetings compensation language in Section 4.5 along with the last sentence in Section 4.6 would have no meaning. To give meaning to the Section 4.5 meetings compensation provisions as well as to the last sentence in Section 4.6 which carves out Section 4.5 compensation from Section 4.6 compensation, these meetings must be compensated as specified under the language in Section 4.5.

Fourth, and again assuming the language is ambiguous, I can look to bargaining history.²⁵ Here, in order to prevail, the Union has the burden to show that there was a meeting of the minds across the table consistent with the Union’s position that meetings outside of work hours were to be compensated at time and one-half.²⁶ The evidence shows the opposite.

SPCO Newell testified that he was involved in the negotiations on behalf of the Union and:²⁷

Q. And the call-in pay, what’s your recollection of the bargaining history regarding the call-in, Dave?

A. We did make a little bit of progress on that issue in terms of the two hours minimum for a call-in for a meeting.

However, we were always at loggerheads over whether that would be compensated at time and a half or at straight time.

We wanted time and a half for all work above and beyond 40 hours, *and the City said that would never happen.*

²⁵ See note 7, *supra*.

²⁶ *Id.*

²⁷ Tr. 30-31 [emphasis added].

Therefore, just from Newell’s testimony, there was no meeting of the minds during bargaining with respect to time and one-half compensation for these meetings. In Newell’s words with respect to these meetings, “We wanted time and a half for all work above and beyond 40 hours, and the City said that would never happen.”²⁸ There was no meeting of the minds on this issue consistent with the Union’s position.

Fifth, continuing with the assumption that the language is ambiguous, I can also turn to the evidence to see if there was a past practice.²⁹

To be a past practice, the conditions in dispute must be “(1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both Parties”.³⁰ There was no past practice consistent with the Union’s position for compensating SPCOs for these meetings at time and one-half.

SPCO Newell testified:³¹

- Q. Prior to the collective bargaining agreement being in place, were you receiving any compensation for attending these meetings?
- A. No.
- Q. What was the City's position on that? Is that because they thought you were exempt?
- A. Because we were considered exempt, yes, sir.

²⁸ *Id.*

²⁹ See note 7, *supra*.

³⁰ *Celanese Corp. of America*, 24 LA 168, 172 (Justin, 1954).

³¹ Tr. 33.

c. Conclusion On The Meetings Issue

In sum then, if considered as an issue for clarification under the *Award*, the Union's position on clarification is not warranted. If considered as a contract dispute, then clear contract language determines the issue against the Union's position. And further, assuming there is an ambiguity in the language, the rules of contract construction, bargaining history and past practice also line up against the Union's requested interpretation. Section 4.5 governs this issue ("Employees called in to the Employer's work site for work outside their regular working hours, including for meetings at which attendance of the employee is required, shall receive compensatory time at their regular straight time rate of pay, on an hour for hour basis, computed on the basis of completed fifteen (15) minute segments, with a minimum of two (2) hours of straight time compensatory time.").

3. The Holiday/RDO Issue

a. The Scope Of The Holiday/RDO Issue

With respect to compensation for holidays falling on regular days off, at the commencement of the hearing on January 20, 2015, the City brought forward the following issue for the interest arbitration analysis:³²

- (3) Did the Benn Award order that, when SPCOs work on a holiday that falls on their regular day off [RDO], they receive their regular salary, plus time and one-half comp. time for all hours worked, plus another day off at a time mutually agreed between the SPCO and the Employer?

For the contract analysis, the City alternatively posed the holiday compensation issue as "If you find that the answer to #3 is No, the City wants you

³² Tr. 4-5. *See also*, Joint Exh. 6.

to address how should the SPCOs be compensated when they work on a holiday that falls on their regular day off.”³³

The Union viewed the dispute as broader than just working on a holiday which falls on an RDO. According to the Union, “The question really from the Union’s perspective, as they see it, is if the regular day off is a holiday ... how is the employee compensated if they work *and if they don’t*.”³⁴

Therefore, to fully resolve this disputed holiday/RDO issue, the question to be addressed is how to compensate SPCOs for holidays which fall on RDOs – both when they work and when they do not.

