

AMERICAN ARBITRATION ASSOCIATION  
LABOR ARBITRATION TRIBUNAL

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In the Matter of the Arbitration Between

AAA Case No.  
01-17-0004-2051

**TRIBOROUGH BRIDGE AND TUNNEL  
AUTHORITY,**

JS Case No. 4477

Employer,

and

**TBTA SUPERIOR OFFICERS BENEVOLENT  
ASSOCIATION,**

Union,

**OPINION  
AND INTERIM  
AWARD**

Re: Grievance 17-02 (09-16-03) - Improper creating of  
Work Schedule (Absentee Replacement Sergeants).

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**Before JOHN E. SANDS, Impartial Arbitrator**

**OPINION**

On January 8, 2020 I determined that the parties had agreed to submit  
the following issues to arbitration by me:

- A. Did the employer violate the parties' collective bargaining agreement  
as alleged in Grievance 09-16-03 dated August 3, 2016?
- B. If so, what shall be the remedy?

Grievance 09-16-03, dated August 3, 2016, reads, in relevant part:

**Nature of Grievance**

Management is in violation of Article IX, Article X, and Article XIX of the  
CBA, paragraph 10 (c) of the MOU dated 10/10/86, paragraph 7 of the

MOU dated 6/23/06, sections 1 and 2 of Stipulation of Settlement dated 1/10/2000, paragraph 15 of the MOU dated 4/7/99, and all applicable SOBA bidding procedures in effect between the parties, as well as any other relevant agreements and past practices when on 06/09/16 the Authority improperly assigned newly promoted supervisors to cover daily and short term absences of less than five days at work locations throughout the Authority and improperly changing these supervisor's work location without providing these members the proper, contractually agreed upon, advance notification of facility assignment change.

**Remedy**

Cease and desist from this practice and make Association members whole in every way.

[Joint Exhibit 2, p. 1.]

Pursuant to my authority under the parties' collective bargaining agreement, I conducted hearings in person in New York City on January 8, 2020 and remotely by Zoom on October 21 and 22 and November 10, 2020, and March 25 and 26, 2021. Both parties appeared by counsel and had full opportunity to adduce evidence, to cross examine each other's witnesses, and to make argument in support of their respective positions. Each has submitted a post-hearing brief, and neither has raised any objection to the fairness of this proceeding.

On the entire record so produced, I find the following relevant facts. TBTA is an agency of the Metropolitan Transportation Authority. TBTA operates a number of bridge and tunnel facilities and is responsible for ensuring safe passage over and through those facilities. SOBA represents Sergeants and

Lieutenants who perform supervisory law enforcement functions. The nub of the parties' dispute is whether TBTA improperly redeployed absentee replacement ("AR") Sergeants and Lieutenants to cover short-term absences of less than five days' duration at other facilities in order to avoid paying overtime to bargaining unit personnel at those facilities. I interpret the grievance as covering the time period beginning June 9, 2016 when newly-promoted AR Sergeants and Lieutenants were assigned to cover short-term absences and ending when that practice stopped. I also interpret it as seeking a remedy only for those Sergeants and Lieutenants who were not selected pursuant to the SOBA Overtime Procedure as required by Section 2 of the parties' January 10, 2000 Stipulation of Settlement (quoted below) to cover short-term absences during that period because TBTA used the newly-promoted AR supervisors for that purpose instead of them.

The parties' relevant agreements that govern bargaining unit members' terms and conditions of employment include their January 8, 1981 collective bargaining agreement as supplemented by numerous Memoranda of Agreement, Memoranda of Understanding, and Stipulations. (Joint Exhibit 1.) Of particular relevance here are the October 10, 1986 MOU (*Id.*, pp. 45-48), the April 7, 1999 MOU (*Id.*, pp. 22-26), and the January 10, 2000 Stipulation of Settlement (Joint Exhibit 3.)

The January 10, 2000 Stipulation of Settlement appears most directly relevant. It reads, in relevant part:

1. Management reserves its prerogative to determine if an absence will be covered by an extra permanent sergeant, a sergeant on overtime, or fully or partially uncovered unless otherwise specified herein.

2. During an absence or Detail assignment\*, the SOBA Overtime Procedure shall be used to attempt to cover the first five (5) days the absence or Detail assignment requires coverage. After the fifth day, an acting or temporary sergeant may be used to backfill any absence or Detail assignment.

\* \* \*

\*Detail assignment(s) are defined as temporary special purpose assignments (either planned or spontaneously created) which supplement the regularly scheduled complement of supervisors at a facility.

[Joint Exhibit 3, p. 1.]

Paragraph 15 of the 4/7/99 MOU and Article X (“Facility Assignment”) of the parties’ collective bargaining agreement provide for an annual bid process that permanent Sergeants and Lieutenants use to select a permanent facility assignment that TBTA offers in its annual facility assignment schedules. The annual bid process has existed since at least the 1981 agreement. Bidding is done by telephone pursuant to the procedures set forth in Paragraph 15 of the 4/7/99 MOU. Article X provides that Sergeants and Lieutenants “may remain at a facility for an unlimited period if not ‘bumped’ by a senior man at the time of annual facility selections.”

