

AMERICAN ARBITRATION ASSOCIATION

 In the matter of the arbitration between *
 *
 WORCESTER FIRE FIGHTERS, *
 LOCAL 1009, AFF * 01-19-0000-0737
 -and- *
 CITY OF WORCESTER *
 *

INTRODUCTION

A demand for arbitration was filed by the Worcester Firefighters, Local 1009, pursuant to the parties' collective bargaining agreement and in accordance with the rules of the American Arbitration Association. The parties jointly selected Mary Ellen Shea to act as single neutral arbitrator in the matter. A hearing was conducted on June 18, 2019 in Worcester, Massachusetts.

The Worcester Firefighters, Local 1009 (Union) was represented by Attorney Leah Barrault. Appearing for the Union were [REDACTED], Local President; and [REDACTED], Local Vice President. [REDACTED], Local Secretary-Treasurer, also attended.

The City of Worcester was represented by Attorney Tim D. Norris. Appearing for the City was Fire Chief Michael Lavoie. Also, in attendance were Deputy Fire Chief, [REDACTED]; Human Resources Coordinator, [REDACTED] and Assistant HR Director, [REDACTED]
[REDACTED]

The parties submitted post-hearing briefs. Thereafter, the Union filed a Motion to Strike and the City filed a Response to the Motion to Strike. The arbitrator's ruling on the Motion and the Response was issued on December 5, 2019, at which time the record was closed.

THE ISSUES

The parties could not agree on the framing of the issues to be decided by the arbitrator.

The Union proposed:

Did the City of Worcester violate the collective bargaining agreement by discriminating against lieutenants, captains and district chiefs in pay and benefits based upon whether they received a temporary civil service promotion as opposed to a permanent civil service promotion? (Grievance 2018 03, 05 and 07)

Did the City's actions during the night tour 10/6/2018 with respect to Temporary District [REDACTED] and the filling of a vacancy violate the collective bargaining agreement?

If so, what shall the remedy be?

The City proposed the issues be framed as:

Did the City violate the collective bargaining agreement by continuing to pay temporary incumbents in officer positions pursuant to Article 22 after the method of selecting those incumbents changed from seniority to position on the civil service list?

If so, what shall the remedy be?

The proposed issue statements unnecessarily include elements of their parties' arguments on the merits. I have reviewed the Union's original grievances and each of the demands for arbitration to the American Arbitration Association. The following issue statements summarize and accurately reflect the issues in dispute:

Did the City violate the collective bargaining agreement when it paid employees pursuant to Article 22, Out of Grade Compensation?

If so, what shall be the remedy?

Did the City violate the collective bargaining agreement when it assigned temporarily promoted District [REDACTED] to fill the district chief position in Car 4 on October 6, 2018?

If so, what shall be the remedy?

RELEVANT CONTRACT PROVISIONS

The parties' collective bargaining agreement contains the following pertinent provisions:

ARTICLE 2
UNIT REPRESENTATION

...the City acknowledges that the Union is the exclusive representative of all employees in the following job classification of the City of Worcester Fire Department:

Fire Fighter
Fire Lieutenant
Fire Captain
District Fire Chief

and excluding all other employees.

ARTICLE 17
SUBORDINATION TO EXISTING LAW

Section 1. ...Subject to the provisions of Massachusetts General Laws, chapter 150E, this Agreement shall in all respects, whenever the same may be applicable herein, be subject and subordinate to the provisions of the Worcester City Charter in effect at the time of the execution of this Agreement.

Section 2. ...It is intended by the parties hereto that the provisions of this Agreement shall be in harmony with the duties, obligations and responsibilities which by law devolve upon the City Manager or the City Council....

It is further understood and agreed that no expenditures or compensation will be paid employees in accordance with this Agreement unless and until the requirements and procedures required by law and the provisions of the City Charter are satisfied.

ARTICLE 22
OUT OF GRADE COMPENSATION

Section 1. Payment for hours worked in an out-of-grade capacity shall be for hours worked not to exceed 42 hours per week, as long as the agreed upon minimum fill in period of one full tour has been met. The 42-hour limitation applies to regularly scheduled hours; accordingly, the practice in effect at the signing of the agreement, when an employee is called back for emergency overtime and works in an out-of-grade capacity, shall continue, i.e. to pay the overtime at the rate of the higher rank.

