VOLUNTARY LABOR ARBITRATION TRIBUNAL

Michael C. Ryan, Esq., Arbitrator

In the matter of the arbitration between:	
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 509	
- and -	ARB. NOS.: 9253; 9254 OER NOS.: 14-42605; 16-43895 Gr: [redacted]
COMMONWEALTH OF MASSACHUSETTS, DEPT. OF TRANSITIONAL ASSISTANCE	

DECISION AND AWARD

For the EMPLOYER

Patrick G. Butler, Esq.

For the UNION

Jillian M. Ryan, Esq.

I. Background.

The hearing in this matter took place on April 20 and June 13, 2018. The parties jointly submitted the issues:

> Did the Department of Transitional Assistance violate Articles 8, 12, 14 and/or 23 of the Collective Bargaining Agreement regarding the discipline of the grievant, [redacted]
>
> If so, what shall be the remedy?

Both parties filed post-hearing briefs.

The following provisions of the collective bargaining agreement ("CBA") are relevant to the grievance:

ARTICLE 2
MANAGEMENT RIGHTS/PRODUCTIVITY

Section 1

Except as otherwise limited by an express provision of this Agreement, the Employer shall have the right to exercise complete control and direction over its organization and technology including but not limited to the determination of the standards of services to be provided and standards of productivity and performance of its employees; establish and/or revise personnel evaluation programs; the determination of the methods, means and personnel by which its operations are to be conducted; the determination of the content of job classifications; the appointment, promotion, assignment, direction and transfer of personnel; the suspension, demotion, discharge or any other appropriate action against its employees; the relief from duty of its employees because of lack of work or for other legitimate reasons; the establishment of reasonable work rules; and the taking of all necessary actions to carry out its mission in emergencies.

...

ARTICLE 8
LEAVE

Section 1 Sick Leave

A. A full-time employee shall accumulate sick leave with pay credits at the following rate for each full calendar month:

Scheduled Hours per Week	Sick Leave Accrued
37.5 hours per week	9.375 hours
40.0 hours per week	10.000 hours

An employee on any leave with pay or industrial accident shall accumulate sick leave credits.

…

E. A full-time employee shall not accrue sick leave credit for any month in which he/she was on

leave without pay or absent pay for a total of more than one day.

…

ARTICLE 12
SALARY RATES

…

Section 4
A. Under the terms of this Agreement, an employee shall advance to the next higher salary step in his/her job group until the maximum salary rate is reached, unless he/she is denied such step rate by his/her Appointing Authority. An employee shall progress from one step to the next higher step after each fifty-two (52) weeks of creditable service in a step commencing from the first day of the payroll period immediately following his/her anniversary date.
B. In the event an employee is denied a step rate increase by his/her Appointing Authority, he/she shall be given a written statement of reasons therefore not later than five (5) days preceding the date when the increase would otherwise have taken effect. Time off the payroll is not creditable service for the purpose of step rate increases.

…

ARTICLE 14
SENIORITY, TRANSERS, PROMOTIONS, REASSIGNMENTS, FILLING OF VACANCIES, AND NEW POSITIONS

…

Section 4 Transfers and Reassignments

…

B. Reassignment

1. For the purpose of this section a reassignment shall be defined as a change involving different days off, shift or work location, but without a substantial change in duties and without any change in work unit or classification.

2. Reassignments shall not be implemented for disciplinary reasons that are arbitrary and/or capricious.

1. An employee seeking a reassignment shall submit a written request to his/her Appointing Authority or designee.

2. Selection between employees seeking a reassignment shall be made on the basis of seniority.

…

D. Transfers and Reassignments by the Employer

1. In the event it becomes necessary for the Employer to involuntarily transfer or reassign an employee, the Employer will provide the employee at least ten (10) working days prior written notice, except in cases of emergencies involving the protection of the property of the Commonwealth or involving the health and safety of those persons whose care and/or custody have been entrusted to the Commonwealth. In emergency situations management shall, at the Union's request, provide the reasons for the transfer/reassignment. …