A permanent facility assignment includes the permanent home facility

location where the Sergeants and Lieutenants work and the time when their tour begins and ends. It appears on facility assignment schedules. In the past, bidding took place for AR positions that only covered actual and anticipated long-term absences at the facility involved.

In accordance with past practice, annual bids occurred in December or January and became effective March 1. Sometimes, an additional bid would also be held using the same bid process under Paragraph 15 of the 4/7/99 MOU. Some of the AR Sergeants and Lieutenants involved in this case had been Bridge & Tunnel Officers (“BTOs”) who were newly promoted in May, 2016 into the SOBA bargaining unit as permanent sergeants and lieutenants in time to participate in an additional bid process. They submitted their bids by May 25, 2016.

Historically, TBTA prepared its annual facility assignment schedules for Sergeants and Lieutenants in consultation with SOBA. Beginning several months before the end of the prior year, TBTA reviewed its projected manpower needs for the next year, including its need for long-term ARs and vacation replacements (“VRs”). It considered anticipated long-term absences for such things as military leave, FMLA leave, education leave, child care leave, pregnancy leave, on- and off-the-job sickness and injuries, vacations, Training Academy

instructor assignments, etc. It also considered other anticipated operational circumstances requiring more or less manpower. After arriving at a reasonable estimate of the number of permanent Sergeants and Lieutenants needed, TBTA then created draft schedules of all facility assignments with different hourly schedules at each facility, including AR and VR assignments. Pursuant to past practice TBTA sent those facility assignment schedules to SOBA for its review and comments. At times in the past, SOBA suggested certain changes; and TBTA, in its discretion, implemented some of those suggestions. After finally determining its manpower needs for the next year and having considered SOBA's comments, TBTA held the annual bid for Sergeants and Lieutenants.

SOBA does not contest TBTA's management right reasonably and in good faith to estimate its anticipated long-term needs for AR assignments each year. In the past TBTA did not deliberately overestimate the need for ARs in order to avoid paying overtime. Accordingly, in the past there were either identifiable long-term absences known at the time the annual bidding occurred or that TBTA was certain would take place during the coming year. At issue here is what SOBA contends was TBTA's intentional overestimation of its AR needs in 2016 to create a cadre of extra personnel available to be deployed to cover short-term absences at other facilities without having to pay overtime for that coverage.

In this context, short-term absences mean those of five days or fewer.

In the past, if TBTA determined a short-term absence did not have to be covered, the AR permanently assigned to that facility would not cover it and would just work his regular tour there doing his regular work; and the absence would go uncovered. TBTA generally did not require coverage of short-term absences, and SOBA does not challenge that procedure. But when TBTA decides to cover a short-term absence, SOBA insists that Paragraph 2 of the January 10, 2000 Stipulation of Settlement requires a Sergeant or Lieutenant, depending on which title was absent, to be selected in accordance with the SOBA Overtime Procedure to cover the absence on overtime. This meant that short-term absences, when covered, should have been covered only on overtime. There was, however, conflicting evidence concerning how TBTA has actually handled short-term absences it decided needed coverage by permanent AR Sergeants and Lieutenants.

On the one hand, SOBA president Lampropoulos testified that redeployment of ARs to cover short-term absences at other facilities than their home locations without having to use the SOBA overtime procedure had only been done pursuant to written agreements.<sup>1</sup> Other than in those circumstances,

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<sup>1</sup>Examples include the Collision Reduction Unit, the Special Operations Division, and the Directed Patrol Agreement.

permanent ARs only covered long-term absences, and there have been no such agreements in place from May 2016 to now. Indeed, Arbitrator Randall Kelly's March 30, 2019 award found that, in the past, redeploying Sergeants or Lieutenants away from their home facilities to cover a short-term absence on straight time occurred only under a negotiated system. After having listed the parties' negotiated agreements over the years allowing such redeployments at pages 11 through 13, Kelly wrote,

I am persuaded by SOBA's argument that past practice of the parties is that the Authority will negotiate a "system" for redeployments when it anticipates the need to do so. That need may not exist at the present time due to the number of sergeants, but if it did, the practice would be for the Authority to reach out to SOBA or visa versa to work out the terms of the redeployments."

[Joint Exhibit 11, p. 17.]