Section 2. The designation of employees for such out-of-grade, fill-in service and compensation will be made on the following basis. Fire fighter for Lieutenant ... on the basis of the senior Fire fighter in the company and in the group involved; Lieutenant for Captain ... on the basis of senior Lieutenant in the company involved; Captain for District Chief ... on the basis of the senior Captain in the group involved; District Chief for Deputy Chief ... on the basis of the senior District Fire Chief in the group involved. Where the Fire Chief does not call back

an off duty Deputy Fire Chief to fill-in for an absent Deputy Fire Chief, and where there is no District Fire Chief in the group involved available to fill-in for an absent Deputy Fire Chief, a District Fire Chief from an off-duty group will be called in pursuant to this Agreement on an overtime basis to work the tour involved as a Deputy Fire Chief, and, in such instance, the District Fire Chief will be compensated at an overtime rate calculated on the basis of the salary step of the District Fire chief salary schedule being received by him/her at the time of such call-in. A District Fire Chief shall be considered “available” pursuant to this Article, notwithstanding the provisions of Article 22, §4, page 11 of the FY 1993-1995 Memorandum of Agreement, or the District Chiefs execution, pursuant to §4 of the appropriate form indicating intent not to serve in an out-of-grade capacity.
Section 3: For purposes of this Article, seniority will be measured by permanent time in rank, and, if employees are equal by that measure, then by permanent time as employee of the Fire Department.

BACKGROUND

The Union filed four grievances, which are consolidated here and concern a dispute about how a temporarily promoted officer is to be paid. For many years, temporary vacancies in an officer position (Lieutenant, Captain, or District Chief) were filled with a lower ranking employee by seniority and on a shift-by-shift basis. In these situations, an employee would fill in for the absent officer, work “out of grade” and be paid at the rate of the absent officer’s rank (Lieutenant, Captain or District Chief) in accordance with Article 22, Out of Grade Compensation.

Despite this long-standing practice of filling temporary vacancies with an officer working out of grade, the Civil Service Commission’s rules actually required that vacancies lasting longer than 30-60 days¹ must be filled with a candidate from a Civil Service promotional list. If the vacancy is expected to be temporary, the Employer may fill the vacancy by temporarily promoting a qualified candidate from the Civil Service list. When the absent officer returns to duty, the

¹ In their post-hearing briefs, the parties’ did not agree whether the requirement to fill a temporary vacancy with a promotion was triggered after 30 or 60 days but the difference does not affect the outcome of this decision.

temporarily promoted officer would then return to their prior (lower) rank.

The difference between the parties' local practice and the Civil Service rule was not a concern until 2017, when it was determined that acting out-of-grade would no longer count as "prior experience" credit when applying to a Civil Service promotional list. To earn credit for prior experience, time spent by an employee "acting out of grade" would not be recognized unless the employee was temporarily appointed to the position.

Due to this change, the Worcester Fire Fighters Union, Local 1007, appealed to the Civil Service to require the City to fill temporary vacancies in excess of 30-60 days from Civil Service promotion lists rather than filling them on a shift by shift basis with the next senior employee working out of grade.

Thereafter, the City began to fill temporary vacancies with an employee selected from the Civil Service promotional list for the rank of the vacant position. For example, in the case of an absent lieutenant, the City would temporarily appoint a fire fighter from the Civil Service list of qualified applicants for promotion to lieutenant. While the Civil Service maintains a single promotion list for each rank, selections from the list may serve different purposes. A municipality promotes from the same list whether to fill a permanent position, or to fill a temporary vacancy.

This dispute arose after the City agreed to fill temporary vacancies from the Civil Service promotional lists, but continued to compensate the temporarily promoted officers pursuant to Article 22, Out of Grade Compensation. The Union complained that employees promoted to a higher rank must be paid at the higher rank for all work, whether they were promoted to a permanent or temporary vacancy. The Fire Chief did not agree and issued a Directive on October 12, 2018, establishing the Department's policy that temporarily promoted employees would be paid according to Article 22, Out of Grade Compensation. This means that officers are

paid at the rank of their temporary promotion only for work performed during the regular shifts of the absent officer. For all other hours (such as overtime or paid leave) the temporarily promoted officers are paid at the rate of their former (lower) rank. For example, a fire fighter who is promoted to fill a temporary lieutenant vacancy is paid at the lieutenant's rate only while working the regular shifts of the absent lieutenant. The temporarily promoted officer may not sign up for or work as a lieutenant (lieutenant details or overtime, for example). For all other hours (sick leave, details, or overtime, etc.) the temporarily promoted officer is compensated at the fire fighter's rate.