The City’s position is that “... SPCOs who are required to work on a holiday will receive compensatory time at one and one-half time for all hours worked only, regardless of whether that holiday coincides with their regular day off or not, plus their regular salary.”³⁵ According to the City, “... under the City’s proposal, that SPCO is receiving 2.5 times pay ... for working on a holiday that falls on his RDO.”³⁶

The Union contends:³⁷

The City’s final offer [in the interest arbitration] proposed compensatory time for hours worked on a holiday in the form of compensatory time; for an RDO on a holiday, it is a holiday earned. But the proposal is silent as to what happens when an employee works on a holiday that was an RDO. The union submits the employee who works on a holiday that is the

³³ *Id.* [and with specific reference to note 3 of Joint Exh. 6].

³⁴ Tr. 5 [emphasis added].

³⁵ City Brief at 26-27. *See also*, Tr. 21 (“... when an SPCO works on a holiday that falls on his regular day off, the SPCO receives his regular salary plus time and one-half comp time for all hours worked only.”).

³⁶ Tr. 21-22.

³⁷ Union Brief at 10.

employee's day off should earn compensatory time for all hours worked, not forfeit the holiday premium. ...

... In short, if an employee works on a holiday, the employee gets compensatory time at 1.5 times the hourly rate for all hours worked on an established holiday. ...

The City views the Union's position for SPCOs working on a holiday that falls on their RDO as "... they receive their regular salary and time and one-half comp time for all hours worked plus another day off ... at a time mutually agreed between the SPCOs and the employer ... [which] is 3.5 times their pay for working on a holiday that falls on an RDO"³⁸

b. The Way SPCOs Are Compensated For Holidays

(1). Prior To The Agreement

OEMC Payroll Administrator Melton Baxter testified about a hypothetical schedule for an SPCO, with a Saturday RDO prior to the Agreement taking effect.

According to Payroll Administrator Baxter, if a holiday (*e.g.*, Christmas) fell on a regular work day; on a RDO when the SPCO did not work; or on an RDO when the SPCO had to work, the SPCO received a "holiday earned" where "... they were given a day off, which is considered a holiday earned where they can use at a later day ... It's a day for a day ... It goes into a bucket ... It can accumulate ... They can use it at a later day ... If they don't use it within that year, it can rollover to the following year ... [but] No cash value."³⁹ Thus, prior to the Agreement, SPCOs received a "holiday earned" for every holiday which could be used at some point. However, those holidays earned could not be cashed out. According to Payroll

³⁸ Tr. 21-22.

³⁹ Tr. 52-54.

Administrator Baxter, prior to the Agreement, "... for all three situations [SPCOs were paid a] holiday earned".⁴⁰

SPCO Newell agreed with Payroll Administrator Baxter's view of how the SPCOs were compensated for holidays prior to the Agreement:⁴¹

- Q. And, finally, Dave, with respect to holidays, prior to the collective bargaining agreement being put in place, how were you compensated for holidays?
- A. Every single holiday we received another holiday -- or another holiday earned day to take.
- Q. So you got to take a day off?
- A. Right.
- Q. In exchange for a holiday?
- A. Right, whether you worked it or whether it was an RDO.
- Q. If you worked on Christmas, for example, you got another day to take at your choosing or in an agreement with management?
- A. In agreement with management.

(2). After The Agreement Took Effect

Section 6.2 of the Agreement provides, in pertinent part:

ARTICLE 6
HOLIDAYS

* * *

Section 6.2 Holiday Observance

Except for employees whose regularly scheduled work week includes Saturday and/or Sunday, said holidays which fall on Saturday will be observed the Friday before the holidays; said holidays which fall on Sunday will be observed on the Monday after the holiday. For employees whose regularly scheduled work week includes Saturday or Sunday sai[d] holiday will be observed on that day.

⁴⁰ Tr. 54.

⁴¹ Tr. 33.

* * *

Employees who are required to work a regular [t]our of duty on an established holiday shall receive compensatory time at one and one-half (1.5) times their regular straight time rate of pay for each hour worked on each such holiday. Employees whose regular day off coincides with an established holiday shall be granted another day off for each such holiday, without any change in their regular salary, at a time mutually agreed between the employee and the Department Head.