…

MEMORANDUM OF UNDERSTANDING
BETWEEN THE COMMONWEALTH OF MASSACHUSETTS
And The
ALLAIANCE, AFSCME-SEIU LOCAL 509
Regarding the
DEPARTMENT OF TRANSITIONAL ASSISTANCE

BERSW CLASSIFICATION

The parties agree that effective January 1, 2015, employees of the Department of Transitional Assistance in the job title Benefits Eligible & Referral Social Workers (BERSW) A/B performing functions related to Transitional Aid to Families with Dependent Children (TAFDC) and Emergency Aid to Elderly, Disabled and Children (EAEDC) commonly referred to as "cash" programs, shall be upgraded to the BERSW C job title. …

> For the period starting January 1, 2015 to twelve (12) months from the date the collective bargaining agreement becomes effective (upon ratification and legislative approval), movement between BERSW A/B Supplemental Nutrition Assistance Program (SNAP) functional positions and BERSW C (upgraded from A/B) "cash" positions shall be considered as lateral transfers.
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> …

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Since 2010, [redacted] the grievant, has worked for the Department of Transitional Assistance ("DTA" or "Department") with the job title of Benefits Eligibility and Referral Social Worker (BERSW) A/B. In April 2014, she was working in one of the DTA's Transitional Assistance Offices, located at Newmarket Square, 1010 Massachusetts Avenue, Boston. Her job duties included assisting individuals and families in applying for Supplemental Assistance Nutrition Plan (SNAP) benefits and managing cases.

In late March 2014, grievant [redacted] and a coworker were accused by another employee, who had filed a workplace incident report, of speaking about this employee in a derogatory manner. Evidence supporting the complaint was ultimately found to be inconclusive by [redacted] an investigator in the DTA's general counsel's office. On Friday, April 4, 2014, [redacted] a union steward, accompanied by a fellow steward, reported to [redacted]

the director of the office, that employees were not getting along because of the ongoing investigation.

Later that day, the grievant asked steward [redacted] to tell two coworkers, [redacted] and [redacted] to stop gossiping about her, which she claimed they were loudly doing. [redacted] and [redacted] are friends who frequently socialize outside of work. They denied to [redacted] that they were being loud or gossiping about [redacted]. A little later that day, the grievant complained again about their continued gossiping and said that she was going to file an incident report if they did not stop.

[redacted] went back and relayed the grievant's comments to [redacted] and [redacted], and told [redacted] she should go back to her own workstation. [redacted] was upset and asked [redacted] to accompany her to speak with the grievant. [redacted] declined to do so and advised [redacted] not to speak with the grievant.

According to [redacted], [redacted] nonetheless "charged" toward the grievant's cubicle, waving her hand to get her attention. The grievant stood up and raised her arms. They were both began arguing loudly, and [redacted] tried to pull [redacted] by the arm to remove her from the grievant's cubicle. People began to gather. Lieutenant [redacted] from the DTA's security team, then arrived. He

observed that the grievant could not escape from [redacted] because there was no place for her to go. He placed himself between the two employees, and then escorted [redacted] back to her own cubicle. After this commotion, [redacted] interviewed the two employees separately, in the presence of [redacted]. Both employees were sent home.

The next day, Saturday, April 5, [redacted] received a call on her cell phone from an "Unknown Caller" at 12:47 p.m., lasting 47 seconds. According to [redacted], the caller identified herself as [redacted] on the first call and said, "When you see me at work, don't speak to me. You niggas think you sleek!" She then received a second call at 12:48 p.m. from an "Unknown Caller" lasting 6 seconds. [redacted] husband answered the second call; the caller allegedly said, "Yeah, bitch," and then hung up.

[redacted] then texted [redacted] and spoke to her about the calls. After speaking with [redacted], she called the Boston Police Department to report the calls -- but then called back to cancel the report. She also spoke with [redacted] to inform her what had happened. On Monday, April 7, [redacted] filed a workplace incident report.