Three of the grievances relate directly to the dispute about compensating temporarily promoted employees pursuant to Article 22, Out of Grade Compensation, rather than compensating them at their temporary rank (Grievances 2018-03, 2018-05, and 2018-07). The fourth grievance concerns an assignment on October 6, 2018. At the time, Captain [REDACTED] had been temporarily promoted to a district chief position. According to the Chief's Directive, [REDACTED] could not work district chief overtime and [REDACTED] was on the list for overtime as a captain and he was called in to fill in for an absent Captain on the night tour. Based on the Chief's Directive, [REDACTED] should have been assigned the overtime shift at the rank of captain. When he reported for the overtime, however, he was (mistakenly) assigned a vacant district chief overtime slot. If [REDACTED] had worked the captain overtime as planned and in accordance with the Chief's Directive, another employee would have had an opportunity to work out of grade.

The Union also filed an unfair labor practice charge with the Department of Labor Relations (DLR) alleging the City violated Mass. General Laws, Chapter 150E by implementing a new pay and benefit structure for temporary promotions without notice or bargaining with the Union and in retaliation for protected Union activities. The charges were dismissed by the DLR (Joint Exhibit #11).

Thereafter, the parties were unable to resolve the grievances and the matter was submitted to arbitration.

POSITIONS OF THE PARTIES

THE UNION

The Union argues that the City violated the collective bargaining agreement by paying employees pursuant to Article 22, Out of Grade Compensation, and by the assignment of District Chief [REDACTED] on October 6, 2018.

According to the Union, the collective bargaining agreement makes no distinction between the rate of pay for a temporary or permanent promotion. Nor is there any contractual provision that requires a temporarily promoted officer be paid at a different rate of pay for different shifts. The contract includes a single salary schedule establishing a single rate of pay for each rank. The salary schedule does not distinguish between temporary and permanent promotions. For this reason, the City violates the contract whenever it fails to pay a temporarily promoted officer at the higher rank for all hours, including when they work overtime or when they take paid leave.

The Union also argues that paying temporarily promoted officers pursuant to Article 22 is improper. The terms of Article 22 are clear and unambiguous. Article 22 allows the Department to fill empty shifts by assigning a lower ranking employee to work out of grade on a shift by shift basis. For example, a fire fighter may act out of grade when a lieutenant assigned for that shift is absent. The fire fighter “acts” as a lieutenant, but only while working that shift. When the shift remains empty for more than 30-60 days, the law requires the City to promote someone from the Civil Service promotional list for lieutenants. The Union argues that whenever the City selects someone from the Civil Service list, that individual is promoted to the higher rank. Once promoted, the employee must be paid at that rank at all times.

The Union points out that Civil Service makes no distinction between temporary and permanent

promotions. Whether appointed to a temporary or a permanent position, an officer is promoted from the same promotional list, regardless of the duration of their appointment.

The Union rejects the City's reliance on Article 22 because, they contend, it only applies to working out of grade, not to promotions. The Civil Service rules expressly prohibit the use of acting out of grade and, by its own clear terms, Article 22 only applies when an "employee occupying a lesser rank" fills in for an absent officer. Article 22 cannot apply to temporarily promoted officers because they no longer occupy a "lesser rank" and once promoted, the employee is working within the higher rank and not "out of grade."

The Union rejects the City's claim that the City Charter places a limit on the number of officers that may be employed and paid at one time. The Union contends the numbers of positions listed in the Table of Organization (City Exhibit #2) does not preclude the Chief from requesting additional positions as he did successfully for Fiscal Year 2020.

The Union points to two prior temporary promotions by the City to support its position. Effective May 2005, the City promoted Captain [REDACTED] to District Chief as a "temporary military substitute" for a Deputy Chief on military leave. Despite his "temporary" assignment, [REDACTED] was treated and compensated as a district chief in all respects. In March 2018, the City temporarily promoted District Chief [REDACTED] to a Deputy Chief position. As with [REDACTED], [REDACTED] was treated and compensated as a Deputy Chief in all respects.

