AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

In the Matter of the Arbitration

-between-

Village of Pelham
Professional Firefighters
Local 2213, IAFF, AFL-CIO

OPINION AND AWARD
Case No. 01 23 0002 8265

-and-

Village of Pelham, New York

APPEARANCES

For the Union: Blitman & King LLP
by Paul K. Brown, Esq.

For the Employer: Law Office of Vincent Toomey
by Thomas J. Marcoline, Esq.

In accordance with the collective bargaining agreement in effect between the above-named parties, the Undersigned was designated as the Arbitrator to hear and decide the following stipulated issues:

> Did the Employer violate the collective bargaining agreement, beginning on or about June 1, 2023, as a result of the Employer's calculation of the hourly rate of pay for straight time and/or overtime hours worked? If so, what shall be the remedy?

A virtual hearing was held on October 25, 2023 at which time the representatives of the Union and the Employer appeared and were afford a full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived. The witnesses were sworn. The parties filed post-hearing briefs.

BACKGROUND

The Employer is a village in Westchester County, New York that operates a Fire Department that employs 11 Firefighters, 4 Lieutenants, and 1 Captain who are represented by the Union. The Employer's fiscal year begins on June 1 and ends on May 31. The Employer pays the members of the bargaining unit an annual salary divided on a bi-weekly basis. As a result, members of the bargaining unit typically receive 26 paychecks during a fiscal year, however, occasionally members of the bargaining unit receive 27 paychecks during a fiscal year. Members of the bargaining unit will receive 27 paychecks during the June 1, 2023 to May 31, 2024 fiscal year.

The Union filed a grievance, dated June 14, 2023, that provided, in pertinent part, that:

> On or about June 1, 2023, and continuing to date, the Village violated the CBA, including, but not limited to, Article V, Section 2; Article IV, Section 1; and Article II, Section 1, by unilaterally changing the calculation for, and reducing, the rate of pay for straight time and overtime hours worked.

(Joint Exhibit 5.) The Employer denied the grievance. The parties failed to resolve the matter during the preliminary steps of the grievance procedure. The dispute proceeded to arbitration for a final and binding determination.

PERTINENT CONTRACT PROVISIONS

ARTICLE II - RECOGNITION

Section 1: The Committee heretofore having presented appropriate evidence that it represents a majority of the employees in the above unit is therefore recognized as the

exclusive employee organization representing said employees for the purpose of collective negotiations with the Village of Pelham in determination of the terms and conditions of employment and in respect to the administration of grievances under the Collective Bargaining Agreement herein executed.

ARTICLE IV - WAGES

Section 1: The annual salaries for Firefighters are as follows:

. . . .

Section 2: Salary shall be paid every two weeks rather than bimonthly.

. . . .

ARTICLE V - OVERTIME AND CALLBACK

Section 1: There shall be minimum compensation of one (1) hour of pay for an employee who voluntarily responds to a fire scene. There is no limit on the number of firefighters who respond to structural, vehicle or brush fires. The Chief shall determine the number of firefighters who may voluntarily respond to all other fires or emergencies. Employees shall receive straight time compensation for the first hour or fraction thereafter for voluntary call-backs. For Mutual Aid calls, only three (3) men shall be required to man the firehouse for mutual aid, unless additional calls for mutual aid to be supplied by the Village of Pelham are called in by neighboring jurisdictions. Additional firefighters reporting after the 3-man staffing has been achieved will receive one (1) hour call back pay.

Members called back to work at the direction of the Department shall receive a minimum of two (2) hours of pay at the rate of time and one half (1 ½) his/her regular rate.

Section 2: Overtime shall be paid at the rate of time and a half for all overtime performed on a daily basis where the said overtime is in addition to the regular tour except as defined by Article V, Section 1.

ARTICLE XII GRIEVANCE MACHINERY AND ARBITRATION

. . . .

Section 2: If any question or difference whatsoever shall arise between the parties hereto touching the agreement or any clause or thing herein contained or the construction arising there from, then, and in all such cases, the matter in dispute shall be settled by arbitration in accordance with the then

prevailing Voluntary Labor Arbitration Rules of the American Arbitration Association. The award rendered by the arbitrator shall be final and binding upon the parties.

CONTENTIONS OF THE UNION

The Union asserts that the Employer always calculated the hourly rate of pay for the members of the bargaining unit in the Fire Department based on 2080 hours per year including the infrequent years when the Employer issued 27 paychecks to the members of the bargaining unit. The Union maintains that certain records for the fiscal year from June 1, 2010 to May 31, 2011--during which time the members of the bargaining unit also received 27 paychecks--contain inadvertent errors that mistakenly referred to 2040 hours rather than 2080 hours as the basis for calculating the hourly rate of pay for the members of the bargaining unit. (Union Exhibit 1.)