The next day, [redacted] began an investigation that lasted until June 2. She interviewed [redacted], [redacted], [redacted], and the grievant about the events of April 4 and

5; she reviewed the written incident reports and the reports to the police; and she reviewed [redacted] phone logs.

During the investigation, [redacted] had asked the grievant if she had any of her coworkers' cell phone numbers. The grievant mentioned a couple of people and said she could not recall if she had any others'. When specifically asked if she had [redacted] number, she acknowledged that she did and had in the past texted her for coupons or for interpretation services. She also acknowledged to [redacted] that she knew how to block a number using *67. She denied making the calls to [redacted] on April 5.

On August 15, [redacted] submitted her report to the DTA's general counsel, concluding that the grievant had violated the employer's policy on Workplace Violence by engaging in harassing calls to [redacted] on April 5, and that she acted unprofessionally and disrupted the workplace on April 4. She concluded that the grievant was not honest in denying making the harassing phone calls, finding it highly unlikely that she would have forgotten having [redacted] phone number and also that [redacted] could offer no plausible explanation why [redacted] would make up such an allegation.

Early in the investigation, the Department decided to move the grievant out of the Newmarket Square office. There is confusion about when and how the notice of that

transfer decision was communicated to her. A letter dated April 23, 2014, which indicates that it was to be hand-delivered, notified her that she was being reassigned to the Department's WEB unit on Washington Street effective that day. A second letter, dated April 25, 2014, which indicates that it was to be sent by certified and regular mail, also notifies her of the reassignment to Washington Street effective April 23.

According to the grievant, she retrieved the certified letter, dated April 25, 2014, from the post office on April 30, after the postal service unsuccessfully attempted to deliver it when she was not home. She maintained that this was the first contact she had had with the Department since being placed on administrative leave with pay. She reported to the WEB unit the next day, May 1.

The Department designated the grievant as "not on payroll" ("NOP") for April 23, 24, and 25, and deducted three days from her accumulated sick leave to cover her absence on April 28, 29, and 30. Although [redacted] testified that she left voicemail messages for her, she had no contemporaneous records to confirm that; also, there was no evidence of a purported doctor's note regarding the grievant indicating that was out sick at the end of April.

On May 29, the Union grieved both [redacted] transfer and being placed on NOP status.

On September 18, the grievant was put on paid administrative leave and ordered to attend a show-cause hearing before [redacted] an assistant general counsel for the Department, on September 30. On September 25, [redacted] was given a one-day suspension for her actions on April 4.

Thirteen months later, on December 30, 2015, [redacted], the assistant commissioner for the Department, having reviewed the evidence at the show-cause hearing, issued [redacted] a 10-day suspension for the following reasons:

> After hearing and reviewing the evidence at the hearing, [redacted] reported his findings to me, which are outlined in Attachment A, and which I adopt. These findings indicate that you violated the Department's Workplace Violence policy as well as reasonable expectations to conduct yourself in a professional manner at all times.
>
> Specifically, it was determined that you made threatening phone calls to a co-worker on the co-worker's personal cell phone. In addition, you failed to conduct yourself in a professional and respectful manner when you engaged in a verbal argument with another co-worker and caused a disruption in the office. Your actions were entirely unprofessional and jeopardized the safe and efficient operation of the Department. Your failure to conduct yourself in a professional manner as BERS A/B cannot and will not be tolerated.

In deciding on the length of the suspension, the Department did not consider the grievant's lack of prior discipline.

She served her 10-day suspension and returned to work on January 13, 2016, at DTA's WEB unit. The union filed a grievance the same day. It contends that the suspension of [redacted] was without just cause. This and the prior grievance regarding her transfer and being placed on NOP status, dated May 29, 2014, has now reached arbitration.

II. Contentions of the Parties.

The Employer

The Department argues it had just cause to suspend the grievant because she violated the Department's policy on Workplace Violence and acted inappropriately and unprofessionally on April 4, 2014. "Workplace Violence," includes "[d]isruptive or aggressive behavior that places a reasonable person in fear of physical harm or that causes a disruption of workplace productivity." Like all other employees, the grievant was expected to review, understand, and comply with the Workplace Violence policy, which makes clear there is zero tolerance for any instances of violent conduct. Because BERSW A/B's are the public face of the DTA, dealing with clients in dire economic need, they are

expected to act appropriately and professionally at all times.