* * *

Payroll Administrator Baxter testified that after the Agreement took effect, if SPCOs work on a holiday that falls on a regular work day (*e.g.*, if Christmas falls on a Wednesday which is the SPCOs' regular work day), "They will still get paid as a salary employee and they would be compensated for working ten hours at time and a half [with compensatory time]."⁴² Baxter testified that the difference between compensatory time and holiday earned is that compensatory time has a cash value to it and can be rolled over.⁴³

Further, according to Baxter, after the Agreement took effect, if SPCOs work on a holiday that falls on their RDO (*e.g.*, Christmas falls on Saturday which is an RDO), similarly, "They ... [are] compensated with ten hours at time and a half ... [c]omp time ... [totaling] 15 hours"⁴⁴

Finally, according to Baxter, after the Agreement took effect, if a holiday falls on the SPCOs' RDO and the SPCOs do not work that day (*e.g.*, Christmas falls on a Saturday, which is an RDO and is not worked), "... they would receive holiday earned."⁴⁵

⁴² Tr. 54.

⁴³ Tr. 55.

⁴⁴ Tr. 55-56.

⁴⁵ Tr. 55.

SPCO Newell testified about the Union's proposal regarding holidays:⁴⁶

- Q. Okay. What was your understanding of the proposal regarding holidays that was put forth?
- A. My understanding was that we wanted to be compensated at time and a half for a holiday that we were scheduled to work.
- Q. What about for holidays that were an RDO, a regular day off?
- A. For regular day off, our thought was that we would receive the equivalent time and compensatory time for the day off, so eight hours for eight hours, so to speak.
- Q. What about if you had to work on a holiday that was your regular day off; did you get into any discussion about that?
- A. The City would not discuss it.
- Q. Do you know why?
- A. The City would not discuss it. We were never to receive premium pay for holidays. The City would not bargain.
- Q. Dave, do you know if the PCOs received any holiday pay premium for RDOs?
- A. Yes, they did.
- Q. Now, their contract had been in place for some years prior to yours, correct?
- A. Yes, sir.
- Q. What about the FCOs, fire communication operators?
- A. Yes, sir.
- Q. And their contract had also been in place for a number of years?
- A. Yes, sir.
- Q. And the same for SFCOs, the supervising fire and communications operators?
- A. Yes, they are in the same unit.
- Q. And, again, their contract had been in place for approximately 20 years prior to yours, correct?
- A. Yes, sir.

⁴⁶ Tr. 34-36.

Q. But to your knowledge, all of them had the holiday premium in their collective bargaining agreement?

A. Yes.

Q. In fact, if memory serves, that was one of the rationales or the bases that your bargaining unit used to propose the holiday premium, correct, parity with the existing bargaining units within the building?

A. Correct.

c. The Award

The holiday compensation issue was addressed in the *Award* as follows:⁴⁷

There is no dispute over holiday observance. The Union sees a dispute over holiday pay.

The Union proposes to add the following language:

Section 6.5 Holiday Compensation

Employees who work on the holidays, as defined in this agreement, shall receive 1.5 hours of compensatory time for every hour worked, along with the employee's hourly wage set forth in this agreement.

According to the Union "[t]he union's proposal is to accrue a 1 1/2 hour of compensatory time, plus the hour's pay, for each hour worked on the holiday.

While the Union sees a dispute on this issue, with the filing of its submissions, the City apparently does not see a disputed issue. According to the City's proposal for Section 6.2 [emphasis added]:

Section 6.2 — Holiday Observance

* * *

Employees who are required to work a regular tour of duty on an established holiday *shall receive compensatory time at one and one-half (1.5) times their regular straight time rate of pay* for each hour worked on each such holiday. ...

Further, according to the City [emphasis added]:

The parties' final offers on holiday pay and work outside of scheduled workweek do not appear to be

⁴⁷ *Award* at 23-24 [footnotes omitted].

in dispute: both the City and the Union’s final offers propose that employees be compensated for additional hours worked in the form of compensatory time at one and one-half times (1.5) the employee’s regular rate of pay, computed on the basis of completed fifteen (15) minute segments, and *both final offers propose that employees who are required to work a regular tour of duty on an established holiday shall receive compensatory time at one and one-half (1.5) times their regular straight time rate of pay for each hour worked on said holiday.*

If there really is a dispute here with the Union seeking additional compensation for working on holidays over and above what the employees presently receive or that which has been agreed to by the City, that requested increase must be rejected.