Kelly held that TBTA had violated both the January 10, 2000 Stipulation of Settlement and established past practice by not having used the SOBA Overtime Procedure to cover the short-term absence at issue there. Kelly also relied on the testimony before him of then-Chief James Fortunato that TBTA could not redeploy Sergeants to cover or partially cover short-staffing caused by absences. (*Id.*, pp. 8, 9, 16-18.) Significantly, in that case grievant Vincent McNeil, a permanent Sergeant at the Marine Parkway Bridge, had reported to that



facility and, after the start of his shift, had been sent to the Bronx-Whitestone Bridge to cover a partial one-day absence there and then drove back to his home facility, where he ended his tour. At the time McNeil was not an AR, was not extra, and was not an acting Sergeant. As a remedy, Arbitrator Kelly issued a cease and desist order forbidding TBTA “from redeploying sergeants away from their home facilities without following the SOBA Overtime Procedures to cover or partially cover for short staffing situations caused by absences.” (*Id.*, p. 18.)

On the other hand, TBTA introduced evidence that extra AR Sergeants and Lieutenants had always covered both short-term and long-term absences at their home facilities and others without use of the SOBA Overtime Procedure. For example, Chief Fortunato testified that TBTA had always redeployed AR Sergeants from their home facilities to cover short-term absences at other facilities. According to him, AR Sergeants who had no long-term absence to cover at their home facilities were considered “running extra” and, within their tours, could be sent to other facilities to cover short-term absences (also known as “miss-outs”) there as long as they began and ended their tours at their home facilities. Inspector Christophé Coradin, Director of the Special Operations Division, testified that the practice there beginning in 2013 was to redeploy extra Sergeants and Lieutenants to other facilities to cover short-term absences without

payment of overtime.

TBTA's Vice President of Labor Relations, Sharon Gallo-Kotcher, testified that, over the years, TBTA had used extra AR personnel rather than the SOBA Overtime Procedure to cover short-term absences at other facilities and that nothing in the parties' various agreements prohibits it. She echoed Chief Hildebrand's testimony that, on a daily basis, ARs running extra would report to their home facilities and, if needed elsewhere to cover a miss-out, would travel to that facility, work there, and report back to their home facility before clocking out there.

Gallo-Kotcher also testified that former SOBA President Marc Sirlin told her in 2013 or 2014, after Sgt. McNeil's August 2013 grievance and others citing the January 10, 2000 Stipulation of Settlement, "Don't worry about it." "We're not going to take these any further, but I've got a problem on my board and we just have to file them." Those grievances included Employer Exhibits 9 and 10, both claiming the same contractual violations as at issue here. Gallo-Kotcher's testimony before me was a repeat of that before Arbitrator Robert Douglas. Notwithstanding that testimony, Douglas sustained the grievance before him. (Union Exhibit 15.)

Before me Gallo-Kotcher testified that the January 10, 2000

Stipulation of Settlement had nothing to do with the use of AR Sergeants and Lieutenants running extra to cover short-term absences, but *only* involved TBTA's temporarily promoting Bridge & Tunnel Officers ("BTOs") to be Acting Sergeants and Lieutenants and deploying them to cover short-term absences without using the SOBA Overtime Procedure. Although Gallo-Kotcher's signature appears on that Stipulation, she did not participate in its negotiation. Her testimony concerning the negotiators' intention was accordingly hearsay and was not corroborated by other evidence in the record before me.

As noted above, the January 10, 2000 Stipulation of Settlement specifically requires use of the SOBA Overtime Procedure "to attempt to cover the first five (5) days the absence or Detail assignment requires coverage." That Procedure is used to determine which Sergeants or Lieutenants will cover an overtime assignment. It appears in Paragraph 13 of the October 10, 1986 Memorandum of Understanding and reads,

13. Effective November 1, 1986, Article IX, Section 4 (c) of the agreement dated January 1, 1981 between Triborough Bridge and Tunnel Authority and Sergeants and Lieutenants Benevolent Association is modified as noted below:

\* \* \*

(C) Overtime for full tours shall be covered in the following order:

1. Senior permanent Sergeant or Lieutenant on day off.

2. Sergeant or Lieutenant on previous tour and Sergeant or Lieutenant on following tour each work four hours overtime. This shall be applicable only if both consent to the arrangement.
3. Central overtime pool (permanent Sergeant or Lieutenant on day off, by seniority).
4. (a) Non-permanent Sergeant or Lieutenant assigned to facility, on day off;  
(b) Non-permanent Sergeant or Lieutenant in central overtime pool, on day off.  
(c) Eligible Bridge and Tunnel Officer on list, from home facility who is authorized to carry a gun, can replace absentee Sergeant or Sergeant who is replacing Lieutenant.
5. Compulsory overtime. Sergeant or Lieutenant on previous tour and Sergeant or Lieutenant on following tour each work four hours overtime.
6. No Sergeant or Lieutenant is to be ordered to work on a regular day off.

Except as hereinabove modified, Article IX, §4 (c) remains in full force and effect.

[Joint Exhibit 1, pp. 47-48.]

The relevant part of Article IX, §4 (c) that “remain in full force and effect” reads, “Deviation from the procedure shall be permitted by the supervisor at the facility for emergency reasons as hereinafter defined.” The definition of emergency appears in Article XXVII and does not cover any of the assignments at issue here.

TBTA did not follow that SOBA Overtime Procedure on any of the occasions at issue in this case.