When [redacted] approached the grievant, after having heard several times that she was going to file an incident report against her, the grievant shouted, "This shit is all your fault," and continued yelling. Yelling and engaging in profane argument with a coworker, causing a commotion requiring a security guard to step in, is an unacceptable disruption of the workplace. This conduct clearly violated the Workplace Violence policy: the grievant's behavior was disruptive, aggressive, and would place a reasonable person in fear of physical harm; it also caused a disruption of workplace productivity. The grievant's claim that she feared that she was going to be struck by [redacted] was not borne out by the evidence.

Both [redacted] and the grievant were found to have acted in a disruptive manner. [redacted] received a one-day suspension. The grievant, however, did more than [redacted] and deserved greater discipline — her actions against another coworker the next day justly resulted in the higher penalty.

The Department's policy on Workplace Violence also prohibits "[t]hreats or acts of intimidation communicated by any means that cause an employee to be in fear of

his/her own physical safety or that of a colleague." That is just what the two "blocked" calls to [redacted] on April 5 were. The phone calls, while not containing a direct threat, were a clear act of intimidation: the grievant's tone of voice, her pejorative language, and her statement, "you niggas think you slick; don't talk to me at work" were reasonably interpreted as threatening. The grievant's abusive, angry language made [redacted] feel so threatened that she called the Boston police and also completed a workplace incident report.

It is clear that the anonymous caller was the grievant. [redacted] recognized her voice and the caller identified herself as [redacted] The fact that the call was blocked indicates that the grievant knew her actions were threatening and were intended to be such.

The Department properly reassigned the grievant to the WEB unit when it sent her a notice to report there on April 23, 2014. Article 14 provides that the employer will provide employees ten days written notice of reassignment "except in cases of emergency involving the protection of the property of the Commonwealth or involving the health and safety of those persons whose care and/or custody have been entrusted to the Commonwealth."

This provision applies to the safety of its employees, for whom the Commonwealth is entrusted to care. Since the Department was informed of the threatening calls only one day after the grievant's inappropriate outburst, it was necessary to separate her from the Newmarket Square office while the Department conducted its investigation. The grievant was sent the notice on April 23 and 25, 2014, and [redacted] twice called her cell phone to inform her of the reassignment. Despite two notices and two phone calls, along with notice to the Union, the grievant failed to report or contact anyone. The Department therefore properly classified her absences as NOP.

Because the grievant committed acts of unprofessional conduct and workplace violence, and because the totality of the circumstances involving her were more egregious than those involving [redacted], the Department properly suspended her for 10 days. The Department needed to respond in a more forceful manner than a one-day suspension. Having been placed on a lengthy, paid administrative leave during the investigation did not financially harm the grievant and she was not hindered from returning to work in 2016.

The investigation that [redacted] conducted was thorough and based on sound practices: she spoke to critical

witnesses, reviewed reports, and interviewed the grievant. The grievant was given a show-cause hearing where [redacted] and [redacted] testified and where she was represented by private counsel and the Union. The assistant commissioner then further reviewed the findings of the show-cause hearing. Only after this process was the grievant issued a 10-day suspension. The Department's investigation and review of the matter was deliberate and thoughtful and should be upheld.

The Union

The Department, which has the burden of proof, failed to establish that the grievant acted unreasonably by engaging in a verbal confrontation with [redacted] on April 4, 2014, or that she violated the Workplace Violence policy by allegedly making "threatening" calls to [redacted] on April 5, 2014. Even if proven, the penalty imposed was out of step with the conduct alleged.