It is the position of the Union that the Employer always calculated the rate of pay to implement Article V of the collective bargaining agreement by dividing the annual salary of a member of the bargaining unit by 2080, which represents multiplying 52 weeks in a year times 40 hours per week for a total of 2080 hours, and by then dividing the annual salary of each member of the bargaining unit by the 2080 hours. The Union explains that this calculation yielded the hourly rate of pay to implement Article V. The Union considers this methodology to constitute a past practice.

The Union criticizes the Employer for improperly using the number of paychecks that the Employer will issue to members of

the bargaining unit during the June 1, 2023 to May 31, 2024 fiscal year to calculate the hourly rate of pay to implement Article V. The Union stresses that the Employer's approach therefore changed the methodology by using 2160 hours rather than 2080 hours. The Union discerns that the Employer obtained 2160 hours by multiplying the 27 biweekly paychecks by 80 hours and by then dividing the annual salary of each member of the bargaining unit by 2160 hours. The Union points out that the Employer's calculation had the effect of improperly lowering the Article V hourly rate of pay for the members of the bargaining unit.

The Union highlights that no year has 54 weeks, however, the Employer's methodology treated the June 1, 2023 to May 31, 2024 fiscal year as if the fiscal year has 54 weeks. The Union notes that the Employer never adjusted any other years by lowering the number of weeks in a year to offset the additional number of weeks that the Employer counted twice and improperly added to the June 1, 2023 to May 31, 2024 fiscal year. The Union comments that the Employer used an arbitrary and artificial methodology that lowered the hourly rate of pay for the members of the bargaining unit.

The Union clarifies that the Union's approach preserves the proper annual base salary for the members of the bargaining unit. The Union differentiates the biweekly payroll periods from the calculation of the hourly rate of pay. The Union indicates that a prior arbitration decision that involved another union merely involved the propriety of the allocation of an annual base salary

over 27 paychecks rather than the calculation of the hourly rate of pay.

The Union elaborates that the Employer's improper calculation of the hourly rate of pay conflicts with the statutory adjustment of hours for fire department employees who typically average 42 hours of work each week rather than 40 hours of work each week. The Union emphasizes that the statutory adjustment, known as Kelly time, presupposes that fire department employees work 40 hours per week for a total of 2080 hours each year.

The Union submits that the grievance should be sustained. As a remedy, the Union requests that the affected members of the bargaining unit should be made whole with interest at the maximum legal rate and that the Employer should be directed to cease and desist from violating the collective bargaining unit.

CONTENTIONS OF THE EMPLOYER

The Employer verifies that dividing the annual pay by the number of pay periods in the year determines the proper biweekly pay. The Employer continues that most years have 26 pay periods, however, occasionally a year has 27 pay periods. It is the position of the Employer that the same methodology determines the proper biweekly pay. The Employer reasons that dividing the 80 hours in a biweekly pay period into the biweekly pay therefore determines the hourly rate of pay. The Employer pinpoints that this calculation yields the proper hourly rate of pay pursuant to Article V of the collective bargaining agreement. The Employer

notes that the Union agrees that the Employer computed the annual salary on a biweekly basis in a proper manner.

The Employer emphasizes that the relationship between the annual pay and the regular hours covered by the biweekly paycheck produces the proper hourly overtime rate for members of the bargaining unit. The Employer highlights that the collective bargaining agreement refers to "the regular tour of duty" and therefore supports the Employer's calculation of the hourly rate of pay. The Employer mentions that the United States Department of Labor applies the Fair Labor Standards Act by using the hours worked during a workweek to calculate the regular hourly rate of pay. The Employer disagrees with the Union's effort to use 2080 annual hours, which does not appear in the contract, rather than the calculation derived from the biweekly pay in the lag payroll year with 27 pay periods. The Employer insists that using 2080 hours constitutes an arbitrary figure because of the presence of 27 pay periods during the June 1, 2023 to May 31, 2024 fiscal year. The Employer argues that the fiscal year with 27 pay periods covers 2160 hours that the employees work.

The Employer considers the Union's focus on the happenstance that the members of the bargaining unit will receive a lower hourly rate of pay during the June 1, 2023 to May 31, 2024 fiscal year than during the prior fiscal year to be derived from the applicable contract language that requires the annual salary to be paid in biweekly installments. The Employer underscores that a calendar year normally has 365 days or 366 days in a leap year.