As I found in the *Award*, if there were differences between the parties’ proposals, the Union’s efforts to seek additional compensation beyond what was agreed to by the parties were rejected by me because of the total compensation factor in Section 14(h)(6) of the IPLRA and the percentage increases yielded by the wage offers and “... any additional compensation sought by the Union on behalf of the employees through this offer concerning holiday pay cannot be imposed.”⁴⁸

As noted, the City took the position in the interest arbitration that “[t]he parties’ final offers on holiday pay and work outside of scheduled workweek do not appear to be in dispute”⁴⁹ And the language that now appears in Section 6.2 of the Agreement is the language proposed by the City.⁵⁰ Because I adopted the City’s proposal which then became contract language and did not add any additional compensation above what was offered by the City’s offer, there is really nothing to be clarified under the interest arbitration analysis. The *Award* resolved the dispute

⁴⁸ *Id.* at 24-26.

⁴⁹ City Brief in the Interest Arbitration at 5, note 1.

⁵⁰ *Id.* at Exh. 4, Tab B, p. 4. Compare the Agreement at Section 6.2.

consistent with the language proposed by the City which became the language in the Agreement. However, the various scenarios that can occur were not really flushed out in the interest arbitration proceeding leading to the *Award* – they just were not addressed. That is certainly not unusual for an initial contract as all possible contingencies just cannot be anticipated.

The real question then is what does the language in Section 6.2 mean? This is therefore really a contract dispute, to be resolved under the contract analysis and not something that is to be clarified through the interest arbitration analysis.

d. The Agreement

Given the parties’ arguments and the testimony offered at the hearing for this dispute, there are three relevant scenarios for holidays and RDOs: (1) holidays that fall on an RDO and the SPCOs do not work; (2) holidays that fall on a regular work day and the SPCOs work; and (3) holidays that fall on an RDO and the SPCOs work.

Those will be treated separately under a contract analysis. For each scenario, Christmas Day will be used as the holiday and Saturday as the RDO.⁵¹

(1) Holidays That Fall On An RDO And The SPCOs Do Not Work

If a holiday falls on an RDO and the SPCOs do not work, the clear language of Section 6.2 requires that the SPCOs get another day for a holiday. Section 6.2 clearly provides that “Employees whose regular day off coincides with an established holiday shall be granted another day off for each such holiday, without

⁵¹ Under Sections 6.1 and 6.2 of the Agreement, Christmas Day is a designated “... [d]ay off ... without any change in ... regular salary”

any change in their regular salary, at a time mutually agreed between the employee and the Department Head.”

Therefore, if Christmas falls on a Saturday, SPCOs with a Saturday RDO get another day off as a holiday as mutually agreed with the Department Head. Payroll Administrator Baxter’s testimony that in this scenario “... [t]hey would receive holiday earned” is a correct application of the clear language of Section 6.2.⁵²

(2). Holidays That Fall On A Regular Work Day and The SPCOs Work

At the commencement of the hearing, compensation for a holiday that falls on a regular work day which is worked by the SPCOs was not made a specific area of dispute as the issues were framed by the parties.⁵³ The focus of the parties’ disagreement at the time was over holidays and RDOs.⁵⁴

However, aside from the testimony offered at the hearing, in their briefs the parties addressed the topic of compensation for work on holidays which fall on a regular work day.⁵⁵ In its brief, the City gave an example for how SPCOs should be compensated for working on a holiday that falls on a regular work day.⁵⁶

Under the City’s offer, SPCOs who are required to work on a holiday will receive compensatory time at one and one-half time for all hours worked only, regardless of whether that holiday coincides with their regular day off *or not*, plus their regular salary. ...

⁵² Tr. 55.

⁵³ Tr. 4-5; Joint Exh. 6.

⁵⁴ *Id.*

⁵⁵ Union Brief at 9-10; City Brief at 26.

⁵⁶ City Brief at 26 [emphasis added].

According to the Union:⁵⁷

... [Payroll Administrator] Baxter’s testimony makes it clear the practice for payment of holidays changed after the contract was implemented. However, without any rational explanation, *holidays worked* earn compensatory time for all hours worked, holidays falling on an RDO result in “holiday earned”, and a holiday worked on an RDO results in a loss of the holiday premium. This change cannot be explained except for an arbitrary decision that is not even supported by the interest arbitration decision or final offer submitted by the City.