Because the "credible evidence establishes that [redacted] was a victim of verbal assault and acted as any reasonable person in her position would" the Department did not have just cause to discipline her for the altercation with [redacted] on April 4, 2014. The Department's investigative report glosses over the indisputable fact that [redacted] instigated the incident and that the

grievant simply reacted. She credibly testified that she feared that [redacted] might strike her, and reacted defensively. Lieutenant [redacted] noted that she could not escape because of [redacted] position inside her cubicle and that he had to physically block [redacted] when she tried to return to the grievant's cubicle. [redacted] the only disinterested witness to the complete set of circumstances, testified that she unsuccessfully tried to keep [redacted] from accosting the grievant on multiple occasions before [redacted] "charged" into her cubicle, yelling and waving her arms. [redacted] described the grievant's behavior as a normal, defensive reaction to an unexpected verbal assault. She even tried to physically remove [redacted] from her cubicle before [redacted] arrived.

The grievant has never denied that she yelled at [redacted] but credibly explained that she only did so in response to [redacted] verbal attack so as to keep [redacted] away from her. [redacted] testimony, in contrast, was inconsistent and unsupported by the evidence. Although [redacted] initially claimed that [redacted] declined her request to come with her to the grievant's cubicle, she later falsely testified that [redacted] did agree to go there with her to speak with the grievant. Her testimony that she did not enter her cubicle and remained

calm was contradicted by the testimony of [redacted] and [redacted].

There is no credible evidence to establish that the grievant made threatening phone calls to [redacted] on April 5, 2015. The Department relied on improper speculation to conclude that she made those calls. Because the grievant had [redacted] personal cell number, had the common knowledge that pressing *67 blocks calls, and that the two calls to [redacted] came from an unknown number, does not establish that she made the calls.

The Department, moreover, unjustly assumed that the grievant made the calls because it held unfair preconceptions about her, which were based on misinformation and conclusory assumptions. In order to conclude that she made the phone calls, the Department wrongly assumed that she was being dishonest simply because she knew about the existence of *67, and that she did not identify the fact that she had [redacted] phone number until specifically asked about it rather than immediately reciting that fact from memory. The Department also improperly relied on [redacted] incorrect speculation that the grievant believed she was a witness in the March 2014 incident as a reason that she made the call when, in actuality, she did not believe that. Finally, to conclude

as the Department did, that the grievant was guilty because she "offered no plausible explanation as to why Ms. [redacted] would make up these allegations," improperly requires the grievant to prove a negative and puts the burden on her to conjure up some improper motive to prove her innocence.

Lacking any evidence beyond hearsay and assumptions, the Union argues, the arbitrator must find that the Department has failed to prove its allegations either that the grievant made the two phone calls to [redacted] or that she had done so in an attempt to intimidate [redacted]. But, the Union further argues, even assuming that she did make those calls, they — as [redacted]herself admitted at the hearing — were not a threat. The Department's "evidence" that those calls were an attempt to intimidate [redacted] in regard to the investigation of the March 2014 incident report is thus nothing more than speculation. There was, in addition, no just cause for the Department to have also based the 10-day suspension on the period of time it could not reach her.

In any event, a 10-day suspension for the misconduct alleged — even were it proven – is too severe for a number of reasons. It is at odds with the one-day suspension given to [redacted]; the discipline was imposed more than a year after the findings of the show-cause hearing; the grievant was forced to languish for 15 months on

administrative leave; and there was a lack of consideration of her spotless disciplinary record. In addition to the discipline without just cause, the Union maintains that the Department committed other contract violations.

First, it improperly categorized her as NOP for April 23, 24, and 25, 2014. Because she had not received the letter transferring her until April 30, there was no directive for her to ignore, and no credible evidence indicates that the Department tried to reach out before mailing the certified letter on April 25, 2014. By improperly classifying her as NOP she lost a step increase she would otherwise have been eligible for and was denied sick leave accrual. Second, the Department wrongly charged her sick leave for April 28, 29, and 30, 2014, since there is absolutely no evidence that she requested sick leave. Third, the Department improperly transferred her to the WEB unit without giving her the required ten days' notice required by Article 14. The Department wrongly relies on the emergency language of that article, which only applies to clients and was not an emergency. Finally, the Department improperly prevented her from exercising her right under an MOU to receive a lateral transfer to the position of BERSW C for the 12-month period beginning

January 15, 2015, by placing her on administrative leave for 15 months.