As employees typically receive their annual salary in 26 pay periods that each cover 14 days, the Employer contends that the biweekly payments actually cover 364 days. The Employer reveals that the cumulative shortfall of 1 or 2 days each year then becomes equalized every 13 or 14 years when a lag payroll year occurs and contains 27 pay periods that generate 2160 hours. The Employer recounts that the parties could have defined the methodology for calculating the hourly rate of pay in the collective bargaining agreement, however, they failed to do so. The Employer illustrates that oftentimes a biweekly pay period will overlap two years so that the Employer makes sure that the members of the bargaining unit receive the appropriate annual pay for the different overlapping fiscal years.

The Employer rejects the Union's attempt to establish the existence of a binding past practice that requires the use of 2080 hours in the calculation of the hourly rate of pay. The Employer indicates that the Union failed to meet its burden to prove the key factors to prove the existence of a longstanding, binding past practice. The Employer downplays the calculation of the hourly rate of pay during the June 1, 2010 through May 31, 2011 fiscal year when the Employer issued 27 paychecks because the relevant documents refer to 2040 hours for the calculation of the hourly rate of pay even though the ultimate calculations appear to have used 2080 hours to determine the hourly rates of pay. Based on certain arbitral precedent, the Employer portrays a single, unclear example 13 years ago to be insufficient to

satisfy the readily ascertainable over a reasonable period of time factor that constitutes part of the analysis to establish a binding past practice.

The Employer concludes that the Employer did not violate the collective bargaining agreement in calculating the hourly rate of pay for the members of the bargaining unit. The Employer urges that the grievance be denied in its entirety.

OPINION

I. Introduction

This case involves language interpretation. The burden of proof is on the Union, as the moving party, to prove its case by a preponderance of the evidence.

II. The Meaning of the Collective Bargaining Agreement

Article II, Section 1 identifies the Union as the exclusive representative of the firefighter unit for the purpose of collective negotiations with the Employer with respect to terms and conditions of employment.

Article IV, Section 1 indicates that Firefighters receive annual salaries and sets forth the annual salaries for the Firefighters.

Article IV, Section 2 specifies that the salary shall be paid every two weeks rather than be paid bimonthly.

Article V provides in Section 1 for a minimum of one hour of pay for an employee who voluntarily responds to a fire scene; addresses structural, vehicle and brush fires and other emergencies; pinpoints that firefighters receive straight time

compensation for the first hour or fraction of an hour for voluntary call-backs; and comments about mutual aid calls. Article V, Section 2 provides that the Employer shall pay overtime at the rate of time and one-half for daily overtime that is in addition to a regular tour except as defined in Article V, Section 1.

III. The Application of the Collective Bargaining Agreement

The combination of Article IV, Section 1 and Article IV, Section 2 embodies the crux of the present dispute. Article IV, Section 1 clearly establishes that the members of the bargaining unit receive annual salaries. The annual salaries therefore must encompass no less than one year and no more than one year. A year for purposes of an annual salary contains either 365 days or 366 days and also contains 52 weeks. The hours of work for a member of the bargaining unit for purposes of the annual salary of a member of the bargaining unit encompasses 2080 hours based on 52 weeks in a year and 40 hours of work per week. A partial anomaly exists in fire services because of the common practice of having firefighters work continuous hours for 24 hours. From a scheduling standpoint, the meshing of the 24 hour tours with 52 weeks per year generally creates an excess of approximately 104 hours that the State of New York and the individual fire departments reconcile by providing for so-called Kelly time that enables firefighters who work such additional hours to receive appropriate treatment.

Article IV, Section 2 creates the mechanism for the Employer

to transfer wages to the Firefighters. In particular, the parties agreed for the Firefighters to receive their salaries every two weeks. The delivery of the salaries does not in any manner change Article IV, Section 1, which quantifies salaries on an annual basis. The delivery of the salaries every two weeks therefore is secondary to the primary feature of Article IV, Section 1 for firefighters to earn their salaries on an annual basis.

To summarize, the Firefighters earn their wages based on an annual contractual salary. The date that the wages get paid to the Firefighters is a function of the administrative payroll process. Thus the fortuitous dates and days of the week of specific paychecks have no bearing on the accrual of the wages or the calculation of the hourly rate of pay. No credible factual basis supports the use of the cash basis methodology, in essence, to recalculate the bilaterally negotiated annual salaries contained in the collectively negotiated agreement. Adopting the disputed approach in the absence of a mutual agreement between the parties would create instability and foster uncertainty in the annual budget process because this methodology perforce creates variations in the hourly rate of pay on a year-to-year accounting basis. No credible evidence exists in the record to suggest that the parties ever intended to implement such an unusual and destabilizing approach.