It therefore appears from the parties’ arguments and general references to holidays (whether worked or not) that they may not be in total agreement on the basic question of how SPCOs are to be compensated for work performed on a holiday which is a regular work day. In order to discuss how SPCOs are to be compensated with respect to RDOs (particularly when the holiday falls on an RDO which is a Saturday or Sunday – *see*, discussion, *infra* at II(C)(3)(d)(3), which is the issue before me and so that there is no further disagreement between the parties, it is necessary to first discuss the more fundamental question of how SPCOs are to be compensated for working on a holiday that falls on a regular work day.

Consistent with the City’s position, under the clear language of Section 6.2, when SPCOs work on a holiday that falls on a regular work day, the SPCOs receive time and one-half compensatory time for hours worked along with their regular pay.

The City’s position is that “... SPCOs who are required to work on a holiday will receive compensatory time at one and one-half time for all hours worked only ... plus their regular salary.”⁵⁸ Section 6.2 provides that “Employees who are required to work a regular tour of duty on an established holiday shall receive compensatory

⁵⁷ Union Brief at 9-10 [emphasis added].

⁵⁸ City Brief at 26-27.

time at one and one-half (1.5) times their regular straight time rate of pay for each hour worked on each such holiday.”

Therefore, if Christmas falls on a Wednesday which is a regular work day and SPCOs are required to work that day, the SPCOs receive time and one-half compensatory time for hours worked along with their salary. Payroll Administrator Baxter’s testimony that in this scenario “[t]hey will still get paid as a salary employee and they would be compensated for working ten hours at time and a half [with compensatory time]” is a correct application of the clear language of Section 6.2.⁵⁹

(3). Holidays That Fall On An RDO and The SPCOs Work

The City sees no difference for compensation for SPCOs who work on a holiday that falls on a regular work day or on a holiday which falls on an RDO. According to the City, “... SPCOs who are required to work on a holiday will receive compensatory time at one and one-half time for all hours worked only, *regardless of whether that holiday coincides with their regular day off or not*, plus their regular salary”.⁶⁰ And with respect to this scenario where the holiday and the RDO coincide with SPCOs working, according to the City, “... under the City’s proposal, that SPCO is receiving 2.5 times pay ... for working on a holiday that falls on his RDO.”⁶¹

However, at first read, if a holiday falls on an RDO which is worked by the SPCOs, under the clear language of Section 6.2 the SPCOs receive time and one-

⁵⁹ Tr. 54.

⁶⁰ City Brief at 26-27; Tr. 21 [emphasis added].

⁶¹ Tr. 21-22.

half compensatory time along with their regular pay *and* the SPCOs also receive another day off as a holiday.

Section 6.2's language appears clear on this – at least a first read. Section 6.2 has two relevant sentences which have to be read together. Specifically, “Employees who are required to work a regular tour of duty on an established holiday shall receive compensatory time at one and one-half (1.5) times their regular straight time rate of pay for each hour worked on each such holiday ...[and e]mployees whose regular day off coincides with an established holiday shall be granted another day off for each such holiday, without any change in their regular salary, at a time mutually agreed between the employee and the Department Head.” Therefore, by clear language, if SPCOs have to work on an RDO which coincides with a holiday, (1) the SPCOs receive their regular salary (a position with which the City does not disagree); (2) “... compensatory time at one and one-half (1.5) times their regular straight time rate of pay for each hour worked on each such holiday” (per Section 6.2); *and* because the SPCOs have a “... regular day off [which] coincides with an established holiday [the SPCOs] shall be granted another day off for each such holiday, without any change in their regular salary, at a time mutually agreed between the employee and the Department Head.” Therefore, by clear language, when a holiday coincides with an RDO and the SPCOs have to work, the SPCOs receive pay, time and one-half compensatory time for hours worked *and* another day off. That is what the clear language of Section 6.2 provides.

And that makes sense. Take the example of SPCOs with a Saturday RDO and Christmas also falls on Saturday. Contractually, that Saturday is a double day off for those SPCOs – the RDO and the holiday.

If SPCOs who work on such days were only paid regular pay and time and one-half compensatory time for hours worked as the City argues, the SPCOs lose one of those days off. Although I believe the language of the Agreement is clear (requiring pay for the day; compensatory time and one-half for hours worked *and* another day off), if there is an ambiguity, the rules of contract construction require a construction against the City's position.