III. Opinion.

1. The Incident of April 4, 2014

Regarding the incident of April 4, 2014, I find that the grievant was not the aggressor. As [redacted] credibly testified, [redacted] stormed into the grievant's cubicle while she was working and began yelling and waving her arms to get attention. [redacted] credibly testified that [redacted], despite cautions from [redacted] approached the grievant, even after [redacted] turned down [redacted] requests to come to the grievant's cubicle with her.

[redacted] was certainly at fault for instigating the verbal altercation that disrupted the office. In fact, after [redacted] accosted the grievant, the Union steward tried to pull her away until security approached. Lieutenant [redacted] observed that the grievant was trapped in her cubicle and could not get away from [redacted].

The grievant testified credibly that, while she did raise her voice and wave her hands and say, "get out," she did so in reaction to the provocation. Anyone, when confronted in his or her single-entrance work cubicle in the manner the grievant was, would have had a powerful reaction. Not unreasonably, she stood up and waved her

hands to say, "get out" and raised her voice somewhat in reaction. This is not cause for serious discipline.

This is not to say that the grievant acted in a wholly professional manner. Of course, it would have been better had she refrained from reacting to [redacted] provocation for, as the Department rightly points out, DTA employees are the face of the agency to the public. But it is important that: (1) she did not instigate the altercation that was the cause of the disruption in the office; and (2) that her actions were a reaction to [redacted], who had charged into her office waving her arms, yelling, and refusing to leave, until security escorted her away.

2. The Anonymous Calls on April 5, 2015

The events of April 5, 2014, present a more serious charge. Calling and harassing a coworker at home because of a workplace incident, even if the words themselves are not threatening, could be viewed as an act of intimidation. The problem here, however, is that the evidence is not convincing that it was the grievant who made the anonymous calls to [redacted]. This is a case of one person's word against another's, supplemented by a screen shot of a phone log recording two anonymous calls made to [redacted] cell phone and the calls she made thereafter. However, the context in which these alleged calls occurred, and the reasons the

Department decided to implicate the grievant as the caller, lead me to find that there is not convincing evidence that the grievant made the calls.

The grievant was a credible witness whose testimony about the events of April 4, 2014, was consistent with that of the other disinterested witnesses. Her testimony about that day lends credibility to her denial that she made the two anonymous calls on April 5, 2015. In addition, the notion that the grievant was lying about having [redacted] phone number was belied by how the investigatory questions were asked, since the grievant merely answered the specific questions that were asked of her. She gave the name of two colleagues whose numbers she had when asked an open-ended question; and she acknowledged having [redacted] number when asked directly. I do not find this to be indicative of a lack of credibility.

The context must also be considered in determining credibility. [redacted] and [redacted] are good friends, and were aware that the grievant had indicated that she intended to file an incident report for their alleged gossiping about her. [redacted] was upset enough to have initiated an altercation the day before, necessitating that she and the grievant be sent home. While the grievant was surely upset, so were [redacted] and surely [redacted] as well. Indeed,

as things stood on April 4, the grievant was intending to file an incident report the next workday.

Although I do not need to find it to be the case, it is not implausible to think that [redacted] and [redacted] would have benefited if the grievant were to get in further trouble before she could file an incident report. [redacted] first contact to anyone after the anonymous calls was to [redacted], and she retracted her call to the police that same day. In addition, although [redacted] testified that she recognized the grievant's voice and that she even identified herself as "[redacted]" it is curiously incongruous that the grievant would go to the trouble of making an anonymous phone call by means of a blocked number, but would then nonetheless identify herself.

The conclusions reached by the Department in its investigation were predicated on some unwarranted assumptions. As the Union rightly points out, *67 is common knowledge; such knowledge alone does not lend heavy support to the inference that the grievant made the calls. The Department, furthermore, was not warranted in basing its decision on the grievant's inability to give a plausible explanation as to why [redacted] would make up this accusation. The Department was well aware of the tensions in the office and the acrimony the investigation had

engendered. Although it is impossible to know on this record, and I do not so find, I nonetheless find it equally plausible that [redacted] and [redacted] made up this entire incident.

