

**AMERICAN ARBITRATION ASSOCIATION
BEFORE ARBITRATOR
LORETTA T. ATTARDO**

In the matter of the Arbitration between:

METHUEN POLICE SUPERIOR OFFICERS' ASSOCIATION L. 17,
Union
And

CITY OF METHUEN,
Employer

Case No. 01-19-0001-3281

THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into by the above-named Parties, and having duly heard the allegations and proofs of the Parties, AWARD as follows:

The grievance is arbitrable.

The City did not violate the parties' 2017-2020 collective bargaining agreement, the July 18, 2018 MOU or the parties 2014-2017 CBA by failing to pay compensation and wages under the 2017-2020 CBA, and/or the MOU, and by failing to increase wages under the 2014-2017 CBA. Further, the City did not discriminate against the Union or its members.

The grievance is DENIED

Loretta T. Attardo

Loretta T. Attardo, Arbitrator
January 7, 2022

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DECISION AND AWARD

Appearing for the Union:

Gary G. Nolan, Esq.
Peter J. Perroni, Esq.
Nolan / Perroni, P.C.

Appearing for the Employer:

Darren R. Klein, Esq.
Jared M. Collins, Esq.
KP Law, P.C.

John Foskett, Esq.
Valerio, Dominello & Hillman, LLC

I. BACKGROUND

A. Introduction

This arbitration arises from a class action grievance filed by the Union on March 6, 2019. At the time the Union represented a bargaining unit of approximately twenty four (24) police superior officers including sergeants, lieutenants and captains. In short, the dispute concerns a 2017-2020 collective bargaining agreement purportedly approved by vote of the Methuen City Council on September 18, 2017. The Union filed a Demand for Arbitration on April 24, 2019 requesting that the Arbitrator enforce the provisions of that agreement as well as other relief including punitive damages. The arbitration was tried before me over ZOOM videoconference during ten (10) days of hearings from October 2020 to June 2021. Over 150 exhibits comprised of over one thousand pages were introduced into evidence. Fifteen (15) witnesses testified under oath and were subject to direct and cross examination. Both parties filed post-hearing briefs of fifty (pages) each, and the hearing record closed on November 23, 2021.

B. Issue

The parties did not agree upon a stipulated issue. Each proposed their own statement of the issue as follows.

1. The Union proposed the following issue:
 - a. *Whether the City of Methuen, on an ongoing and continuous basis, violated the provisions of the parties Collective Bargaining Agreement in effect from July 1, 2017 through June 30, 2020, as modified by the parties' subsequent Memorandum of Understanding ("MOU"), by failing to pay wages and other compensation to bargaining unit members as required by the terms of the MOU. If so, what shall be the remedy?*
 - b. *Whether the City of Methuen, on an ongoing and continuous basis, violated the provisions of the parties' Collective Bargaining Agreement in effect from July 1, 2017 through June 30, 2020 by failing to pay wages and other compensation to bargaining unit members as required by the terms of that CBA. If so, what shall be the remedy?*
 - c. *Whether the City of Methuen on an ongoing and continuous basis, violated the provisions of the parties' immediate past CBA (in effect July 1, 2014 through June 30, 2017), dated July 9, 2015, by failing to properly calculate and pay wages and other compensation to bargaining unit members as required by the terms of the CBA. If so, what shall be the remedy?*
 - d. *Whether the City has discriminated against the members of the bargaining unit because of their membership in the union, and because of their lawful activity and support of the union, in violation of Article 5 of the parties' CBA. If so, what shall be the remedy?*
2. The City proposed the following issues:

- a. *Is the grievance substantively arbitrable, i.e., is there a valid and enforceable contract and/or agreement to arbitrate between the parties and/or are the provisions of Article XXIV and/or any other Article providing for financial increases valid and enforceable?*
 - 1) *Were the cost items in the purported FY18-FY20 CBA ever funded in accordance with G.L.c.150E sec. 7 and, if not, is the CBA valid and enforceable?*
 - 2) *Was the City Council vote to approve the CBA on 9/18/17 legally valid, and if not, is the CBA valid and enforceable?*
 - a) *Did the vote taken by the City Council on 9/18/17 approving the CBA violate the provisions of the City Charter, City Ordinances and/or City Resolutions regarding the requirements for entry into a valid, binding contract and, if so, is the CBA valid and enforceable?*
 - 3) *Is Article XXIV of the CBA based upon an illegal wage parity provision and, if so, is Article XXIV valid and enforceable both in the alleged current CBA and/or through the evergreen clause of the July 1, 2014 through June 30, 2017 CBA?*
 - 4) *Does the CBA violate G.L. c. 40 and, if so, is the CBA valid and enforceable?*
 - 5) *Have the requirements of Article XXIX, Section 4 of the CBA been met and, if not, are the financial increases contained in Article XXIX or any other provision of the CBA valid and enforceable?*
 - 6) *Was there a meeting of the minds between the parties as to the amount of the financial increases provided by the CBA, and if not, is the CBA valid and enforceable?*
 - 7) *Is the CBA void as being contrary to public policy?*
- b. *Did the Union waive its right to file a grievance by not filing a grievance until on or around March 6, 2019?*
- c. *Has the City violated Article XXIV if the purported FY18-FY20 CBA by not implementing the wage increases referenced in Sections A, B, and C? If so, what shall be the remedy? (The City maintains that the Arbitrator has no legal authority to order that funds be appropriated by the City)*

Having considered all of the evidence and arguments presented in this arbitration, I find the following issues to have been presented.

Is the grievance substantively and procedurally arbitrable?

If the grievance is arbitrable:

1. Did the City violate the terms of the 2017-2020 Superior Officers' CBA when it failed to pay the Superior Officers in accordance with the terms of that CBA approved by vote of the City Council September 18, 2017? If so, what shall be the remedy?
2. Did the City violate the terms of the July 18, 2018 MOU when it failed to pay the Superior Officers in accordance with the terms of the MOU? If so, what shall be the remedy?

3. Did the City violate the terms of the 2014-2017 Superior Officers' CBA when it failed to pay the officers in accordance with the terms of that agreement? If so, what shall be the remedy?
 4. Did the City breach the covenant of good faith and fair dealing by failing to pay the Superior Officers in accordance with the terms of the 2017-2020 CBA, or the terms of the July 18, 2018 MOU, or the terms of the 2014-17 CBA? If so, what shall be the remedy?
 5. Did the City discriminate against the Superior Officers in violation of either the 2017-2020 CBA or the 2014-2017 CBA? If so, what shall be the remedy?
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II. FACTS

I find the following to be the key relevant facts:

1. The Methuen Police Department is made up of the patrolmen (represented by the Methuen Police Patrolman's Association), the sergeants, lieutenants and captains (represented by the Superior Officers' Association L. 17), and the Chief of Police employed under an individual employment contract with the City.
2. For at least twenty-eight (28) years, police officers' base pay (including the Chief's) has been built off of the base of officers in the descending ranks. The parties refer to this increased differential between ranks as the "splits". In addition, officers are paid a variety of types of compensation such as uniform allowances and cleaning stipends, night shift differential, longevity, overtime, detail pay, court time, career and educational incentives. Various compensation items are addressed in a number of different articles in the CBA, but the primary article addressing overall compensation is Article XXIV.
3. The Superior Officers' prior CBA expired on June 30, 2017. The parties began negotiations for a successor CBA in May 2017. It was not unusual for the City and the Union to begin cba negotiations after a cba had expired. The City's 2017 bargaining team consisted of Mayor Stephen Zanni, City Solicitor Richard D'Agostino, Assistant City Solicitor/HR Director Ann Randazzo and Police Chief Joseph Solomon.¹ Captain Gregory Gallant and Lieutenant Joseph Aiello made up the Union bargaining team. This 2017 negotiation was the first time Captain Gallant led the Union bargaining team. Between May and August 29, 2017, the Union and City bargaining teams met for several negotiation sessions. The City did not present any written proposals or counter proposals. The Union presented several written proposals. At the insistence of Mayor Zanni, there were no formal ground rules for the negotiation sessions. Although Mayor Zanni was the City's lead negotiator, he claims not to have kept any notes of the negotiations.

¹ At the time of the final Arbitration hearings, none of these individuals remained employees or appointed officials of the City.