As a consequence, the calculation of hourly wages for the purpose of determining straight-time pay and overtime pay to

administer Article V must be derived from the primary feature of Article IV, Section 1 rather than from the secondary feature of Article IV, Section 2. The driving force for the calculation of hourly pay constitutes the number of hours a Firefighter works to receive an annual salary rather than the number of hours the payroll system may accrue to generate paychecks every two weeks.

In the present matter, the Employer improperly linked the calculation of the hourly rate of pay for determining straight-time pay and time and one-half pay to the happenstance of the calendar from June 1, 2023 through May 31, 2024 during which time the delivery of the annual salary occurs in 27 paychecks rather than the more typical delivery of the annual salary of the Firefighters in 26 paychecks. The delivery of the annual salary in 27 paychecks is an outgrowth of the merging of the way that the days of the week happen to coincide with the day of the week when the Employer issues paychecks from the first day of the week of a pay period through the last day of the week of a pay period. These circumstances are independent of the methodology required by Article IV, Section 1 for annual salaries.

As a result, the Employer had a contractual duty to continue to divide the annual salaries of the members of the bargaining unit by 2080 hours to calculate the hourly wages of the Firefighters to determine straight time hourly pay and to determine time and one-half overtime hourly pay pursuant to Article V and any other related provisions of the collective bargaining agreement. This required methodology provides for

consistency, predictability, and uniformity for such calculations. Although superficially appealing on the surface, the Employer's approach creates an unanticipated, unforeseen, and unpredictable result of the Firefighters receiving a reduction in their hourly rate of pay during the June 1, 2023 through May 31, 2024 fiscal year that the parties did not negotiate in any manner at any time for any purpose. To the extent that the record contains probative evidence about the treatment of the unusual happenstance of the calendar in relation to paychecks and pay periods in the past, the credible evidence proves that the parties always calculated hourly pay by dividing the annual salaries of the Firefighters by 2080 hours. As verified by the credible testimony of Lieutenant Vincent J. D'Onofrio, the reference to 2160 hours is unique to the disputed calculation that gave rise to the present dispute. As verified by the credible testimony of Deputy Treasurer Kieya F. Glaze, the reference to 2040 hours in the calculations effective on June 1, 2010 on its face is an error to the extent that the actual computations reveal the Employer used 2080 hours to generate the 2010 overtime rates of pay. (See, e.g., Union Exhibit 1.)

IV. Conclusion

For these reasons, the Union proved by a preponderance of the evidence that the Employer had violated the collective bargaining agreement, beginning on or about June 1, 2023, as a result of the Employer's calculation of the hourly rate of pay for straight time and overtime hours worked.

As the remedy, the Award shall direct the Employer to cease and desist from calculating straight time hourly pay and overtime pay based on 2160 annual hours; shall direct the Employer to calculate straight time pay and overtime pay based on 2080 annual hours; shall require the Employer to make whole all affected employees on a retroactive basis; and shall direct the Employer to calculate straight time pay and overtime pay based on 2080 annual hours on a prospective basis. So long as the Employer makes the retroactive payments to the affected employees promptly, no interest shall be awarded on the retroactive payments. The Arbitrator shall retain jurisdiction to resolve any dispute or disputes that may arise concerning the implementation of the Award and/or the calculation of the remedy.

Any other matters not specifically discussed do not affect the proper resolution of this matter. Any change to the present arrangement is a matter for collective negotiations rather than for arbitration. This determination is consistent with the arbitral authority contained in the record.

Accordingly, the Undersigned, duly designated as the Arbitrator and having heard the proofs and allegations of the above-named parties, makes the following AWARD:

> The Employer did violate the collective bargaining agreement, beginning on or about June 1, 2023, as a result of the Employer's calculation of the hourly rate of pay for straight time and overtime hours worked. As a remedy, the Employer shall cease and desist from calculating straight time pay and overtime pay based on 2160 annual hours; shall calculate straight time hourly pay and overtime pay based on 2080 annual hours;

shall make whole all affected employees on a retroactive basis; and shall calculate straight time pay and overtime pay based on 2080 annual hours on a prospective basis. So long as the Employer makes the retroactive payments to the affected employees promptly, no interest shall be awarded on the retroactive payments. The Arbitrator shall retain jurisdiction to resolve any dispute or disputes that may arise concerning the implementation of the Award and/or the calculation of the remedy.

Robert L. Douglas
Labor Arbitrator

DATED: December 23, 2023
STATE of New York)ss:
COUNTY of Nassau)

I, Robert L. Douglas, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Opinion and Award.

Robert L. Douglas
Labor Arbitrator

DATED: December 23, 2023
STATE of New York)ss:
COUNTY of Nassau)

I, Robert L. Douglas, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Opinion and Award.