The Union argues the City also violated the collective bargaining agreement on October 6, 2018 when it assigned temporarily promoted District Chief [REDACTED] to a vacant district chief shift on overtime. Normally, pursuant to Article 22, the senior captain on duty would be assigned to work the vacant district chief shift on an out of grade basis. While it was logical to have temporarily promoted District Chief [REDACTED] to function as a district chief on October 6, this grievance exposes the fallacy of the City's position that a temporarily promoted officer reverts to their lower rank

when working overtime or taking paid leave.

The Union urges the arbitrator find that the City of Worcester violated the terms of the parties' collective bargaining agreement by failing to treat temporarily promoted officers the same as permanently promoted officers for the purpose of pay and benefits. The Union asks that the arbitrator retain jurisdiction for at least 60 days to resolve any disputes between the parties in implementing the Award.

THE CITY

The City argues the Union has not met its burden of proving the City violated the collective bargaining agreement. In addition, the Department of Labor Relations' initial and final decisions to dismiss the Union's charges based on the same underlying facts are preclusive and must be respected.

The City first argues that the collective bargaining agreement does not support the Union's claims because Article 22 specifies the method of compensating temporary officers irrespective of how they are selected. The City compensates employees temporarily filling in for an absent officer according to Article 22, the only contractual provision that applies. The Union cannot point to any other contract provision that addresses compensation for employees temporarily filling in for an absent officer. The City did not change the method of compensating employees when they fill in for an absent officer. Whether a position was vacant for a single shift or for several months, the employee filling in has always been compensated pursuant to Article 22, Out of Grade Compensation.

The Union's appeal to Civil Service unquestionably created a different process for filling the longer temporary vacancies. Thereafter, "the City began to comply with the statutory process by selecting employees from the Civil Service list instead of by seniority pursuant to [Article 22]" (City brief, page 8). Section 2 of Article 22 specifies the process of selecting the employee to fill

in for an absent officer and “this part of the contract has been partially superseded by Civil Service rules for vacancies in excess of 30-60 days” (City brief, page 12). The selection method for some vacancies may have changed but the underlying reasons for the vacancy remain unchanged.

According to the City, “the types of vacancies filled by the Civil Service temporary promotion process are the same types of vacancies that are filled under Article 22.” The City’s continuation of the same method of compensation for the person filling the same underlying vacancies under the same circumstances was a reasonable choice for the City to make and it does not contravene any language in the collective bargaining agreement. The City rejects the Union’s attempt to distinguish the prior selection process (described in Article 22) from the selection process using temporary promotions because the “process of choosing the most senior fire fighter on the company will actually yield the same fire fighter shift after shift, so the result is not all that different than the result obtained with a temporary promotion” (City brief, page 13).

The City contends that Article 17, Subordination to Existing Law, provides that “no expenditures or compensation will be paid to employees in accordance with this Agreement unless and until all requirements...of the City Charter are satisfied.” According to the City, the City Charter limits how the number of employees working for the City at one time to the number in the approved budget. For example, the current approved budget lists 70 sworn lieutenant positions (i.e., permanent lieutenants). The City would violate the Charter if it were to promote more employees to the rank of lieutenant than is already funded. The Chief testified, “We can’t exceed the Table of Organization. Which if you did that [promotion to lieutenant]...It would have been 72 lieutenants. Two over the Table of Organization” (Transcript, page 74). When asked how the Chief avoids exceeding the Table of Organization when making temporary appointments, he explained, “If we have a certified list from Civil Service, we will appoint off that list according to Civil Service law...[but] compensate according to Article 22, Out of Grade pay” (Transcript, page 77).

Moreover, the City argues it is inequitable to force a more expensive contract than the one negotiated and approved by the City. The City points out that “using Article 22 as the compensation method allowed the City to make the temporary promotions without exceeding the authorized budget” (City brief, page 14).

The City rejects the Union’s argument that the two prior instances (█████ and █████ either prove the Union’s claims or establish a binding practice. First, the 2005 case involving █████ is too far in the past and the circumstances too dissimilar to the grievances at issue. █████ was filling in for an employee who was on military leave, an absence that went on for about 4 years. The position was filled by █████ pursuant to Article 22, Out of Grade Compensation, for an extended period of time and eventually, █████ was temporarily promoted. The circumstance was unique, in the distant past, and does not establish a practice.