4. The Union's goal during negotiations was to increase base pay for its members. The Union wanted to make up for years they had accepted zero increases and other reductions in pay. In addition, the Union wanted to ensure that certain pieces of compensation were added in to a member's base pay and to avoid having the City Auditor Tom Kelly omit items from officers' base pay calculation as he had in the past and , which omissions the Union considered to be incorrect.²
5. Despite having served on many City negotiating teams in the past City Auditor Kelly, a thirty-year City employee, was excluded from the City's bargaining team in 2017. He was not asked to review any bargaining proposals or to cost out any of the proposals made during the Superior Officer contract negotiations until the newly elected mayor James Jejuga made this request to Mr. Kelly shortly after taking office as Mayor in January of 2018.
6. The final bargaining session was held on August 29, 2017. By that date, the bargaining teams had reached a tentative agreement on all material terms, which Captain Gallant labelled "First Final Draft" and which was signed by Captain Gallant. The only handwritten note on this draft states "17/18/19 add in 0/2/2". There were no notes indicating other language would be added to the agreement. As of August 29, 2017 the bargaining teams had agreed to the following benefits:
 - i. Increased vacation buy-back and carry over in Article VII, Sec. 5-7;
 - ii. Increased compensation for in-service training in Article XIV, Sec.2-3 (Sec. 3 effective 7/1/18);
 - iii. Increased compensation for officers working out of rank in Article XXIII;
 - iv. Officers' military time credited for longevity in Article XXVI, Sec. 2;
 - v. Proration of the career incentive in Article XXVI, Sec. 3.Except as noted above, there is no language in the CBA stating that these benefits would take effect on a date other than during the first year of the CBA effective July 1, 2017 (FY2018).
7. In addition, the bargaining teams agreed that certain benefits would be "rolled into base pay" beginning July 1, 2018. These "rolled-in" benefits included: holiday pay, cleaning allowance for sergeants³, and hazardous duty/technology compensation. There was no discussion at the bargaining table that the Quinn Bill /educational incentives would be included in the calculation of the "splits" from one level to the next. In the 2017-2020 CBA the language of the Quinn Bill/Educational incentive article, Article XXIX Sec. 19, was not changed from the 2014-2017 CBA language. That article provides

² In addition to being City Auditor, Thomas Kelly was ex-officio Chair of the City of Methuen Pension Board and responsible for enforcing Massachusetts Municipal pension regulations as to what constituted pensionable income.

³ The record shows that cleaning allowance was previously rolled into the sergeants' base pay in the 2014 CBA, but City Auditor Kelly did not calculate it that way. The bargaining teams also agreed to increase the amounts for the officers' clothing allowance and the cleaning allowance effective July 1, 2018 and again July 1, 2019.

that Superior Officers hired before July 1, 2013, receive an educational incentive payment as a percentage of base pay in accordance with the percentages for Associates, Bachelors and Masters degrees set out in M.G. L. c. 41, sec. 108L (aka "The Quinn Bill"). Officers hired after July 1, 2013, receive \$2000 for Associates degree; \$4000 for Bachelors degree; \$6000 for Masters degree.

8. At the conclusion of the August 29, 2017 bargaining session, Mayor Zanni requested that Captain Gallant draft a clean copy of the final agreement for signatures.⁴ Captain Gallant had no prior experience drafting a collective bargaining agreement and he admittedly struggled with the contract language as well as the logistics of formatting and producing a clean contract for signatures. Captain Gallant drafted what he himself considered the final agreement, albeit in a cut and pasted "Frankenstein" format, that he signed and dated August 31, 2017. This "first final draft" (Union Exhibit 4) contained no Paragraph A in Article XXIV, the Compensation article. That Article XXIV began with Paragraph B.
9. On August 30, 2017, the day after the final bargaining session, Captain Gallant and Lieutenant Aiello met with their Union membership to report on the agreed upon terms for the new CBA. They had no written contract to distribute to the union members at that meeting, nor did they have any written wage scales or financial cost calculation to show their members. Captain Gallant only estimated what new wages would be under the proposed CBA. Nevertheless, the members unanimously voted to approve the agreement. At this meeting the Union members also withdrew their previously approved vote of July 21, 2017 to engage the services of an accountant to cost out the contract and actually calculate the precise wages each member would receive under the new agreement. The July 21, 2017 unanimous vote to hire an accountant was rescinded so an accountant was never engaged by the Union.
10. On August 30, 2017, Captain Gallant delivered three copies of his first final draft of the contract (Union Exhibit 4) to Mayor Zanni and to Chief Solomon. A copy was not given to the other members of the bargaining team for review. Subsequently, Chief Solomon informed Captain Gallant that Mayor Zanni wanted him to include language expressly stating the "0,2,2 percent COLA" raises. Captain Gallant was concerned that adding this language would cause confusion because the bargaining teams had agreed that the "0,2,2" increases would be on the "splits" percentages, not an across the board COLA. In addition, Captain Gallant became concerned that City Auditor Kelly would miscalculate the salaries he believed the bargaining teams had agreed upon. So Captain Gallant added language to the first final draft including the requested "0,2,2" language, a paragraph specifying how base

⁴ Captain Gallant testified that in the past when the City had drafted the final contract language, the Union members believed that the City included language that did not reflect the agreements reached at the bargaining table.

pay was to be calculated, and repeatedly inserting language stating that the jump off points in the splits should include “all added base pay calculations.”

11. While struggling with drafting the appropriate language, on August 31, 2017, Captain Gallant reached out to the Union’s counsel for assistance sending him a copy of the revised draft with the additional language. The Union’s attorneys had not been involved in the contract negotiations. Captain Gallant pointed out that the rank differentials had some “big changes” and that he foresaw “having to litigate the wording” “because of the large increases in pay”. Captain Gallant noted that the contract provided “great increases, and it all compounds.” In their communications about the contract between September 1 and 6, Union counsel advised that Gallant attach a wage schedule and define the language so it clearly reflected the agreement reached. Captain Gallant believed it too difficult for him to create wage schedules because of all the individual variables in each members’ compensation and because the parties had not used wage schedules in the past. He attempted to draft revised contract language on his own, never reviewing it with Union counsel or any other members of the bargaining team, with the exception of Chief Solomon.

12. Captain Gallant added the following language to Article XXIV:
In bold print, at the top of the Article he added –

The Superior Officers Ranks shall receive the following compensation,

The cost of living increases are as follows:

July 1, 2017 – zero percent increase

July 1, 2018 – two percent increase

July 1, 2019 – two percent increase (U. Ex. 1, Art. XXIV)

In addition, Captain Gallant added a Section A stating:

Base pay and added base pay calculations are to be calculated in the following order and manner to arrive at base pay for all purposes; Base pay, then add cleaning allowance, subtotal, then calculate and add Holiday compensation under Article XII, then add calculated Protective Vest/Hazardous Duty and Technology Compensation percentage, calculate Quinn Bill/Education Incentive.

Section A was a completely new provision added by Captain Gallant without any discussion with the bargaining team. At the bargaining table there had been no discussion of including or excluding the Quinn Bill/Education Incentive in the base for purposes of calculating the roll up. Nor was any change made to the language of Article XXIX, Sec. 19 – the Quinn Bill/Educational Incentive article.

In addition to the new Section A, Captain Gallant added new language to Sections B and C of Article XXIV. The following new language in *italics* appears in every sentence in Sections B and C:

“Sergeants shall receive a salary equivalent to 132% of the maximum patrolman’s salary *including all added base pay calculations*” [Effective July 1, 2018 – 134%; Effective July 1, 2019 -136%].⁵

“Lieutenants shall receive a salary equivalent to 116% of the maximum Sergeant’s salary *including all added base pay calculations*” [Effective July 1, 2018 – 118%; Effective July 1, 2019 – 120%].

“Captains shall receive a salary equivalent to 116% of the maximum Lieutenant’s salary *including all added base pay calculations* [Effective July 1, 2018 – 118%; Effective July 1, 2019 – 120%].

In addition to his Article XXIV revisions, Captain Gallant also added language to the Uniforms provision – Article XVII – repeatedly adding “*and be considered base pay for all purposes including determination of total compensation under Article 24.*”

He repeatedly added the same language linking the Hazardous duty/Technology addition to base pay to the calculation of total compensation under Article XXIV. He did the same thing adding language to the Article XII Holiday Pay add-ins to base.

13. Captain Gallant testified that he understood the additions to Article XXIV (and presumably the other articles) to mean that the higher ranked officers would benefit from compensation items rolled into the bases of the lower ranked officers. He referred to this as “compounding” and he acknowledged that it resulted in significant increases to the pay of the Superior Officers. Captain Gallant testified that these language additions by him were not intended to change but only to clarify the agreement he believed the bargaining teams had reached at the negotiation table.
14. The same language stipulating how to calculate base pay and “including all added bay pay calculations” was subsequently added to the patrol officers’ contract at the recommendation of Chief Solomon who wrote in an e-mail to the patrol union president on September 6, 2017: “I changed the wording on base pay calculations (per superior wording).” Because of this addition to the wording in the Patrolman’s cba, the jumping off point increased for calculating a Sergeant’s base pay, thereby increasing Superior Officers’ pay up the ranks. This added language also increased Chief Solomon’s pay which was contractually tied to the wage increases given to the highest paid police officer and increases in Superior Officer benefits.

⁵ Because the CBA is for a three-year period, in each subparagraph applicable to each rank, there are three provisions containing the “including all added base pay calculations” formula. The City argues this means that the first such provision applies to the first fiscal year of the CBA, i.e., July 1, 2017-June 30, 2018. In his testimony Captain Gallant testified that he believed the 0% controlled the first year of the contract entirely.