Where the RDO coincides with the holiday, the City's position causes a forfeiture of a day off (either the holiday or the RDO). That interpretation is contrary to the fundamental rule of contract construction that ambiguous language should be construed against interpretations which cause forfeitures.⁶² Further, the City's position reads the clause in Section 6.2 that "Employees whose regular day off coincides with an established holiday shall be granted another day off for each such holiday, without any change in their regular salary, at a time mutually agreed between the employee and the Department Head" completely out of the Agreement. As noted earlier, another fundamental rule of contract construction is that ambiguous language should be interpreted so that relevant clauses have meaning.⁶³

So even if the language in Section 6.2 is ambiguous (which it is not), the City's interpretation does not hold up. The correct interpretation for the scenario of SPCOs being required to work on holidays which fall on an RDO is that they are paid their regular pay, time and one-half compensatory time for hours worked and they get another day off without any change in their regular salary, at a time mutually agreed between the employee and the Department Head.

⁶² *How Arbitration Works, supra* at 500 ("If an agreement is susceptible of two constructions, one of which would work a forfeiture and one of which would not, the arbitrator will be inclined to adopt the interpretation that will prevent the forfeiture").

⁶³ See note 24, *supra*.

However, with that finding, the discussion on this issue is not yet over. That is because of the very first sentence in Section 6.2 – *i.e.*, “Except for employees whose regularly scheduled work week includes Saturday and/or Sunday, said holidays which fall on Saturday will be observed the Friday before the holidays; said holidays which fall on Sunday will be observed on the Monday after the holiday.” And this goes to the same example where the SPCOs have Saturday as an RDO and Christmas falls on Saturday. In that example, by clear contract language at the beginning of Section 6.2, Friday becomes the holiday and Saturday remains the RDO. So if the holiday and RDO coincide on Saturday and SPCOs have to work on Saturday and if Friday is treated as a holiday, pay for that Saturday would be consistent with the City’s position that compensation would be regular pay plus time and one-half compensatory time for hours worked on that Saturday. However, if SPCOs are also required to work on that Friday, they are to be paid as if working on a holiday – *i.e.*, regular pay plus time and one-half compensatory time for hours worked.

e. Conclusion On The Holiday/RDO Issue

This is an initial contract. Contemplating every possible scenario for holiday pay and codifying that into language in a first contract especially when employees can work on many combinations of days during a seven-day week as the SPCOs can be required to do is a daunting, if not impossible, task – especially where, as here, the first contract is set through an interest arbitration. And there may well be possible combinations of holidays and RDOs with work requirements which can exist beyond those discussed. So in case there are other examples not addressed (or yet faced by the parties), this is the template:

1. For holidays which fall on an RDO and the SPCOs do not work, Section 6.2 clearly requires that the SPCOs receive another day for a holiday.
2. For holidays that fall on a regular work day which is worked by the SPCOs, Section 6.2 and the City's position clearly require that the SPCOs receive time and one-half compensatory time for hours worked along with their regular pay.
3. (a) For holidays that fall on an RDO and the SPCOs work, the SPCOs receive time and one-half compensatory time for hours worked along with their regular pay and another day off.

(b) However, for SPCOs with Saturday and/or Sundays as RDOS, if the first sentence of Section 6.2 is utilized by OEMC for the SPCOs ("Except for employees whose regularly scheduled work week includes Saturday and/or Sunday, said holidays which fall on Saturday will be observed the Friday before the holidays; said holidays which fall on Sunday will be observed on the Monday after the holiday"), because the day before or after the designated holiday becomes the holiday observed (Friday holiday for Saturday holiday/RDO and Monday holiday for Sunday holiday/RDO), then the SPCOs receive time and one-half compensatory time for hours worked along with their regular pay for working on their Saturday or Sunday RDO. If the SPCOs also work on that Friday or Sunday which has become the holiday observed, they shall be compensated in accord with the holiday pay requirements (time and one-half compensatory time for hours worked along with their regular pay).