The City also rejects the assertion that the 2018 promotion of █████ to Deputy Chief proves the Union’s argument or establishes a past practice. The City points out that the Deputy Chief position is not in the bargaining unit and the circumstances should not be relied upon to establish a past practice in the bargaining unit. Moreover, the vacancy was, in fact, a permanent vacancy, distinguishing that situation from those being grieved by the Union now. The promotion list was “short,” which meant a permanent promotion was not possible and so a provisional appointment was made. The City urges that neither example supports the Union’s arguments and neither example establishes a binding past practice.

The City contends that using the Article 22, Out of Grade Compensation, as the method of compensation for temporarily promoted officers also means the City will not be required to pay the officer’s rate to multiple employees for the same shift, whereas the Union’s model could result in three employees being paid at an officer’s rate for the same shift. For example, using the Article 22 method of compensation, the City does not pay a temporarily promoted lieutenant at the higher rate

when they call out sick when they are supposed to be filling in for an absent lieutenant. When they call out sick, the City must then assign another employee to fill in and must pay that employee “out of grade compensation” at the lieutenant’s rate. If the City is required to compensate the temporarily promoted officer at the officer’s rate even when they are not working the shift they were promoted to fill, the City would have to pay three employees at the lieutenant’s rate when only one of them is actually working.

The City contends the same, underlying factual issues in dispute have already been decided by the Department of Labor Relations. At the time of the arbitration hearing, the matter had been dismissed at the investigator’s level. Thereafter, a final decision was issued by the DLR’s Commonwealth Employment Relations Board (CERB) affirming the initial dismissal. “When an issue of fact is litigated by a final order, the determination is conclusive in a subsequent action between the parties under the doctrine of issue preclusion” (City Brief, page 20). The Union had a full and fair opportunity to litigate the key factual issues regarding whether the City violated the contract or deviated from past practice by its chosen method of paying employees filling temporary vacancies. The City argues the Union should not be permitted to re-litigate a settled matter.

The City contends the state agency’s decisions are conclusive and have a preclusive effect on the issues presented at arbitration. The CERB’s affirmance of the investigator’s decision is a final and binding order like a final judgment issued by a court; “irrespective of the arbitrator’s determinations regarding the legal posture of the DLR matter, the arbitrator should accept the DLR determinations as persuasive authority” (City brief, page 24) and deny the grievances.

Regarding the [REDACTED] grievance, the City concedes a mistake was made regarding [REDACTED] assignment in October 2018 but the mistake was made by a bargaining unit member, rather than the City and the mistake did not amount to a contract violation. The City took corrective action by counselling the bargaining unit member who made the assignment error. [REDACTED] was compensated at

a higher rate than he should have been but for the error. Since the City took corrective action and all employees were properly compensated for the work they performed, the grievance should be denied.

The City concludes the Union did not meet its burden of proof and urges the arbitrator to deny all the grievances in their entirety.

DISCUSSION

The first question before me is whether the City violated the collective bargaining agreement when it paid employees pursuant to Article 22, Out of Grade Compensation. The second question is whether the City violated the collective bargaining agreement when it assigned temporarily promoted District Chief [REDACTED] to fill the vacant district chief position on October 6, 2018.

The Union's first three grievances concerning the compensation of temporarily promoted officers are fairly direct. The Union argues that Article 22 does not apply to temporarily promoted officers and they should be paid the compensation corresponding to their promoted rank as established by the negotiated salary schedule. The City contests both these arguments and raises several defenses, which will be addressed below. First, the City's argument that the issues presented at arbitration have already been adjudicated by the DLR and the DLR decision should control or the issues are precluded from being adjudicated at arbitration must be addressed.

The doctrine of issue preclusion requires that several elements be met, including a determination that the issue at stake here (arbitration) is the same issue that was at stake in the prior proceeding (DLR). The issue here and described above is whether the City violated the parties' collective bargaining agreement. The issue at stake at the DLR was whether the City had violated the state law at M.G.L. 150E, Sections 10(a)(1), (3) and (5) (See Joint Exhibit #11). Whether an initial finding or a final ruling, the DLR decision dismissing a charge that the City violated the state

labor law does not preclude the arbitration of a distinct and different issue, that is, whether the City violated the parties' collective bargaining agreement when it paid employees pursuant to Article 22, Out of Grade Compensation.