15. Captain Gallant claims that on September 4, 2017, he gave a copy of this revised contract, tabbed to indicate the changes, to Chief Solomon and ultimately to Mayor Zanni for signature. There is no evidence that the revised contract was ever given to any other members of the City bargaining team to review. At the instruction of Chief Solomon, Captain Gallant signed the revised contract inserting his original August 31, 2017 signature date. Captain Gallant received a signed copy of the contract back from Mayor Zanni on September 6, 2017, back dated August 31, 2017. There is no evidence Captain Gallant and Mayor Zanni had any discussion about the new language Gallant added to the original draft contract.
16. Mayor Zanni was anxious to complete all contract negotiations and have the City Council vote on collective bargaining agreements in September 2017 because he incorrectly believed the contracts needed to be completed before he left office December 31, 2017.
17. About one week before the September 18, 2017 Council meeting, a copy of the signed CBA was left for City Auditor Tom Kelly's review. He and his staff, including the Deputy Director of Budgets, immediately noticed changes to base pay in the 2017-2020 CBA which raised concerns about how the base pay built up and about the impact on pension calculations. When Auditor Kelly expressed his concerns to Mayor Zanni stating they "could not go forward" with approval, Mayor Zanni said nothing and walked out of Auditor Kelly's office. Mr. Kelly also claims he briefly informed Council Chair Atkinson and Vice Chair Kazangian of his concerns. All three men (Zanni, Atkinson and Kazangian) deny receiving such warning from Auditor Kelly. Auditor Kelly attended the September 18, 2017 Council meeting at which the CBA was approved, but he did not pro-actively speak up against the CBA or raise any questions during the meeting.⁶
18. On September 18, 2017, the City Council voted to approve the Superior Officers' 2017-2020 CBA. On that same night the Council quickly approved six other collective bargaining agreements using the same approval process.⁷ On September 13, five days before the Council meeting, copies of all of the contracts had been delivered to the City Councilors in a 225-page package. This was less than ten days before the September 18 meeting mandated by the City Order #4720.⁸ None of the documents included a red lined version

⁶ In his hearing testimony Auditor Kelly expressed regret about his silence but explained it as caused by his fear of retaliation, having spoken up previously about the Police Chief's lucrative contract and having been "punished" for that including having been excluded from collective bargaining negotiations.

⁷ Other cbas approved by the City Council on September 18 2017 include City cbas with unions representing the firefighters, middle management, patrol officers, dispatchers, DPW and Department Heads.

⁸ Section 2-9 of Methuen City Charter provides "no measure shall be passed finally on the date which it is introduced, except in cases of special emergency...." In addition, the Council is required to have two readings of collective bargaining agreements and a contract cannot be voted on the same day on which it was introduced before Council. City Council Resolution #4720, adopted in 2007, mandates that collective bargaining agreements be submitted to the City Council no less than ten (10) days prior to any scheduled meeting for the acceptance, adoption and consideration of appropriation therefor, and that the cba be

or financial impact statement of the cbas in the package. No questions were asked about the agreements during the Council meeting. No presentation was made by the City Auditor or anyone else explaining changes from the prior CBA. Although some City Councilors testified that they had read the entire Superior Officers' CBA before the September 18 meeting, others admitted they had not read the contract. The City Solicitor and Assistant City Solicitor both testified they had not read the Superior Officers' CBA before it was voted on by Council on September 18, 2017.

19. Multiple City Councilors testified they believed they were voting to approve a Superior Officers' CBA which provided pay increases of zero, two and two percent in FY2018, FY2019 and FY2020 respectively. They based this understanding on the representation by Mayor Zanni that all the contracts provided for 0, 2 and 2% increases. There is no evidence the Councilors understood how the items rolled in to the Superior Officers' base pay or other monetary items in the Superior's CBA would increase the costs to the City. Other contracts approved by City Council on September 18, 2017 resulted in pay increases of more than 0, 2 and 2%.
20. City Council took no vote to appropriate funds for the 2017-2020 Superior Officer's CBA on September 18, 2017. At the September 18, 2017 meeting Mayor Zanni made no request for an appropriation to fund the wage increases in the Superior Officers' CBA. There was no discussion at the Council meeting about how much the wage increases would cost, and no detailed reference was made to the City's budget in relation to the Superior Officers' CBA. No wage scale was presented by either the City or the Union. Without any financial information whatsoever regarding the wage increases in the CBA, the City Council voted to merely "approve" the contract in the Regular and Special meetings it held on September 18, 2017.
21. On January 1, 2018, former City Councilor James Jejuga became Mayor of Methuen.⁹ Shortly thereafter, the Mayor of Haverhill, James Fiorentini, contacted Mayor Jejuga and informed him that Mayor Fiorentini's office had reviewed the new 2017-2020 Methuen Superior Officers' CBA and had come up with exorbitant salary figures. When Mayor Jejuga spoke with Auditor Kelly he learned that Kelly had concerns about the costs of the new CBA but that he had not yet calculated the complete costs of the contract. As ex officio Chair of the City of Methuen Retirement Board, Kelly had concerns about

accompanied by a "separate financial impact statement and a memorandum delineating the differences between the proposed contract and any previous agreement between the City and the respective collective bargaining unit". The hearing record shows that these procedures were not followed by the City Council when approving prior collective bargaining agreements.

⁹ Mayor Jejuga was on the Methuen City Council at the time the Council voted on the Superior Officers' 2017-2020 CBA on August 18, 2017. Although he had a son who was a Methuen superior officer on the Methuen police force, Councilor Jejuga was given a legal opinion by the City that he needed to vote on the Superior Officers' CBA because of the "rule of necessity".

- certain benefits not being pensionable income and the effect of rolling certain benefits into base pay.¹⁰
22. After receiving this “heads-up” from Mayor Fiorentini, and preparation of the FY2019 budget, Mayor Jeguga asked Auditor Kelly to calculate the cost of the CBA provisions. Throughout the spring of 2018, Kelly prepared multiple cost analyses, which is not uncommon in costing out unusual or new contract language. Because of the complexity of the CBA’s wage calculations, Kelly’s full cost analysis took considerable time. His initial analysis showed that the costs of wage increases were significantly higher than 0, 2 & 2% per officer. Some of the cost calculations he conducted excluded the Quinn Bill enhancement from the base pay calculations utilized in the build-up of wages from rank to rank. Nevertheless, the resulting wages, even without the Quinn Bill in the calculations, resulted in substantial wage increases for Superior Officers.¹¹ When Auditor Kelly applied the Article XXIV language literally and included the Quinn Bill enhancements in the base pay calculations used for the build up from rank to rank, the resulting wage increases were astronomical, resulting in wage rates over \$400,000/year for Captains such as Captain Gallant, and base wages of more than \$300,000/year for many lieutenants and \$180,000/year for many sergeants.¹²
23. Mayor Jeguga and Auditor Kelly realized such astronomical increases could not be supported, so they calculated a number of different alternative wage scenario’s hoping to reach agreement with the Union on a modified wage scale the City Council would approve. Auditor Kelly labelled one scenario “Proposed Zanni Contract” which included his literal interpretation of the CBA language in Article XXIV, including the Quinn Bill enhancement in the roll up through the ranks. Another scenario Auditor Kelly labelled “City Auditor Interpretation.” This scenario was how Auditor Kelly thought the CBA language could be applied in light of the contributory retirement laws, leading to a less exorbitant result. Auditor Kelly also performed a calculation of costs using only a straight 0/2/2% increase.
24. In the meantime, in late April 2018 as the FY2018 budgetary year was ending, the City Council approved a resolution (Order #5402) authorizing the mayor and Auditor to make inter and intra departmental transfers to balance

¹⁰ Auditor Kelly later requested and received opinions from the Retirement Board’s counsel and PERAC Public Employees Retirement Administration Commission) concerning the retirement issues with the Superior Officers’ CBA. These opinions concluded that numerous items purportedly “rolled into base” under the 2017-2020 Superior Officers’ CBA were not “pensionable” income under Massachusetts pensions laws. In addition, they opined that literal reading of the CBA compensation language would result in salary calculations that could bankrupt the Methuen pension system.

¹¹ It is the Union’s position that wage calculations WITHOUT the Quinn Bill in the base pay build up rank to rank is what the Union agreed to, i.e., that the Quinn/educational incentive would only be added to the base of the individual Superior Office.

¹² It is the Union’s position that the Union never intended the Quinn Bill enhancement to be added to base pay build up from rank to rank. The Union contends even Auditor Kelly did not believe the Quinn Bill should be included in the base pay build, but he included it at the direction of the Mayor because it was intended to artificially inflate the wage numbers to an unsupportable level in the opinion of the City Council and citizens of Methuen.