III. CONCLUSION

This was an initial contract established after lengthy litigation and through negotiations and the interest arbitration process under Sections 7 and 14 of the IPLRA for initial contracts in small units. From a drafting of language standpoint, initial contracts are always difficult to put together – especially when it comes to hours of work and holiday compensation. All possible scenarios just cannot be contemplated. The parties now have the template for resolution of the disputed issues in this case which arose after the Agreement was put together (and hopefully

for other issues which may arise). If further language changes need to be made (or tweaked), that must occur through the negotiation process.

Any SPCOs not compensated consistent with the terms of this Supplemental Award shall be made whole.

IV. SUPPLEMENTAL AWARD

1. **Clarification of my Opinion and Award dated January 9, 2013:**

No clarification is required.

(City position)

2. **Retroactivity of Sections 4.8 (Acting Up), 4.5 (Call-in) and 6.2 (Holiday Observances) to January 1, 2008:**

These sections are not retroactive to January 1, 2008.

(City position)

3. **Call-in meetings outside of regular work hours:**

Section 4.5 specifically governs compensation when SPCOs are called in for meetings outside of their regular work hours (compensatory time at straight time with a two hour minimum).⁶⁴

(City position)

⁶⁴ Section 4.5 (“Employees called in to the Employer’s work site for work outside their regular working hours, including for meetings at which attendance of the employee is required, shall receive compensatory time at their regular straight time rate of pay, on an hour for hour basis, computed on the basis of completed fifteen (15) minute segments, with a minimum of two (2) hours of straight time compensatory time.”).

4. Holidays and regular days off (RDO):

(a) For holidays that fall on an RDO and the SPCOs do not work, SPCOs receive another day for a holiday.⁶⁵

(City position)

(b) For holidays that fall on a regular work day that is worked by the SPCOs, SPCOs receive time and one-half compensatory time for hours worked along with their regular pay.⁶⁶

(City position)

(c) For holidays that fall on an RDO and the SPCOs work, the SPCOs receive time and one-half compensatory time for hours worked along with their regular pay and another day off.⁶⁷

(Union position)

(d) However, for holidays that fall on a Saturday or Sunday which is also an RDO and the SPCOs work but the holiday is observed on the day before the RDO (Friday for Saturday holiday/RDO) or after the RDO (Monday for Sunday holiday/RDO), then the SPCOs receive time and one-half compensatory time for hours worked along with their regular pay for working on their RDO. If the SPCOs also work on the changed observed holiday (Friday or Monday), compensation will be paid in accord with holiday compensation rules (time and one-half

⁶⁵ Section 6.2 (“Employees whose regular day off coincides with an established holiday shall be granted another day off for each such holiday, without any change in their regular salary, at a time mutually agreed between the employee and the Department Head.”).

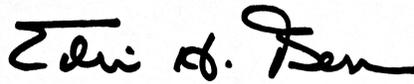
⁶⁶ Section 6.2 (“Employees who are required to work a regular tour of duty on an established holiday shall receive compensatory time at one and one-half (1.5) times their regular straight time rate of pay for each hour worked on each such holiday.”). *See also*, City Brief at 26 where the City agrees that in addition to the time and one-half compensatory time, the SPCOs also receive their regular salary (“... SPCOs who are required to work on a holiday will receive compensatory time at one and one-half time for all hours worked ... plus their regular salary.”).

⁶⁷ Section 6.2 (“Employees who are required to work a regular tour of duty on an established holiday shall receive compensatory time at one and one-half (1.5) times their regular straight time rate of pay for each hour worked on each such holiday ... [and e]mployees whose regular day off coincides with an established holiday shall be granted another day off for each such holiday, without any change in their regular salary, at a time mutually agreed between the employee and the Department Head.”). *See also*, City Brief at 26 quoted in note 66 *supra*.

compensatory time for hours worked along with their regular pay).⁶⁸

(Contract interpretation)

5. Any SPCOs not compensated consistent with the terms of this Supplemental Award shall be made whole.
6. With the consent of the parties, I will retain jurisdiction to resolve any further disputes which may arise concerning the *Award* and this Supplemental Award.



Edwin H. Benn
Arbitrator

Dated: April 3, 2015

⁶⁸ Section 6.2 (“Except for employees whose regularly scheduled work week includes Saturday and/or Sunday, said holidays which fall on Saturday will be observed the Friday before the holidays; said holidays which fall on Sunday will be observed on the Monday after the holiday.”) and other holiday pay provisions discussed.