Over the years, TBTA has repeatedly sought without success to negotiate relief from the express limitations of its SOBA agreements. Here are examples of TBTA's contract proposals:

- **August 24, 2016 (Union Exhibit 6, Tr. 120-121):**  
Proposal 3 - "Eliminate requirements that overtime will be used to cover the first five days of an absence or a detail assignment that requires coverage."  
Proposal 12 - "All training may be scheduled on an employee's regular tour. Redeployment may be used to cover those in training."  
Proposal 15 - "Employees may be re-deployed to any Authority location during their tour."  
Proposal 16 - "The following matters shall be withdrawn with prejudice, or be deemed withdrawn with prejudice: . . . 2. AAA Case No. 13 300 02426 13 (Reassignment of Sgt. McNeil from his home facility) Grievance 09-13-09"; [decided by Arbitrator Kelly] . . . 10. Grievance 09-16-03 (Alleged improper assignment of newly promoted supervisors)". [This case.]
- **March 15, 2009, (Union Exhibit 5, Tr. 120-122):**  
Proposal 3 - "Eliminate requirements that overtime will be used to cover the first five days of an absence or a detail assignment that requires coverage."  
Proposal 28 - "Employees may be re-deployed to any Authority location during their tour."  
Proposal 30 - "All training may be scheduled on an employee's regular tour. Redeployment may be used to cover those in training."
- **December 15, 2002 (Union Exhibit 4, Tr.122-123):**  
Proposal 22 - "The Authority shall have the right to direct Sergeants/Lieutenants to report to other than their assigned facility to provide coverage for employees scheduled for training;

Proposal 26(f) – delete Article X which says: “Employees may remain at a facility for an unlimited period if not ‘bumped’ by a senior man at the time of annual facility selections.”

Proposal 26 (b) - Delete Article IX, Sec.1 which says: “Except on matters set forth in this agreement, the present rules, orders and conditions applicable shall prevail unless modified. Any modification shall become part of this agreement.”

Proposal 26 (i) – Delete Article XIX, Sections 1 and 2 (re continuing working conditions)

- **October 19, 1993 (Union Exhibit 3, Tr. 125):**

Proposal 26 – “All limitations on Management’s rights to transfer or assign employees shall be eliminated.”

Proposal 28 – “The Authority shall have the right to reschedule days off and/or tours of duty as it deems necessary.”

Proposal 42 – “Eliminate Article IX, Section 1 (re: present rules, orders and conditions).”

Proposal 43 – “Eliminate Sections 1 and 2 from Article XIX (re: continuing working conditions).”

Proposal 55 – “Delete the following sections of the contract: . . . Article X: Facility assignment.”

In none of those cases did TBTA secure the concessions sought. According to Chief Hildebrand, TBTA made these proposals for “flexibility” and “where the costing of the contract actually made sense so that we would be getting back some, you know, some minor givebacks...” On the other hand, Gallo-Kotcher’s explanation of these proposals included “to create complete flexibility to be able to move any sergeant or lieutenant to any location at any time” and “perhaps it was an old chestnut that got, you know, put in from round to round, which frequently happens.” Either way, TBTA made those demands and failed to get them.

These are the events that generated this grievance. Beginning several months before the end of 2015 TBTA reviewed its projected manpower needs for 2016 as it had done in the past. One new circumstance affecting that calculation was TBTA's having begun its conversion to open-road cashless tolling. After having arriving at the number of permanent Sergeants and Lieutenants it needed, it then created facility assignment schedules for all home facility locations and the hours of each tour to be offered at each location. In accordance with past practice, on December 22, 2015, TBTA faxed those annual facility assignment schedules to SOBA in a Memorandum entitled "SOBA Facility Assignment Annual Bid (2016-2017)" (Employer Exhibit 5, p. 6) for its review and comments. SOBA raised no objections.

Sergeants and Lieutenants' annual bid process occurred by seniority from Tuesday, January 5 through Friday, January 8, 2016. The results included the award beginning March 1, 2016 of five AR Sergeant positions and one AR Lieutenant position. SOBA did not object because it anticipated vacancies and expected no extras. To the right of each named AR is their home facility assignment they would return to when the long-term absentee returned to work. (Joint Exhibits 4, 5.) Thereafter the AR Sergeants filled the holes or vacancies in the schedule that were left when bidding for long-term absences had concluded.

On May 5, 2016 TBTA emailed SOBA two Memoranda containing lists of thirteen AR Sergeant vacancies and five AR Lieutenant vacancies for an additional bid process with bids due back by May 25<sup>th</sup>. Seniority lists effective May 1<sup>st</sup> were attached. Later in May but before the 25<sup>th</sup>, TBTA promoted a number of BTOs into the bargaining unit as permanent Sergeants and Lieutenants. They participated in the May bid process, and some became AR Sergeants and Lieutenants. (Joint Exhibits 5, 6.)