In the end, it is not clear just what happened on April 5, 2014. But the dynamics of the office, and the fact that [redacted] and [redacted] were close friends, should have been taken into consideration. I need not find that the grievant did not make the call nor do I need to find that two friends made it up, for I do not find convincing evidence that establishes that it was the grievant made the two anonymous calls.

3. The Time Categorized as Not on Payroll and as Sick Time.

I also find that the Department did not have cause to categorize the grievant as NOP for the days of April 23, 24, and 25, 2014, since the only contemporaneous evidence documenting that she was notified to report to the WEB unit is the certified letter she picked up on April 30, 2014. This was the letter — dated April 25, 2014 — that informed her to report to the WEB unit on April 23. There is no evidence that the letter dated April 23, 2014, was in fact hand-delivered to the grievant as it purports; there is no certificate of service or other such proof of delivery.

There is likewise no contemporaneous evidence that documents any phone calls to her. Lastly, there was no attempt to contact her by e-mail.

There is also no documentation that the grievant requested sick leave. The evidence thus supports the finding that the grievant did not use sick leave on April 28, 29, and 30, 2014, which is, moreover, consistent with her understanding that she was still out on administrative leave. As a result, the grievant should not have lost her sick-leave accrual; she should not have been denied a step increase; and she should not have been charged three days' sick leave.

4. [The Transfer and] Paid Administrative Leave

[The Union claims that the Department violated Article 14 of the collective bargaining agreement when it transferred the grievant without giving her ten days' written notice. The Department counters that it had the right to do so under the emergency language of that article, which excepts from the ten-day notice requirement "emergencies ... involving the health and safety of those persons whose care and/or custody have been entrusted to the Commonwealth." This provision, however, manifestly refers to clients and not employees. The Department was therefore obligated to provide her with a ten-day notice

before reassigning her. I note, however, that she is not seeking a reassignment to the Newmarket Square location, and so I need not order a remedy.]

The grievant was placed on paid administrative leave for 15 months, an inordinately long time. According to the Union, she was thereby denied her right to take an opportunity for upgrade from BERSW A/B to BERSW C, where she would otherwise have been entitled to a lateral transfer and upgrade under the terms of the MOU. The Department states that she did not suffer any diminution in remuneration because she was paid while out on administrative leave. The Department, however, does not specifically address the fact that she lost an opportunity for an upgrade.

Since I find that there was no just cause to suspend the grievant, she should be made whole for all lost wages and benefits. A make-whole remedy should include any lost opportunities for an upgrade that she would otherwise have been able to secure except for the fact that she was suspended without just cause. [Consequently, I am remanding this issue to the parties for up to 30 days to see if they can reach an agreement on whether the grievant is entitled to an upgrade. I will retain jurisdiction for 30 days, and if the parties are unable to reach a

resolution, either party may request that this matter be brought back before me.] *Or*: [Because the paid administrative for 15 months was further discipline without just cause, the grievant shall also receive the upgrade that she would have been entitled to, retroactive to January 1, 2015.]

AWARD

The ten-day suspension of the grievant was without just cause. The discipline shall be reduced to a written warning "for inappropriate behavior on April 4, 2014." The grievant was also wrongly categorized as "Not on the Payroll" for April 23, 24, and 25, 2014, and for sick leave on April 28, 29, and 30, 2014.

The grievant shall be made whole for all lost wages and benefits, including her sick-leave accrual, charged sick leave days, and lost step increase. She shall also be upgraded from BERSW A/B to BERSW C, effective January 1, 2105, and made whole for any lost wages and benefits due to the higher wage rate.

Due to the complicated nature of the remedy, I shall retain jurisdiction for 60 days to resolve any dispute regarding the implementation of this remedy. Either party may invoke my retained jurisdiction for the purposes of rendering a complete and final remedy on this matter.

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Michael C. Ryan
Arbitrator
October 17, 2018