Turning to the merits of the grievance, there is no dispute that the parties' collective bargaining agreement does not specifically mention "temporary promotions" but this does not mean that the proper method of compensating temporarily promoted employees cannot be established. The Union rejects the City's argument that Article 22, Out of Grade Compensation, applies to temporarily promoted employees. The Union correctly argues that Article 22 is clear and unambiguous and applies to employees who are working in a position that is above their appointed grade or rank. For example, when a fire fighter is temporarily promoted to lieutenant and fills in for an absent lieutenant, they are not working "out of grade" because they are not in a position that is above their grade or rank.

The Union rejects the City's claim that the language of Article 22 is the only appropriate contractual provision for compensating employees temporarily promoted from a Civil Service list. According to the City, the selection process described in Article 22, Section 2, has only "been partially superseded by Civil Service rules for vacancies over 30-60 days" and remains the only contract provision that applies to temporary promotions. The City's position is not supported by the evidence.

According to the City, "the types of vacancies filled by the Civil Service temporary promotion process are the same types of vacancies that are filled under Article 22 and the City's decision to continue the same method of compensation..." was a reasonable choice for the City to make" (City brief, page 13). A review of the entire provision makes it clear that Article 22, Out of Grade Compensation, does not apply to temporarily promoted employees and Article 22 was not an appropriate choice for compensating temporarily promoted employees.

Article 22, Section 2, contains very specific language and describes in detail every possible assignment that is eligible for out of grade compensation. Contrary to the City's assertion, out of grade compensation does not apply "irrespective of how [the employees] are selected." In each specifically described instance, Article 22 provides that out of grade compensation be paid when a selection for a vacant officer's shift is filled by a lower ranked employee in a higher ranked vacant position (fire fighter for lieutenant; lieutenant for captain and captain for deputy chief). There is no provision for paying out of grade compensation for other situations such as when a temporary vacancy is filled by an employee of the same rank, whether the employee holds that rank as a permanent or temporary appointment. It is clear that the language of Article 22 is meant to establish a method of filling a temporary vacancy such as a lieutenant position when there is no employee appointed to the rank of lieutenant available. Article 22 establishes the method of compensating an employee while they are filling in or acting in a higher rank, such as a fire fighter acting as a lieutenant. Once a fire fighter is temporarily promoted to lieutenant, however, they are not "acting" and they are not working "out of grade."

The City did not refute the Union's assertion that, other than the duration of a promotional appointment, Civil Service makes no distinction between temporary and permanent promotions. For example, Civil Service does not maintain separate promotional lists for temporary or permanent vacancies. Civil Service allows a temporary promotion for the duration of a temporary vacancy from the promotional lists, but there is no evidence that Civil Service allows the equivalent of a "partial promotion," an appointment that alternates between two ranks during the same time period.

The City contends the method of compensating temporarily promoted employees should remain the same because the selection process is virtually the same. "The process of choosing the most senior fire fighter on the company will actually yield the same fire fighter shift after shift, so

the result is not all that different than the result obtained with a temporary promotion.” (City brief, page 13). Even if this is generally true, once selected, the status or rank of the selected employees are not the same. A fire fighter selected on a shift by shift basis to fill in for a lieutenant, remains a fire fighter and is compensated for working above their grade pursuant to Article 22. If that same fire fighter is then selected from a Civil Service list and temporarily promoted to fill a longer vacancy in a lieutenant position, they are no longer acting or working above their grade because they have been appointed to a lieutenant position.

The City did not refute the Union’s assertion that the salary schedule incorporated into the parties’ collective bargaining agreement makes no distinction between a temporarily or permanently promoted Lieutenant, Captain, or District Chief. The negotiated salary schedules establish rates of pay for Fire Fighters, Lieutenants, Captains, and District Chiefs (Joint Exhibits #4A and #4B). The negotiated salary schedules clearly and unambiguously establish different rates of pay for each rank based on the employee’s years of service. The negotiated salary schedules clearly and unambiguously establish different rates of pay for each rank based on the employee’s level of education. The negotiated salary schedules, however, do not establish different rates of pay for permanent or temporary appointments to any rank. Nor do the salary schedules provide any language or mechanism for compensating employees at their appointed rank for some circumstances and then reducing their compensation to their former rank for other circumstances.