By May 25<sup>th</sup> an additional bid process began in which the newly-promoted Sergeants and Lieutenants participated plus two other bargaining unit members on the May 1<sup>st</sup> seniority lists, Sgt. Chiarelli (no. 60) and Lt. Petrillo (no. 25). The Sergeants and Lieutenant in this additional May bid process did not receive home facility assignment location information before bidding as required by Paragraph 15 of the 4/7/99 MOU and as had been done consistently in the past.

On June 2, 2016 TBTA emailed SOBA a Memorandum entitled “Lt. Perm. Bid Outcome Memo & Position Chart” listing five AR Lieutenants who were granted permanent facility assignments by seniority effective June 9, 2016 including their home facility information:

	<u>Lieutenant</u>	<u>Home Facility</u>
AR1	Petrillo	VNB
AR2	Cortapasso	VNB



AR3	Cupo	QMT
AR4	Parker	BWB
AR5	Persad	RFKB

(Joint Exhibit 9, p. 2.) On June 2, 2016 home facility location assignments for four of the thirteen AR Sergeants first appeared on the Bid Outcomes relating to June 9, 2016 (Joint Exhibit 7, last page). Home facility assignment locations for all AR sergeants appeared on the June 17, 2016 Sergeant's schedule. (Joint Exhibit 10, last page.)

The last page of the Bid Outcomes attachment to Joint Exhibit 7 lists the following thirteen AR Sergeants as of June 9, 2016, showing that only AR nos. 1-4 received home facility assignments and the other nine AR Sergeants had none because their home facilities were "to be determined":

AR#1	Montoya	Throgs Neck Bridge
AR#2	Chiarelli	Verrazano Narrows Bridge
AR#3	Smith	RFK Bridge
AR#4	Reid	Henry Hudson Bridge
AR#5	Aurila	TBD
AR# 6	Magenta	TBD
AR# 7	Nelson	TBD
AR# 8	Hu	TBD
AR# 9	Rivera E.	TBD
AR# 10	Gajdos	TBD
AR# 11	Vasquez	TBD
AR# 12	Frammarino	TBD
AR #13	Aiken	TBD

The identical list of thirteen AR Sergeants also appears on the June 17<sup>th</sup> Absentee Replacement list (last page of Joint Exhibit 7) for Sergeants showing *all* their home facility locations and schedule assignments for June 17, 2016.

	<u>Name (Home Facility)</u>	<u>AR Assignment</u>
AR#1	Montoya (TNB)	HHB 10A Line 1
AR#2	Chiarelli (VNB)	MPB 6P Line 1
AR#3	Smith (RFKB)	RFKB 6A Line 1
AR#4	Reid (HHB)	VNB 6P Line 1
AR#5	Aurila (HLC)	CBB 6P Line2
AR# 6	Magenta (VNB)	VNB 10A Line 2
AR# 7	Nelson (CBB)	RFKB 6A Line 1
AR# 8	Hu (BWB)	QMT 6A Line 1
AR# 9	Rivera E. (QMT)	HHB 6A Line 1
AR# 10	Gajdos (HLC)	VR#1
AR# 11	Vasquez (QMT)	TNB 6P Line 2
AR# 12	Frammarino (RFKM)	RFKM 6A Line 2
AR #13	Aiken (RFKM)	BWB 6P Line 2

SOBA did not file a grievance in connection with the additional May bid process for AR Sergeants and Lieutenants or at the time they received their AR home facility location assignments in June because SOBA was not aware TBTA was going to use them to cover short-term absences. This was the first time TBTA had posted AR assignments for bid without telling SOBA or anyone else that the ARs would be used to cover short-term absences. The facility assignment schedules used for bidding did not contain a statement to that effect, nor did they contain home facility assignment locations.

TBTA thereafter assigned those thirteen AR Sergeants and five AR Lieutenants to cover short-term absences at facilities other than their home facilities without using the SOBA Overtime Procedures and without giving advance notification each time they were so redeployed. This grievance ensued.

On these facts SOBA argues (a) that TBTA improperly assigned newly-promoted Sergeants and Lieutenants to cover short-term absences of five days or fewer at work locations throughout the Authority instead of using the SOBA overtime procedure; (b) that the *McNeil* award is dispositive because the January 10, 2000 Stipulation of Settlement requires TBTA to use the SOBA overtime procedure when TBTA chooses to cover the first five days of an absence; (c) that TBTA improperly ignored various provisions of the parties' collective bargaining agreements and other agreements by failing to cover short term absences in accordance with their terms; (d) that TBTA is trying to gain in this arbitration what it repeatedly sought and failed to achieve in prior negotiations; (e) that TBTA violated clear and unambiguous contract language (i) by never allowing newly promoted AR supervisors to bid for temporary replacement assignments but rather running them extra to avoid coverage on overtime, (ii) by reassigning ARs on a daily basis notwithstanding their entitlement to facility assignments without having been bumped by senior employees, (iii) by not