- the FY2018 budget. This omnibus transfer authorization was intended as a standard year-end budget clean-up and it did not include a specific appropriation to fund the wage increases in the Superior Officers' 2017-2020 CBA.
25. In the Spring of 2018, Mayor Jejuga sent to City Council a budget request for a straight 2% increase for Superior Officers, without funding any of the stacking and compounding language in Article XXIV. The City Council rejected that request and instructed Mayor Jejuga to negotiate an acceptable resolution with the Union. In the interim, the City adopted a 1/12 level funded budget for one month, using FY2018 budget amounts until the Council approved the full FY2019 budget.
 26. After several negotiation sessions, In July 2018 the Union and Mayor Jejuga's teams reached a settlement/compromise reduced to a written Memorandum of Understanding ("MOU"). The MOU would have paid the Superior Officers average increases of 24% for FY2019 and 2020. Although less than the average 77%-224% increases projected under the CBA's stacking and compounding language of Article XXIV, the 24% average was greater than other City unions were receiving under their 2017-2020 contracts. [Patrol Officers between 6%-14% over three years; Firefighters between 8% and 14% over three years]. The MOU contained a wage scale attachment calculating the precise wage payments to be made to each individual Superior Office for FY2018, 2019 and 2020. This was the first such written wage schedule ever agreed to by the parties for the 2017-2020 contract period.
 27. The MOU by its terms required City Council approval and funding. In July 2018 City Council refused to approve the MOU, and reduced by \$1.8m the Personnel Services line item in Mayor Jejuga's proposed FY2019 budget – the line item containing sufficient funds intended to pay the Superior Officer reduced salary items in the MOU.
 28. Although City Council had neither approved nor funded the MOU, Mayor Jejuga, on his own initiative, began paying the MOU salary rates in July 2018, hoping that City Council would reconsider and restore the \$1.8M before the budget was exhausted and before police layoffs became necessary.
 29. The dispute about the Superior Officer's CBA continued and the City Council did not approve or fund the MOU. By January 2019 the FY2019 budget that had been approved was nearing deficit and Mayor Jejuga, who had been paying the MOU rates to Superior Officers without authorization, faced the choice of police layoffs or ceasing Superior Officer payments under the MOU rates. In January 2019, the City offered to bargain with the Union and notified the Union of its intention to begin paying union members' salaries under the prior 2014-17 contract's evergreen clause. The Union did not bargain with the City and City Council subsequently transferred funds into the police budget from the stabilization funds in order to allow payment of the 2014-2017 wage rates to happen for the remainder of FY2019.

30. No calculations of the costs of the Superior Officers' 2017-2020 CBA were given by or to the negotiating teams at the bargaining table before their negotiations concluded on August 29, 2017. No full calculations of the cost of the proposed CBA or wage scales were presented to Union members before they voted to approve the CBA on or about August 30, 2017. Despite an initial vote by Union members to hire an accountant to fully calculate their wages under the proposed CBA, no accountant was ever hired by the Union. No calculation of costs of the proposed CBA or wage schedule was presented to the City Council before the Council vote on September 18, 2017. No comparison of wage increases between the prior 2014-2017 contract and the 2017-2020 CBA was provided to the City Council before their vote on September 18, 2019. The first complete wage schedule for FY18, 19 and 20 that was agreed upon by the Union and City representatives as a compromise was attached to the July 18, 2018 MOU that was never approved or funded by City Council. Captain Gallant testified that these MOU wage amounts were less than what the Union believed they had obtained in the final 2017-2020 CBA voted by City Council.
31. Albeit after the fact, the CBA which was "approved" by City Council on September 18, 2017, including all the language added to Article XXIV by Captain Gallant, has been interpreted and its costs calculated by several very experienced accounting professionals employed by the City. In addition to Auditor Tom Kelly, the CBA has been costed out by Kelly's interim successor Cheryl Wright, by Wright's permanent successor Methuen's Chief Administrative and Financial Officer Maggie Duprey, by Sean Cronin Methuen's state appointed Fiscal Stability Officer, and by the state Inspector General. All reached similar conclusions – that the language of Article XXIV results in base salaries between \$200,000 and \$500,000 annually by year 2020 – i.e., between 77% and 224% increases in pay. These figures do not reflect pay for additional overtime.
32. There is no evidence in the record that any City employee was ever asked to artificially inflate the cost calculations or to perform calculations he or she believed to be false or inaccurate.

III. POSITIONS OF THE PARTIES

The Union's Position

The Union argues as follows:

- The City violated the 2017-2020 CBA by failing to pay wages and other compensation due to bargaining unit members pursuant to that agreement.
 - The City falsely accused the Union of fraud and deliberately misinterpreted the requirements of the contract in order to inflate salaries beyond reason and avoid paying the actual raises agreed upon by the parties.
 - The City's claims of fraud in the formation of the contract are baseless.

- The contract should be construed and applied in according to its plain and natural meaning.
- The 2017 CBA was approved and funded.
 - The Spring 2018 supplemental appropriations further confirm that the contract was funded.
- Article XXIX Section 4 does not help the City.
- To the extent that the City argues that there is no enforceable 2017 CBA such arguments are not within the jurisdiction of the arbitrator, have otherwise been waived and only demonstrate the City's animus toward the Union.
 - The City has waived its right to rely on requirements it has never followed.
 - The City's attempts to void the 2017 CBA while at the same time honoring all other CBA's formed and funded using the same procedural process violates the non-discrimination clause in the 2017 CBA.
- The City has violated the 2017 CBA as modified by the MOU.
- The City has violated the provisions of the parties' prior (2014-2017) CBA.

The City's Position

The City argues as follows:

- Massachusetts law and local enactments implementing that law bar enforcement of the wage increases in the contract because the appropriation process required for those "cost items" never occurred.
 - Mass. G.L. c. 150E sec. 7(b) and implementing local enactments required that the proposed wage increases be the subject of an appropriation request to the City Council and a vote by the Council to appropriate an amount funding those increases. Those mandatory steps never occurred.
 - Massachusetts law bars the Union from enforcing the CBA against the City because the requirements for an enforceable contract were never satisfied and the City cannot be estopped from insisting on those requirements.
 - Arguments by the Union that the wage increases were in fact "funded" despite the failure to follow the process set for the in M.G.L. c. 150 E sec. 7(b) must be categorically rejected.
 - Under Massachusetts law the Arbitrator has no authority to remedy the failure to follow the appropriation process by issuing an award that requires an appropriation.
- The CBA that the Union seeks to enforce itself requires by its own clear language that there have been an annual appropriation funding the wage increases, and an award enforcing the contract is barred by its own terms.
- The MOU purportedly settling the contract dispute is not enforceable because it was expressly contingent upon a vote by the Council funding the "compromise" salary amounts, which never happened.
- The purported CBA that is the subject of this grievance is not enforceable under basic tenets of contract law, as there was no "meeting of the minds".
 - The Union added language that the parties did not discuss and that did not result in a shared understanding of the wage increases.

- The Union has consistently ignored the plain language that Gallant unilaterally added to Article XXIV and has taken inconsistent positions on what it means.
- The lack of clarity in Article XXIV must be construed against the Union, which as the drafting party is solely and unforgivably responsible for any lack of clarity.
- The Union's grievance cannot be sustained as a matter of public policy, because enforcement of the terms of the CBA would bankrupt the City and the retirement system.
- The Union's grievance is not procedurally arbitrable due to its failure to timely file a grievance.
- The Union did not meet its burden of proof to establish any type of retaliatory discrimination by the City.

IV. OPINION

A. Introduction

The resolution of the dispute between the City and the Union concerning the 2017 Superior Officers' CBA has involved a long, arduous and contentious process including direct settlement discussions, mediation and this ten (10) day arbitration including fifteen (15) witnesses and hundreds of pages of documentary exhibits. There have clearly been significant political ramifications to this dispute as well as press coverage, external investigations and formal or informal opinions by other legal and governmental authorities. While some of these opinions have been made part of the voluminous record in this arbitration, as arbitrator I have endeavored to focus narrowly on the contractual dispute between the parties, expressing no opinion about the external investigations, legal interpretations or political motivations and ramifications.

The Union bears the burden of proof in this contract interpretation case. The questions before me are several and are outlined in the issues presented section described above. Having carefully reviewed the evidence presented and the arguments of the Union and the City, the following is my decision.

B. Decision

1. THE GRIEVANCE IS SUBSTANTIVELY AND PROCEDURALLY ARBITRABLE.

For the reasons more fully set forth in Paragraph IV B. 8. of this Decision below, I find the grievance to have been timely filed. With respect to the City's challenge to the substantive arbitrability of the Union's grievance, I find the grievance to fall within the broadly stated parameters of the grievance and arbitration provision (Article X) of both the purported 2017-2020 CBA and the prior 2014-2017 CBA. Article X is identical in both contracts and provides:

Section 1. Any dispute, grievance or difference which may arise between the parties during the term of this Agreement including the application, meaning or

interpretation of, this Agreement, and which is not otherwise controlled by the laws of the Commonwealth of Massachusetts shall be adjusted in accordance with the following procedure. This procedure, hereinafter called the grievance procedure, shall be informal and confidential at all times. Any time limitations herein set forth may be waived and/or extended by. Mutual agreement of the parties.