It is clear that Article 22, Out of Grade Compensation, does not apply to temporarily promoted officers because they are not acting above or working out of their grade. For this reason, the City violates the contract when it pays temporarily appointed officers out of grade compensation because they are not working out of grade and are not covered by Article 22. It is also clear that the negotiated salary schedules do not distinguish between temporary and permanent appointments to the rank of Lieutenant, Captain or District Chief. For this reason, the proper

compensation for any temporarily promoted officer under this collective bargaining agreement is the rate of pay in the negotiated salary schedule (Joint #4A and #4B) that corresponds to their appointed rank.

The City correctly argues that paying temporarily promoted employees pursuant to Article 22 necessarily limits the number of employees it must compensate at the higher rank. If the Union's requested remedy is awarded, the City may be faced with paying an officer's rate of pay to more employees than it does under the current compensation method. The City's concern about the potential of increased costs is understandable. The cost associated with the City's approach versus the Union's approach is a factor that may be considered if/when the parties negotiate alternatives to the existing contract language. In the absence of contractual language requiring the arbitrator to consider cost effectiveness, however, the comparative cost of the two approaches is not a factor in determining whether the existing collective bargaining agreement has been violated.

The City also argues that Article 17, Section 1, Subordination to Existing Law, provides that "no expenditures or compensation will be paid to employees in accordance with this Agreement unless and until requirements of the City Charter are satisfied." It must be noted that Article 17 requires that compensation to employees be consistent with and subordinate to the City Charter as well as to external law, which necessarily includes Civil Service law. According to the City, Article 17 means the City may not pay out more compensation than is listed and approved in the Department's budget. "For example, the City Charter places a limit of 70 sworn lieutenants (i.e., permanent lieutenants) who may be working for the City at any time (City Exhibits #1 and #2). Hence, promoting fire fighters to the rank of lieutenant for all purposes would violate the City Charter by creating more lieutenant positions...than are permitted and funded by the City Council" (City Brief, page 13, emphasis added).

The City's argument that Article 17, Section 1, does not permit the City to pay temporarily

promoted officers in the same manner as permanently promoted officers or that it requires the City to pay temporarily promoted officers pursuant to Article 22 is not supported by the evidence. City Exhibit #1 contains excerpts from the City Charter, but the City did not indicate which provision limits the Department's ability to modify either the appropriation amount or the number of positions once their budget has been submitted and approved, but it appears there are some procedures for requesting changes at Section 5-3, Supplementary Budgets, Other Appropriations and at Section 5-4, Transfer of Appropriations. Modifying a budget after it has already been approved may be very difficult, but the City has not established that the Department is legally or procedurally prevented by the City Charter from changing the number of positions in its Table of Organization or by paying out more compensation than was initially budgeted.

The City argument that the Union's requested remedy would violate Article 17 of the contract is not supported by the evidence. First, I find no provision in the Charter/Ordinance (City Exhibit #1) that mentions or limits a department's ability to change the number of positions listed in their budget. Second, the City's argument suggests it may exceed the Charter limit of 70 lieutenants, provided they make only "partial promotion". This is not a term used by the parties but the arbitrator's term that roughly describes the City's approach to temporary promotions. According to the City, to avoid exceeding the approved budget or the Table of Organization, when a temporary promotion is needed, the temporary promotion is not "for all purposes." For example, the City argues a "temporary promotion" does not apply when compensating an employee for overtime or paid leave purposes. There is no evidence that a "partial promotion" is contemplated or permitted by the parties' collective bargaining agreement. There is no evidence that the contract permits a promotion for some purposes and not others or that once promoted, an employee's rank may be reduced for some purposes. Since the parties agree that Civil Service law requires a vacancy exceeding 30-60 days be filled by appointing a temporarily promoted employee, rather

than an employee who is acting or working out of grade, it is not clear how the City's approach is "in harmony with the duties, obligations and responsibilities which by law devolve upon the City" as required by Article 17, Subordination to Existing Law.

In a Civil Service decision preceding Worcester's change in filling temporary vacancies, the Chairman explains that the Civil Service law regarding temporary vacancies exceeding 30-60 days requires the City do more than select an employee from a Civil Service list but who then fills the vacancy in an out of grade capacity. Rather, Civil Service law requires a promotional appointment be made to fill temporary vacancies:

To provide context for the issues related to these appeals, a brief overview of the civil service promotional process and the practice of civil service employees serving in a higher grade for a limited period of time is warranted.