allowing newly-promoted SOBA members to participate in annual bidding by telephone, and (iv) by unilaterally changing established procedures and practices in violation of the collective bargaining agreement's past practice and status quo provisions; (f) that, even if the applicable contract language were found to be ambiguous, the parties' consistent past practice establishes how they intended their agreements to apply and how TBTA's assignments and redeployments of newly promoted ARs was improper; (g) that, prior to this case and *McNeil*, TBTA negotiated with SOBA when they wanted to deviate from the practice of permanent facility assignments for units like the Collision Reduction Unit, the Special Operations Division, and the Directed Patrol Agreement, which it did not do here; (h) that on at least eight occasions during negotiations for contracts commencing March 1991 through March 2012, TBTA unsuccessfully sought express contract language that would have provided authority for the actions at issue here, redeployment of supervisory personnel to avoid payment of overtime; (i) that TBTA has failed to establish any binding past practice or management right to create AR positions without expected long-term absences to cover, and (j) that I should accordingly sustain SOBA's grievance, grant a cease and desist order going forward, and make SOBA members whole for lost overtime opportunities and compensation that resulted from TBTA's contract violations.

TBTA, on the other hand, contends (a) that no contract violation occurred because determining the number of AR officers to schedule is a proper exercise of management rights pursuant to Article I of the parties' collective bargaining agreement; (b) that nothing in the parties' agreements limits the number of AR positions TBTA can offer; (c) that the established past practice has been for TBTA to create AR positions to cover expected long-term absences, retirements, injuries on duty, and new positions that would be created and offered during the term of each annual bid; (d) that Joint Exhibit 3, the January 10, 2000 Stipulation of Settlement, is inapposite to this case because it governs what must happen when a non-SOBA member is used to work as an Acting Sergeant and in any event permits using an extra Sergeant before running SOBA's overtime procedure; (e) that SOBA never bargained for a limitation of the number of AR assignments that TBTA can offer, and the parties' agreements contain no such limitation; (f) that the parties' agreements clearly and unambiguously allow TBTA to deploy Sergeants and Lieutenants who are extra to any facility their schedules cover so past practice evidence may not be considered; (g) that, even if the contract language were found to be ambiguous, consistent past practice in using and deploying AR Sergeants and Lieutenants requires denial of this grievance; (h) the *McNeil* award is inapposite to AR Sergeants because Sgt. McNeil had a

facility-based assignment and was not running extra when he was deployed to another facility, and grievants here were AR Sergeants who, by definition, report to different facilities and can be deployed to other facilities their schedules cover when extra; (i) that the relief SOBA seeks would require my reading into the parties' agreements limitations on TBTA's authority to do what it did that have no contractual foundation and for situations that SOBA has known about and acquiesced in, and (j) that I should accordingly deny this grievance and the relief SOBA seeks.

On the entire record before me, including my assessments of witnesses' credibility and the probative value of evidence, I must sustain SOBA's grievance and grant the relief it seeks. I reach that conclusion for the following reasons.

First, Sections 1 and 2 of the January 10, 2000 Stipulation of Settlement, read together, could not be more clear and unambiguous in requiring TBTA to use the SOBA Overtime Procedure when it exercises its management prerogative to cover short-term absences or Detail assignments of five days or fewer. Section 1 preserves management's right to determine whether and how to cover an absence "*unless otherwise specified herein.*" (Emphasis added.) And Section 2 is just such a specification. For the first five days of an absence or

Detail assignment, “the SOBA OT Procedure *shall be used*. . . .” Section 2 clearly limits Section 1’s prerogative. It goes beyond what TBTA acknowledges to be a commitment to use the overtime procedure ahead of acting or temporary supervisors for coverage of short-term absences and details. In fact it requires TBTA first to attempt to use the SOBA Overtime Procedure to select Sergeants and Lieutenants to cover absences of five days or fewer when it needs to do so. Arbitrator Kelly confirmed that reading, and that decision provides an authoritative gloss on Section 2’s meaning.

Second, management rights provisions in collective bargaining agreements are not absolute. They embody the residual or reserved rights doctrine, that management has all the rights that it had prior to entering the agreement, except the conditions and limitations on those rights that it accepted in the agreement.

It is a well recognized arbitral principle that the Collective Bargaining Agreement imposes limitations on the employer’s otherwise unfettered right to manage the enterprise. Except as expressly restricted by the Agreement, the employer retains the right of management. This is known as the Reserved Rights Doctrine; it lies at the foundation of modern arbitration practice. [Am. Bar Ass’n, *Elkouri & Elkouri: How Arbitration Works*, 659, (Volz and Goggin, Co-Editors, Fifth Ed., 1997), citing Arbitrator C. Chester Brisco in *Vacaville Unified Sch. Dist.*, 71 LA 1026, 1028 (1978).]