Thus, even if I find that the 2017-2020 Superior Officers' CBA is not valid and enforceable, the 2014-2017 CBA becomes operative under the Duration (aka evergreen) clause, Article XXI, of the parties' prior agreement:

...The provisions of this Contract shall remain in effect until the approval of a successor contract."

In this multi-claim grievance, the Union asks the arbitrator to rule on the "application, meaning and interpretation" of its purported 2017-2020 CBA, its MOU and its 2014-2017 CBA with the City. Accordingly, the grievance is substantively arbitrable.

2. THERE WAS NO MEETING OF THE MINDS BETWEEN THE PARTIES AS TO THE AMOUNT OF THE FINANCIAL INCREASES PROVIDED BY THE 2017-2020 CBA.

One of the elements of a binding agreement is that the parties must show intent to be bound by the same terms so that their understanding is mutual. This understanding is referred to as a meeting of the minds.

The phrase "meeting of the minds" refers to the full comprehension and mutual agreement of the obligations within a contract. In other words, a meeting of the minds means each party understands the terms **in the same way** so that consensus is mutual. A meeting of the minds is when all parties acknowledge that they fully understand and agree to all of the terms of a contract.

Occasionally, a successful meeting of the minds never actually occurred because the parties involved had completely different interpretations. Based upon my review of the entirety of the record in this arbitration, I conclude that is exactly what occurred in this case between the Union and the City, in particular with the last minute additions to Article XXIV and to several other articles.

As a matter of background, in the former CBA (effective 7/1/14 – 6/30/17), wage and base pay calculations were straightforward. The sergeants were the only ones who by contract language were to have their clothing allowance added to their base pay. No other officer had any of the additional ancillary stipends added to their base pay. This was apparently a matter of contention with Union members who believed these additional items should have been included in their base pay, especially for the purposes of calculating the officer's Quinn Bill incentive and

retirement pay. Including ancillary items in base pay calculation and otherwise increasing base pay was the Union's objective going into the 2017 contract negotiations. The Superior Officers believed that a number of items should have been added into base pay in the past, but the City Auditor failed to calculate the officers' pay in accordance with the Union's interpretation. So, the Union's goal in negotiations was to ensure that the "add ins" became part of the individual officer's base. What is not clear is whether the Union and the City intended that the items they agreed would be added into an individual officer's base would also be added into the bases of the higher level officers, thereby "compounding" or "stacking" the additions to base pay.

The final 2017-2020 CBA at issue has many more added calculations to base pay than the prior 2014-2017 CBA. The evidence unquestionably revealed that the City Council did not understand the full wage implications of all the layered add-ons which Captain Gallant added to the final version he left for the Mayor's signature on September 4¹³ and which was submitted to the Council on September 18 **without ever pointing out the changes to the full bargaining team, to the Mayor or the City Council.**¹⁴ Admittedly, Captain Gallant had difficulty drafting the last-minute language changes to the CBA. With the exception of Chief Solomon, Gallant did not consult others on the bargaining team for assistance in drafting, despite the fact that he was making these significant language changes AFTER the final bargaining session of August 29, 2017. Gallant relied solely on a private consultation with Chief Solomon and on very general but minimal instructions from Union counsel before making the significant language changes which are at the heart of the dispute in this arbitration.

Many facts support the conclusion that the Council did not understand the financial impact of the multi layered salary additions to base pay, some of which were agreed to at the bargaining table, some of which were unilaterally effectuated by Captain Gallant's post-bargaining language changes. Nor did the Council understand the layered ramifications of the additions to base pay. It is not even clear from his own testimony that Captain Gallant understood the full ramifications of the words he drafted.

No calculated proposed salary schedule was ever prepared by the Union. None was given to Union members before their unanimous ratification vote. None was given by the Union to the City either during bargaining or before the September 18, 2017 City Council vote on the CBA. Remarkably, no proposed salary schedule was

¹³ Although the amplified contract was left for Mayor Zanni's signature on September 4, it bears his signature date of August 31, 2017. On September 6 Captain Gallant received the CBA back dated and signed by Mayor Zanni. There was no meeting or discussion of the CBA between Zanni and Gallant before Zanni signed it.

¹⁴ Several Councillors testified that they read the entire contract (with the Gallant added language) before they voted on September 18, 2017. However, no Councillor, even those who claim to have read the entire contract, understood the financial implications of all of the items added to base pay or any stacking effects of multiple add ins to base. Remarkably, to the contrary, several Councillors testified they believed they were only approving a zero/two/two percent increase for the Superior Officers.

produced by the Union in this Arbitration, despite the Union's requested remedy that I order payment of Superior Officer's wages under the 2017-2020 CBA. The Union's entire arbitration presentation on contract costs was comprised of attacks on how multiple City employees calculated the costs along with acknowledgment by Union Counsel when cross examining witnesses that there could be different interpretations of the CBA language.

The evidence showed that the Council believed the wage increase approved on September 18, 2017 was 0/2%/2% over the three-year term and that a few ancillary items were to be added to the base. In the "first final draft" (Union Exhibit 4) produced by Captain Gallant immediately following the August 29 bargaining team session, holidays and Quinn bill amounts (prorated for holidays) were added to the base for all officer ranks. Uniform cleaning amounts continued to be added to a sergeants' base pay and a small percent (1 or 2%) was to be rolled into base pay for protective vest/hazardous duty/technology for all officers. Several other cost items were included in the "first final draft" such as pro-rating longevity pay, and counting military service time for longevity.

After the final August 29, 2017 bargaining session, and after learning from Chief Solomon that Mayor Zanni wanted Article XXIV to include specific language reciting 0%, 2%, 2% wage increases, Captain Gallant drafted the additional language in Article XXIV, Section A, which provided how "base pay" and "added base pay calculations" were to be determined. He also drafted the additional language in Sections B and C to add "including all added base pay calculations" at the end of each sentence. This language in Sections B and C was added by Gallant after he communicated with Solomon on August 30, and the language in Section A was added by Gallant on or after September 1.¹⁵ Captain Gallant testified that he was concerned adding the "0,2,2" language might cause confusion, because the percentage increases were on the "splits" not an overall COLA. He was further concerned that Auditor Kelly would not calculate the base pay increases as had been agreed at the bargaining table. After Union counsel advised Captain Gallant to be as clear as possible in drafting the contract language, Captain Gallant added Section A and the additional, repeated "including all added base pay calculations" language in Sections B and C.

The additions to Article XXIV of the bold zero/two/two language at the top of the page and the language additions of Sections A, B and C, occurred after the final bargaining committee meeting on August 29, 2017. Notwithstanding, none of these

¹⁵ Although it is clear that based on Chief Solomon's post August 29, 2017 communications with Captain Gallant, Chief Solomon KNEW that Captain Gallant would be making language changes to the "first final draft" of the CBA, Chief Solomon never informed the members of the City's bargaining team, not did he instruct Captain Gallant to run his contract changes by the full bargaining team.

changes were expressly brought to the attention of the full bargaining team, the Mayor or the City Council, and there is no credible evidence to the contrary.¹⁶

The plain language of Section A's base pay calculation methodology added to base pay a cleaning allowance (for other officers not limited to sergeants), holiday pay, protective vest/hazardous duty/technology and then the Quinn bill. Thus, the Quinn bill was added twice; once for holidays and again on top of all add-ons. Moreover, the Union's claim now and belatedly (in the face of the financially absurd results when Quinn is added to base) that the Quinn Bill amounts were never intended to be included in the compounding calculations, defies the very language Gallant drafted.

The Union's main argument in this arbitration is that this is only a case about whether the parties intended the Quinn Bill benefit – the educational incentive, under G.L. 41, Sec. 108L- increasing a police officer's pay up to 25% - was intended by the parties to be included in the contractual "salary build", resulting in Superior Officer salaries up to the \$450,000 range. The Union asserts that the City and Union bargaining teams never intended this, and that the City only began taking this "bogus and inflated" position (what the Union calls a "strawman") in May 2018, as a way of avoiding the approved 2017-2020 CBA, that the Union claims resulted in Superior Officer salaries only up to the \$200,000 range, i.e. 50% less than the City claims. The Union makes the "strawman" argument that Auditor Kelly was ordered to perform the higher calculations including the Quinn Bill, so the public would be enraged against the Superior Officers. I find no evidence the City maliciously and artificially inflated the salary figures, or that the City did not believe in good faith that the Quinn Bill/educational incentive was required under the plain language of the CBA. I do not find that the City instructed Auditor Kelly to inflate his calculations for malicious reasons.

My understanding of the plain language of Section A reveals that: Lieutenants get 116% or more (118% in 2018, 120% in 2019) of the maximum sergeant's salary including the **sergeant's** clothing allowance, **sergeant's** holiday pay and **sergeant's** vest/hazardous duty/technology and then the **sergeant's** Quinn Bill **added to their base pay** since they will get 116% of the sergeants recalculated base pay. **Added to that 116% will be each lieutenant's add-ons like holiday pay, clothing allowance and so on, including the Quinn Bill.** This 116% plus increase appears to take effect 7/1/17, and it increases to 118% and 120% on 7/1/18 and 7/1/19 respectively.