In order to appear on an "eligible list" of candidates who are eligible for a permanent or temporary promotional appointment, a civil service employee takes and passes a promotional examination. Once that occurs, her name would appear on the eligible list for a set period of time...If, during the life of that eligible list, a civil service community seeks to make a permanent or temporary promotional appointment, that community must create a certification of names from the eligible list, and then promote someone from within the top three ranked candidates...

Joint Exhibit #12

The effect of the Civil Service rules for filling temporary vacancies may mean that the number of officers working for the City at any given time will fluctuate and may exceed the number initially budgeted and approved. And when temporary promotions are required, the Department may need to submit requests to modify its previously approved appropriation. The City has not established that it is legally prevented by the City Charter/Ordinance from making temporary promotional appointments or is legally prevented from requesting changes to its budget. In fact, the Fire Chief testified at hearing that some budget items can only be estimated and when needed, the City Charter allows him to "go before the Council and ask for additional money" (Transcript, page 121).

In summary, the Union established that the City violated the collective bargaining

agreement by compensating temporarily promoted employees pursuant to Article 22, Out of Grade Compensation, rather than compensating the temporarily promoted officers pursuant to the negotiated salary schedule. The City has not established the DLR decision(s) are controlling or that the Union's grievances must be denied because of the DLR decision(s). The City has not established that the City Charter/Ordinance prevents it from compensating temporarily promoted employees at the contractually negotiated rate of pay corresponding to their rank. Note: This decision is based on clear and unambiguous language of the parties' collective bargaining agreement and not based on any alleged past practice. That said, the City correctly argued that the examples of alleged past practice were too distant in time and/or not sufficiently similar to the grievances before me.

The second question is whether the City violated the collective bargaining agreement when it assigned temporarily promoted District Chief [REDACTED] to fill the district chief position on October 6, 2018 (Grievance 2018-16). In this grievance, the Union appears to argue against its firm position that a temporarily promoted officer must be paid at the higher rank for all hours worked. In this grievance, rather than challenge the decision to compensate [REDACTED] pursuant to Article 22 as it did in the other three grievances, the Union argues here that the City violated the Chief's Directive by not paying [REDACTED] pursuant to Article 22. In any event, The Union has not established that an employee was not paid properly for any time worked and has not established that an employee's status was harmed. The Union has not established that the City violated the collective bargaining agreement when it assigned temporarily promoted District Chief [REDACTED] to fill the district chief position on October 6, 2018 (Grievance 2018-16). This grievance is denied.

REMEDY

The Union asked that the arbitrator determine whether the City had violated the contract but the Union did not articulate a remedy request. The Union asked that "...the Arbitrator [find] that the City of Worcester violated the clear terms of the parties' collective bargaining agreement by failing to treat temporarily promoted officers the same as permanently promoted officers....[and] The Union respectfully requests that the Arbitrator retain jurisdiction for a period of at least sixty days...to resolve disputes between the parties in implementing the Award" (Union brief, page 21).

As discussed above, I have found the City violated the collective bargaining agreement when it paid temporarily promoted employees pursuant to Article 22, Out of Grade Compensation, rather than compensating them at the negotiated rate of pay corresponding to their promoted rank. This directly responds to the Union's request that the Arbitrator find the City of Worcester violated the parties' collective bargaining agreement.

The question of remedy in this matter is complex and it is more appropriately resolved by the parties themselves. The question of remedy is remanded to the parties for resolution by March 27, 2020. The arbitrator retains jurisdiction for sixty (60) days for the sole and limited purpose of resolving disputes about fashioning a remedy and implementing the award.

AWARD

The City violated the collective bargaining agreement when it paid temporarily promoted employees pursuant to Article 22, Out of Grade Compensation, rather than compensating them pursuant to the negotiated salary schedule at the rate of pay corresponding to the rank of their promotion.

The question of remedy is remanded to the parties for resolution by March 27, 2020.

The arbitrator retains jurisdiction for sixty (60) days for the sole and limited purpose of resolving disputes about fashioning a remedy and implementing the award.

The City did not violate the collective bargaining agreement when it assigned temporarily promoted District Chief [REDACTED] to fill the district chief position in Car 4 on October 6, 2018.



Mary Ellen Shea, Arbitrator
January 26, 2020