The issue facing TBTA in 2016 was *never* whether it would be able to manage its manpower needs. Rather, it was whether TBTA was willing to meet its manpower needs while also meeting its contractual obligations and paying the price to do so. TBTA does not dispute that it made no attempt under Section 2 of the January 10, 2000 Stipulation of Settlement to use the SOBA Overtime Procedure to cover short-term absences. Nor does it claim “emergency reasons” that, under Article IX, Section 4 (c), would have permitted deviation from the SOBA Overtime Procedure. It simply redeployed personnel to avoid the expense of overtime payments. And that violated the parties’ agreements.

Third, TBTA’s unsuccessful efforts to negotiate contractual authority to do what it did here supports my reading of the parties’ agreements. It repeatedly proposed eliminating Section 2 of the January 10, 2000 Stipulation of Settlement, the SOBA Overtime procedure in Paragraph 13 of the October 10, 1986 Memorandum of Understanding, and the prohibition of unilateral changes of working conditions in Article XIX.2 and IX.1. Clearly TBTA believed these sections operated as SOBA contends and wanted them gone. The “bible” of arbitration practice, *Elkouri & Elkouri*, recognizes that parties cannot win in arbitration what they failed to secure at the bargaining table.



If a party attempts but fails, in contract negotiations, to include a specific provision in the agreement, many arbitrators will hesitate to read such provision into the agreement through the process of interpretation.

[*Id.*, p. 504.]

And both Arbitrators Douglas and Kelly so held for these parties.

Douglas: “The arbitrator recognizes the well-settled axiom that a party lacks a right to obtain in arbitration what a party did not obtain during the collective bargaining process.” (Opinion, p. 44.)

Kelly: “This interpretation is buttressed by the Authority bargaining demands in 2012.” (Opinion, p. 17.)

And I so hold. TBTA cannot win here what it repeatedly tried but failed to secure in collective bargaining.

Fourth, I reject as unfounded TBTA’s argument that the January 10, 2000 Stipulation of Settlement only applies to prohibit using BTOs acting as Sergeants and Lieutenants rather than to permanent Sergeants and Lieutenants running extra to cover short-term absences. In the first place, nothing in the Stipulation’s language supports such a reading. Sections 1, 2, 6, 8, 9 (first three sentences), 10, 11, 12, 13, and 17 can apply to permanent Sergeants and Lieutenants who are not acting. In addition, nothing in the record corroborates Gallo-Kotcher’s hearsay testimony to that effect. Neither the TBTA negotiator, John Berill, nor SOBA’s then president, Jerry Benhardt, testified; nor did TBTA

offer negotiating notes to support that contention. And, as noted, if that had been true, TBTA would have had no reason to negotiate elimination of overtime for covering short-term absences. Finally, TBTA did not even raise this contention in the *McNeil* arbitration, nor did it mention it when answering SOBA's grievance here.

Fifth, I reject as unpersuasive TBTA's past practice argument that SOBA's not having brought grievances to arbitration involving the same subject matter as this case evidenced its acceptance of TBTA's reading of the contract provisions at issue. In the first place, I have found Section 2 of the January 10, 2000 Stipulation of Settlement to be a clear and unambiguous qualification of Section 1's prerogative so past practice evidence cannot denigrate from that meaning. In addition, a party to a collective bargaining agreement does not waive or abandon a clear and unambiguous provision merely by having failed to enforce it in the past.

A related rule is that a party's failure to file grievances or to protest past violations of a clear contract rule does not bar that party, after notice to the violator, from insisting upon compliance with the clear contract requirement in future cases. **Elkouri & Elkouri, How Arbitration Works, *Id.*, pg. 652.**

And here, SOBA had in fact put TBTA on notice of such an intention to enforce the January 10, 2000 Stipulation of Settlement by filing and arbitrating the August

2013 McNeil grievance. Moreover, the three- or four-year hiatus in SOBA's enforcement of these obligations hardly meets the requirements of longevity and mutuality to constitute an enforceable past practice.

Having found TBTA violated the parties' agreements as SOBA's 2016 grievance asserts, I shall issue a cease and desist order and require TBTA to make whole the bargaining unit members who lost overtime opportunities by reason of its having wrongfully redeployed newly-promoted Sergeants and Lieutenants to cover short-term absences at other than their home facilities. Because of the unique circumstances of this case and the long period of time it has been pending, I find that the January 10, 2000 Stipulation of Settlement's Section 6 does not apply.<sup>2</sup> The make-whole remedy shall require TBTA to make whole for lost wages, including lost overtime, all Sergeants and Lieutenants who should have been but were not selected to cover daily and short-term absences of five days or fewer that TBTA covered instead by redeploying newly-promoted extra AR Sergeants and Lieutenants. The time period of this make whole remedy is

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<sup>2</sup>That provision states that, if a permanent Sergeant was improperly denied an opportunity to work overtime pursuant to Section 2, the aggrieved Sergeant will be offered an opportunity to work an overtime tour on a date satisfactory to the supervisor and General Manager, that such overtime must be offered and agreed to within a one-month period, and that, if the Sergeant fails to request an opportunity to work the overtime prior to the end of the one-month period, the opportunity will be lost. That cannot apply where, as here, TBTA's position would have made an aggrieved Sergeant's request futile.

from June 9, 2016 until the use of those newly-promoted extra absentee replacements for such purposes stopped. TBTA shall make available all records for the parties to determine the identity of the Sergeants and Lieutenants who lost wages, including overtime, and the amounts they lost.