On top of that, captains get lieutenant's clothing allowance, lieutenant's holiday pay and lieutenant's other add-on items, including the Quinn Bill added to their base pay since they will get 116% of the lieutenant's

¹⁶ The Union put into evidence a photograph of a yellow tabbed copy of the final CBA which the Union claims Captain Gallant gave to Mayor Zanni highlighting the changes he made. Mayor Zanni, and all other City witnesses categorically deny ever seeing a yellow tabbed version of the CBA highlighting the changes.

recalculated base pay. Added to that 116% will be each captain's add ons like holiday pay, clothing allowance and so on, including Quinn Bill. Again this 116%-plus increase appears to take effect 7/1/17, and it increases to 118% and 120% on 7/1/18 and 7/1/19 respectively.

As such, the higher ranks get multiple Quinn Bill add-ons, multiple clothing allowance add-ons, multiple holiday add-ons and multiple vest/hazardous duty/technology add-ons. None of this result was made known to the City Council when they reviewed the proposed CBA and voted on it on September 18, 2017.

Moreover, effective with the start date of the CBA, i.e. July 1, 2017, the sergeants receive 132% of the “maximum patrolman’s salary including all base pay calculations”. This “split” increases to 134% and 136% effective 7/1/18 and 7/1/19 respectively. The evidence reveals that the “including all base pay calculations” language was added to the patrol contract at the insistence of Chief Solomon after the final August 29, 2017 bargaining session between the Superior Officers and the City. Under the terms of his own employment contract with the City, Chief Solomon personally benefited by this increased patrol base. Furthermore, there is no evidence Chief Solomon brought this patrol contract change to the attention of his City bargaining team for the Superior Officers’ contract, despite the change’s direct impact on the Superior’s contract by increasing the jumping off point for calculating Sergeant’s pay.

Adding further evidence that there was no meeting of the minds is the testimony of Captain Gallant stating that, as of August 29, 2017, he did not know what the patrolman’s contract would provide because that contract had not been completed.¹⁷ Gallant did not have knowledge of the patrol terms being negotiated. Accordingly, if Captain Gallant did not know how much the patrolmen would be paid under their 2017-2020 CBA, there was no way for him to precisely calculate how much sergeants would be paid as their wages were a percentage of the maximum patrolman’s salary.

The Union in fact knew that the multipliers resulting from the “stacking” of additions to base pay significantly increased all Superior officers’ base pay, even without Quinn bill additions. This is evidenced by Captain Gallant’s communication with his membership and with Union counsel.¹⁸ On September 6, 2017, after having

¹⁷ Union Exhibit 2 – the final and signed Patrolmen’s 2017-2020 CBA is dated with a blank September 2017 date. I therefore conclude that the patrol contract was not finalized until sometime in September, AFTER the Superior Officer’s ratified their contract on August 30, 2017.

¹⁸ On August 31, 2017, Gallant wrote to Union counsel:

“Ive’ forwarded the contract. As you’re going to say there are some big changes to the splits on compensation between patrolman Sergeant Lt and captains. There is also an increase given to us with a percentage and hazardous duty pay. I foresee, Because of the large increases in pay, having to litigate the wording. Can you check especially the compensation warding to guarantee as much as possible that we will be strong. Thank you.” (City Ex. 14). Thirty minutes later Gallant wrote to Union counsel confirming a Sept. 1 phone call at noon: *“Noons great, great increases, and it all compounds. Thanks Gary” (City Ex. 16)*

received the revised contract back signed by Mayor Zanni, Captain Gallant informed Union counsel that the contract would go before City Council on September 18 for a vote. Union counsel responded “you covered all bases Greg, nice work. Hopefully they don’t have calculators at the meeting. Good Luck”. (City Ex. 20). Further obfuscating the significance of the CBA’s wage increases, the Union refused their own the attorney’s suggestion to create a wage table and the Union refused to hire an accountant to do the calculations, thereby making it absolutely clear what the Union intended the added language to accomplish. Although Captain Gallant claims he only estimated the calculation for wages under the new CBA, he estimated his own 2017 compensation of approximately \$150,000 would increase to \$200,000 or \$210,000 under the new CBA. This amounts to an increase of approximately 33%, certainly not the amount contemplated by City Councilors approving a 0% 2% 2% increase on September 18, 2017.

Manifestly made clear to this Arbitrator during the many days of hearings in the case is that neither party agreed on the meaning of the layered add-on language which Gallant wrote and added to the final draft before he gave it to the Mayor for signature. There is no evidence that these multiple layered additions to base pay were ever discussed in negotiations. Nor were they brought to the attention of either Mayor Zanni or the Council after Captain Gallant added them to the final contract. Nor were the additions ever calculated by the Union or City¹⁹, revealing the ramifications of the contract language before the City Council approval vote on September 18, 2017. These omissions and events show to this arbitrator that there was no mutual consensus on these very complicated wage terms.

For these reasons, I find that a meeting of the minds between the Union and the City Council did not occur over the meaning of the “first final draft” signed by only Captain Gallant, or over the late amendments to the “first final draft” made by Gallant after August 29, 2017, and included in the 2017-2020 CBA signed by Mayor Zanni and Gallant and voted by the City Council on September 18, 2017.

¹⁹ The first time the City attempted to calculate the costs of the CBA approved by City Council September 18, 2017, was in or about January/February, 2018 after newly elected Mayor Jejuga was alerted to the potentially astronomical costs by mayor of another city. In its post hearing brief the Union blames the City for wrongfully withholding its calculations from the Union. However, the City’s 2018 calculations took place AFTER the CBA had been signed by Mayor Zanni and the Union, and it had purportedly been “approved” by City Council. I find the City had no obligation to provide its calculations to the Union or to provide a wage schedule to the Union. That was the Union’s obligation to its members, who repeatedly asked for precise wage calculations, but were only given estimates by Captain Gallant.

3. THE CITY COUNCIL DID NOT APPROPRIATE FUNDS TO SUPPORT THE WAGE INCREASES IN THE SUPERIOR OFFICERS' 2017-2020 CBA OR THE LATER NEGOTIATED MEMORANDUM OF UNDERSTANDING.

Even if there had been a true “meeting of the minds” establishing an enforceable agreement between the parties, there was no required appropriation or funding for the 2017-2020 CBA. As Counsel for the City points out, Mass law at G.L. c. 150E Sec. 7(b) requires an appropriation request to fund the cost items contained in a collective bargaining agreement.²⁰ Submission of cost items to the Council for approval and funding is a mandatory step in the contract negotiation process. The obvious purpose is to set money aside to fund those cost items described in the collective bargaining agreement. An appropriation is especially important in this case to cover the numerous additions and contributions to base pay required in the second and third years of the CBA, as set forth in the language Gallant drafted. Although Captain Gallant testified that he believed the cost items for the first year of the CBA were zero, the plain language of the CBA indicates that some items were clearly flagged to take effect July 1, 2018 and July 1, 2019, but other cost items which were not “flagged” and presumably would take effect retroactively on July 1, 2017, the effective date of the new CBA. Since the City approved the FY2018 budget well before their September 18, 2017 vote purportedly approving the Superior’s CBA, a funding appropriation for the cost items in the later approved CBA could not have been requested in that budget.

In addition, the language of Article XXIX, Section 4 of the CBA is clear: ²¹

No monies shall be paid out under Section 3 of this Article or under any other provision of this Agreement unless and until an appropriation of funds has been made therefore.

In the event a majority vote of the appropriating authority is not had, the parties agree that none of the cost items negotiated for the fiscal year in question under the Agreement shall be implemented and the parties shall resume bargaining.

The record is devoid of any evidence that the wage provisions the Union is seeking to enforce were ever funded by the Council. No appropriation was ever made by the Council to cover the costs of the various ramifications of Article XXIV or other cost provisions of the 2017-2020 CBA.

a. Response to the Union’s Argument that First Year Funding Binds City for Three Years

²⁰ (b) *The employer ... shall submit to the appropriate legislative body within thirty days after the date on which the agreement is executed by the parties, a request for appropriation necessary to fund the cost items contained therein;... If the appropriate legislative body duly rejects the request for an appropriation necessary to fund the cost items, such cost items shall be returned to the parties for further bargaining...*

²¹ This language is the same in both the 2017-2020 CBA and in the prior 2014-2017 CBA.

The Union contends that the City is bound by the terms of the CBA for FY 19 and FY 20 on the theory that approval of the terms for FY 18 CBA binds the City to the appropriations required in years two and three, citing Boston Teachers Union, Local 66 v. School Committee of Boston, 386 Mass. 197, 203 (1982) ("Local 66"). The Massachusetts SJC held in that case that an appropriation for the first year of a three-year contract constitutes approval for the entire term of the agreement.