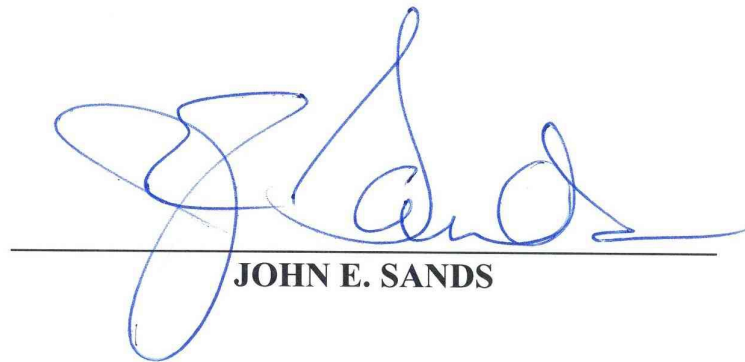
The cease and desist order shall require TBTA to cease and desist from (a) using newly promoted extra AR Sergeants and Lieutenants to cover daily and short-term absences of five days or fewer instead of Sergeants and Lieutenants selected pursuant to the SOBA Overtime Procedure, (b) failing to continue the long-established past practice of having extra AR Sergeants and Lieutenants cover only long-term absences, (c) creating a bid process to have extra AR Sergeants and Lieutenants cover daily and short-term absences of five days or fewer, and (d) creating a bid process that fails to provide home facility assignment location information for absentee replacement positions. Because of the complexity of implementing the make-whole remedy, I shall retain jurisdiction of this matter of a period of six months to give the parties an opportunity to negotiate a mutually-acceptable settlement of its implementation. Either party may invoke that retained jurisdiction by written demand to the other with a copy to me, failing which that jurisdiction shall lapse; and this Interim Award shall become final in all respects.

By reason of the foregoing, I issue the following

### **INTERIM AWARD**

1. The employer did violate the parties' collective bargaining agreement as alleged in Grievance 09-16-03 dated August 3, 2016.
2. TBTA shall make whole for lost wages, including lost overtime, all Sergeants and Lieutenants who should have been but were not selected to cover daily and short-term absences of five days or fewer that TBTA covered instead by redeploying newly-promoted extra AR Sergeants and Lieutenants.
3. The time period of this make whole remedy is from June 9, 2016 until the use of those newly-promoted extra absentee replacements for such purposes stopped. TBTA shall make available all records necessary for the parties to determine the identity of the Sergeants and Lieutenants who lost wages, including overtime, and the amounts they lost.
4. TBTA shall cease and desist from (a) using newly promoted extra AR Sergeants and Lieutenants to cover daily and short-term absences of five days or fewer instead of Sergeants and Lieutenants selected pursuant to the SOBA Overtime Procedure, (b) failing to continue the long-established past practice of having extra AR Sergeants and Lieutenants cover only long-term absences, (c) creating a bid process to have extra AR Sergeants and Lieutenants cover daily and short-term absences of five days or fewer, and (d) creating a bid process that fails to provide home facility assignment location information for absentee replacement positions.
5. Because of the complexity of implementing the above make-whole remedy, I shall retain jurisdiction of this matter of a period of six months to give the parties an opportunity to negotiate a mutually-acceptable settlement of its implementation. Either party may invoke that retained jurisdiction by written demand to the other with a copy to me, failing which that jurisdiction shall lapse; and this Interim Award shall become final in all respects.

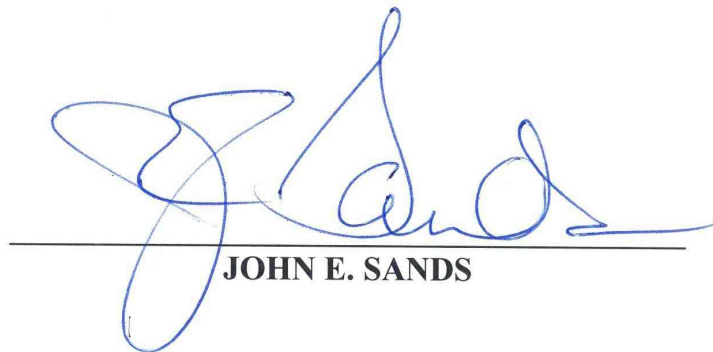
Dated: January 18, 2022  
Boca Raton, Florida



**JOHN E. SANDS**

**AFFIRMATION**

Pursuant to CPLR 7507, I hereby affirm that I am the Arbitrator in the above matter and that I have executed the foregoing as and for my Opinion and Interim Award.



**JOHN E. SANDS**