The Union's argument presumes that the City Council approved and funded the salaries set forth in Article XXIV in this CBA in September 2017. The facts show that no such approval and funding occurred at that time. There was no funding vote by City Council on September 18, 2017. The budget for FY 2018 had already been approved and funded by the Council earlier in or about July 2017, and well before this CBA was given to the Council on September 18, 2017 for approval. The first year of the CBA at issue in this case was July 1, 2017-June 30, 2018. Since the FY 2018 budget had already been appropriated by Council before September 2017, it is evident that the first year of this CBA approved on September 18, 2017, was not part of that appropriation. Further, there is no evidence the Mayor subsequently ever requested that the Council appropriate funds to pay for CBA cost items that arguably took effect July 1, 2017, or for increases that took effect on July 1, 2018 and July 1, 2019. Since there was never a request for an appropriation nor any actual appropriation by the Council for salaries called for in FY 2018, FY 2019 and FY 2020 under Article XXIV or any other articles, the case cited by the Union does not apply to the facts of this case.

b. Response to the Union's Argument that Memorandum of Understanding is Binding

The Union also argues that the Memorandum of Understanding negotiated by Mayor Jujuga and the Union in July, 2018, was an appropriation for the salaries under Article XXIV. In July 2018, the Mayor and the Union negotiated a resolution to the 2017-2020 contract dispute which is set forth in the July 18, 2018 MOU that was expressly contingent on approval and a funding appropriation by the Council. The MOU provides:

(4) ... This MOU, including any agreement to deviate from the existing CBA, is contingent upon approval and funding by the City Council of the specific Police Superior Officers' salaries and positions as set forth in Attachment A. In the event that all such salaries and positions are not funded, this MOU including Attachment A and the waiver of claims under Par. (3) shall become null and void. (Union Ex. 22)

By its terms, the MOU expressly became 'null and void' without such Council approval vote and funding. It is undisputed that the Council never voted to approve the MOU and that it refused to make an appropriation to fund the MOU salaries by allowing Mayor Jujuga to continue his unauthorized payment of MOU salaries to the Superior Officers. The MOU became 'null and void' by its terms. In fact, the Council not only refused to approve the MOU but also reduced the Mayor's FY 2019 budget request by 1.8 million dollars which Mayor Jujuga had proposed to cover the MOU's revised Article XXIV salaries.

c. Response to the Union's Argument that The April 2018 Omnibus Transfer Resolution Binds the Council to Fund the Disputed Wages

The Union also argues that the supplemental omnibus transfer of funds by the Mayor, authorized by the Council vote of April 26, 2018, was an "appropriation" sufficient to bind the City to fully fund the salaries set forth in Article XXIV. That Resolution and Order #5402 provide:

...BE IT ORDERED: That the Mayor with the concurrence of the City Auditor, be and hereby is authorized to execute by executive order, intra-departmental and inter-departmental transfers for the purpose of providing proper balances and satisfying budgetary requirements in Fiscal Year 2018. Said authority further shall include the ability to utilize other available funds including Special Revenue Funds and other such miscellaneous funds as authorized by the Mayor....

While the City Council voted a resolution to allow the Mayor to execute year-end inter and intra departmental fund transfers in order to resolve FY 2018 budget shortfalls, this was a routine resolution to allow year end clean-up of budget discrepancies and not a City Council vote in support of funding Article XXIV or other provisions of the Superior Officers' 2017-2020 CBA. The purpose of this resolution and others like it is to satisfy budgetary shortfall requirements before the end of a fiscal year. These transfers are done annually and routinely to cover cost shortfalls at the end of the fiscal year over previously budgeted amounts. Although this Order gave the Mayor limited transfer authority to balance the previously approved (FY 2018) budget, it did not give the Mayor independent appropriating authority to fund the new 2017-2020 Superior Officers' CBA. In my view, this routine omnibus transfer authority granted to Mayor Jejuga in April 2018 is not the required appropriation process recognized by G.L. c. 150E, § 7(b). The appropriating authority is the exclusive domain of the Council as the City's legislative body under the Charter. Absent a clear vote by the City Council evidencing their intention to fund the many cost increases in the Superiors' 2017-2020 CBA, I decline to find that the contract was funded by this April 2018 omnibus transfer authority or otherwise.

4. PRIOR FAILURES BY THE CITY TO FOLLOW PROCESS REQUIREMENTS ARE NOT A WAIVER OF THOSE REQUIREMENTS.

The City cites Article XXIX, Section 4 of the CBA which provides: *No monies shall be paid out under Section 3 of this Article or under any other provision of this Agreement unless and until an appropriation of funds has been made therefore.*

The Union argues that the Council many times in the past has not followed the Charter requirements, that they funded prior CBAs without following the appropriation process and that these prior failures to follow the correct process amount to a waiver for not having followed the process in this case.

Article XXX of the CBA provides expressly that prior performance failures do not constitute a waiver for any future performance obligations. Thus, even if Article XXIX, Section 4 had not been followed in prior years, Article XXX unequivocally bars either party from relying on a past failure. I find the Union's waiver argument without merit.

a. There Is No Need to Rule on Appropriation Process Deficiencies

In view of my previous conclusions that there was no meeting of the minds, and that there was no funding appropriation for the 2017-2020 Superior Officers' CBA, I do not need to rule on the impact of any alleged procedural deficiencies in the approval or appropriation process, as those alleged procedural deficiencies can be remedied when the parties do reach a consensus agreement on salaries in the future and then appropriate funds for that new understanding

5. THE UNION'S DISCRIMINATION CLAIM IS WITHOUT MERIT

The Union has argued in its brief that since several other collective bargaining agreements which the City is honoring were approved on the same September 18, 2017 night, "...using the exact same procedures and with the exact same alleged procedural errors..." this precludes the City from claiming now that the 2017 Superior Officers' CBA is unenforceable since it would be violation of the non-discrimination clause in Article 5 Section 2 which states:

The City and the Union agree that there will be no discrimination by the City or the Union against any employee because of his or her membership in the Union or because of any employee's lawful activity and/or support of the Union.

This clause applies to discrimination against an individual employee because of his/her union activity, not to treatment of different unions differently.

The Union asserts that the City has treated similarly situated unions (the six others whose contracts were "approved" on September 18, 2017) differently in violation of this Article. This claim is without merit for several reasons. The 2014-17 and the 2017-20 CBAs have the same Article 5 Non-Discrimination clause which, on its face, applies to discrimination against an individual employee because of union activity. It does not apply to different treatment of other unions not covered by this bargaining unit. This clause applies only to those bargaining unit employees covered by this Agreement and alleged discrimination as between those employees and the City within the four corners of the CBA. The other Methuen municipal unions are not similarly situated as they are covered by their own specific CBAs with their own separately negotiated terms and conditions.

Second, the other collective bargaining agreements the City Council approved on September 18, 2017 are not before me, and never were before me. Nor are any of the facts about any Council vote on any requests for an appropriation or the actual appropriations made for each of those CBAs by the City Council. There was general testimony that those other CBAs, although providing wage increases costing more than 0, 2,2%, were less costly than the Superior Offices' CBA. However, I do not need to address any process failures or funding issues for any of those CBAs which are not before me and over which I have no authority to rule in this arbitration.

Third, the Union made allegations about the City's alleged discriminatory retaliation against Union members for asserting rights under this CBA and seeking to enforce Article XXIV.²² I have reviewed the record and find no substantial evidence to support any of those claims which amount to no more than an unsubstantiated opinion. The Union has failed to meet its burden of proving improper discrimination which requires considerable evidence not presented here. Witness opinions are insufficient to meet that burden.

Further, there is no evidence to support the Union's unsubstantiated claim of a violation of the implied covenant of good faith and fair dealing. In most jurisdictions, including Massachusetts, the law provides that every contract contains an implied covenant of good faith and fair dealing. This means that, even though not specifically stated in the contract, it is implied or understood that each party to the contract must act in good faith and deal fairly with the other party in performing or enforcing the terms of the contract. To act in good faith and deal fairly, a party must act in a way that is honest and faithful to the contract and not act in bad faith or dishonestly. Typically, a successful Massachusetts claim of breach of the covenant of good faith and dealing is based on termination of employment intended to deprive an employee of wages earned for work already performed. In the case before me, the City has continuously paid the Superior Officers and has not terminated an employee in order to deprive him/her of pay. The dispute before me is about HOW MUCH the Superior Officers should have been paid, and given the lack of clarity and mutual understanding about the cost impact of the 2017-2020 CBA, I find that the contract interpretation dispute before me is genuine and not made in bad faith, dishonestly, or with wrongful intent to deprive Superior Officers of established wages and benefits they have earned.

For all of the foregoing reasons, I find the Union's claim of discrimination and its claim of breach of implied covenant of good faith and fair dealing both to be without merit.

²² The Union claims, *inter alia*, that individual members have been threatened by other City employees; that the City has intentionally released to the public personal information about individual unit members and their families; that the City has failed to provide supplies to the Union.

6. THE UNION'S WAIVER CLAIM IS WITHOUT MERIT

The Union contends that any arguments advanced because of process failures have all been waived by the City's non-compliance with requirements over the past decade and by the September 18, 2017 approvals of six other collective bargaining agreements.

The City has several procedures the Council is obligated to follow specific to its approval collective bargaining agreements. Among other things, before the Council vote, those agreements must be given to City Council ten (10) business days before vote on the contracts. The contracts should be accompanied by a financial impact statement and a written delineation of the differences between the proposed agreement and the previous CBA. It is undisputed that the City Council was not given a redlined version of the CBA clearly identifying the language changes; any written summary or list of the changes; any financial impact statement or cost analysis of the changes in the CBA; or a table/chart/list of new salaries/wage increases. Moreover, the Councilors received the large package containing multiple proposed contracts less than ten days before the September 18, 2017 Council meeting. Nor was there a second reading of the proposed collective bargaining agreements and vote on a separate day than the cbas were first presented. All of these provisions were clearly intended to provide the City Council with complete information about the proposed cbas and ample opportunity for full review.

The Union argues that the City has not adhered to these procedures in the past and yet the City has honored each and every one of the other six contracts approved on the same evening as the 2017 Superior Officers' CBA before me, using the exact same process, with all of the same asserted procedural errors and Charter violations. The Union maintains that the City cannot now use any non-compliance to avoid the City's obligations under the Superior Officers' 2017-2020 CBA.

As noted earlier, the other six collective bargaining agreements the Council approved on September 18, 2017 are not before me, and never were. Nor are the complete facts about the negotiation and terms of those agreements, or any funding or appropriations for each of those CBAs. Thus, I do not need to address any process failures or funding issues for any of those CBAs not before me.

The Union seeks wage payments and enforcement of Article XXIV in spite of Article XXIX, Section 4 of the CBA which provides:

No monies shall be paid out under Section 3 of this Article or under any other provision of this Agreement unless and until an appropriation of funds has been made therefore.

In the event a majority vote of the appropriating authority is not had, the parties agree that none of the cost items negotiated for the fiscal year in question under the Agreement shall be implemented and the parties shall resume bargaining.

This language is identical in the 2014-17 CBA except that it is Section 5 instead of Section 4. Clearly, the intent of the provision is - no appropriation, no payments.

Nor can there be any waiver by the City since Article XXX of the CBA provides expressly that prior performance failures do not constitute a waiver for any future performance obligations. Article XXX of the CBA reads:

Failure of the City or the Union or of any other covered persons to insist, in any one or more situations, upon performance of any of the terms or provisions of this Agreement, shall not be considered as a waiver or relinquishment of the right of the City or of the Union, or of any such employees to the future performance of any such term or provision and the obligations of the Union and the City or such employee for such future performance shall continue in full force and effect.

Thus, even if Article XXIX, Section 4 (the “no appropriation – no payment” provision) had not been followed in prior years, Article XXX unequivocally bars either party from relying on a past failure. This waiver proscription is clear and unambiguous.

For the foregoing reasons, even if the City Council in the past failed to follow procedural provisions of City Ordinances or City Charter requirements for collective bargaining agreement approval and appropriation, I find that any such noncompliance is not a waiver of the City’s claim that such requirements were not following in this case.

7. THE CITY DID NOT VIOLATE THE TERMS OF THE PRIOR 2014-2017 CBA BY NOT INCREASING SUPERIOR OFFICERS’ PAY IN ACCORDANCE WITH THE 2017-2020 PATROLMEN’S CBA .

The Union argues, in the alternative, that even assuming the City’s reversion to paying Superior Officers under the 2014-17 CBA was appropriate, the City has violated the terms of that CBA by not increasing Superior Officer wages relative to increases in patrolman’s pay provided under the 2017-2020 patrolman’s contract. Article XXXI -the Duration clause of the Superior Officers’ 2014-2017 CBA provides: ... *The provisions of this Contract shall remain in effect until the approval of a successor contract.* As stated above, I have determined that there was no meeting of the minds between the City Council and the Union about the 2017-2020 Superiors’ CBA, and I have determined there was no mandatory appropriation of funds to support the Superiors’ 2017-2020 CBA. Therefore, the ONLY operative and enforceable CBA between the Superior Officers and the City after July 1, 2017 was the 2014-2017 CBA. That contract called for payment of Sergeants based on 132% of the maximum patrolman’s salary “upon the patrolman reaching a new agreement with the City”. The “new agreement” contemplated when the Superior Officers and the City signed their 2014-2017 CBA on July 9, 2015 could only have been the Patrolman’s CBA effective 2014-2017. I find that in July 2015, the parties could not have understood or agreed that they were incorporating the patrolman’s 2017-2020 compensation rates into their 2014-2017 agreement. They would have had no knowledge of what the patrolman’s 2017-2020 compensation rates would be at that time. It is not reasonable to believe the City would

have agreed to signing such a “blank check” for Superior Officers’ compensation when they agreed to the language in the 2014-2017 Superior’s CBA. Accordingly, I find the City, under the terms of the Superiors’ 2014-2017 CBA had no obligation to increase the Sergeants’ wages pursuant to the patrolman’s 2017-2020 CBA. The City did not violate the 2014-2017 CBA.

8. RESPONSE TO THE CITY’S CLAIM THAT THE UNION’S GRIEVANCE WAS UNTIMELY

The City argues that the Union’s grievance is not procedurally arbitrable because the grievance was not timely filed. Article X of the CBA provides:

Sec. 1. Any dispute, grievance or difference which may arise between the parties during the term of this Agreement including the application, meaning or interpretation of, this Agreement, and which is not otherwise controlled by the laws of the Commonwealth of Massachusetts shall be adjusted in accordance with the following procedure. ...

Step 1. The Union, through its President, or his designee, shall submit the grievance, in writing, to the Chief of Police within ten (10) days of the date of the events giving rise to the grievance....

Sec. 5. The decision of the arbitrator shall be final and binding on the parties, except that the arbitrator shall make no decision, which alters, amends, adds to or detracts from this Agreement....

The grievance was filed on March 6, 2019, after the City declined to pay certain wage increases purportedly called for under the 2017-2020 CBA, and after the City informed the Union that it intended to pay the Superior Officers under the terms of the 2014-2017 CBA.²³ The City maintains that the disputed failure to pay did not begin in February 2019 but 18 months earlier, when the City failed to implement wage increases under the 2017-2020 CBA. Since the Union never filed a grievance at that time over the City’s failure to pay the new wages, the City claims the March 6, 2019 grievance is untimely.

The Union’s responds that this untimely filing claim by the City is misplaced because this is “... a wage grievance that renews each time a wage provision is violated”.

²³ Article XXIV of the Superior Officers’ 2014-2017 CBA provides:

... Upon the patrolman reaching a new agreement with the City, Superior officers shall be compensated in accordance with the following provisions:

B. Sergeants shall receive a salary equivalent to 132% of the maximum patrolman’s salary.

Lieutenants shall receive a salary equivalent to 116% of the maximum Sergeant’s salary.

Captains shall receive a salary equivalent to 116% of the maximum Lieutenant’s salary.

...(Union Exhibit 3)

The Union relies on the “doctrine of continuing violation” pointing out that when a grievance involves the disputed payment of wages, a new violation occurs each payment period. As such, a new window of opportunity to file a timely grievance occurs.

I agree with the Union’s position. The violation alleged by the Union is not an isolated, singular, discrete event but continues to occur each time the wages in dispute are not paid. Many arbitrators have held that “continuing” violations of a collective bargaining agreement occur when the act complained of is repeated, like failure to pay correct wages. Elkouri & Elkouri, How Arbitration Works, Eighth Edition, pp 5-30-31 and the cases cited therein. Accordingly, I find the City’s untimely filed grievance defense to be without merit. The Union’s March 6, 2019 grievance was timely filed.

V. CONCLUSION

Having considered the record in its entirety, and for all of the above-stated reasons, I find that the Union’s grievance was timely filed and substantively and procedurally arbitrable under both the language of the 2017-2020 CBA and the operative 2014-2017 CBA. I further find that the City did not violate the parties’ 2017-2020 CBA. There was no meeting of the minds between the City and the Union as to the costs and meaning of the compensation provisions of Article XXIV and the several other compensation provisions to be included in the base pay of Superior Officers. In addition, I find that there was no statutorily and contractually mandated appropriation of funds to support the increased compensation under the 2017-2020 Superior Officers’ CBA purportedly “approved” by vote of the City Council on September 18, 2017. Further, the July 18, 2018 MOU between the City and the Union is void and unenforceable as it was never approved by the City Council and no funds to pay wages under the MOU were ever appropriated by the City Council. The City did not discriminate against the Union or its individual members in violation of the contract or in breach of a covenant of good faith and fair dealing. Nor did the City violate the 2014-2017 Superior Officers’ CBA when it failed to increase the pay of Sergeants (and thereby of other officers based upon the “splits”) under the compensation terms of the patrolman’s 2017-2020 CBA.

VI. DECISION

The Union’s grievance is DENIED.

Loretta T. Attardo

Loretta T. Attardo, Arbitrator

January 7, 2022