Before
MARC D. GREENBAUM
Arbitrator

In the Matter of Arbitration Between:

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 509

And **OPINION AND AWARD**

COMMONWEALTH OF MASSACHUSETTS
(Department of Children and Families)

ARB #9827, OER #19-44884
(Educational Incentive)

APPEARANCES

For the Commonwealth:
Melissa A. Thomson, Esq.

For the Union:
Ian O. Russell, Esq.

INTRODUCTION

On July 16, 2018, Service Employees International Union, Local 509 ("the Union") filed a class action grievance alleging that the Commonwealth of Massachusetts ("the Commonwealth"), acting through its Department of Children and Families ("the Department"), violated the parties' collective bargaining agreement ("the Agreement") by failing to include the educational incentive when calculating the salaries of newly promoted employees. When the parties were unable to resolve the grievance, the Union demanded arbitration and the undersigned was selected to resolve the dispute.

Hearings on the grievance were held on a video conference platform before the undersigned on October 12, 2021 and December 20, 2021. Both parties were present and represented by counsel at each day of hearing. Following presentation of the

evidence, and some post-hearing evidentiary compilation, both parties sought leave to submit post-hearing briefs. Upon the arbitrator's receipt of those briefs, the matter was ripe for resolution.

THE ISSUE

Whether the Department of Children and Families violated Article 12, Section 5(B) of the Agreement when calculating the step placement for promoted employees?

If so, what shall be the remedy?

RELEVANT PROVISIONS OF THE AGREEMENT

ARTICLE 12
SALARY RATES

Section 5

A. Whenever an employee paid in accordance with the salary schedules provided in Appendices A-1 through A-2 of this Agreement receives a promotion to a higher job group, the employee's new salary rate shall be calculated as follows:

1. Determine the employee's salary rate at his/her current job group;

2. Find the next higher step within the employee's current job group, or, for employees at the maximum rate within their current job group; and

3. Multiply the employee's current salary rate by one and three one hundredths (1.03); then,

4. Compare the higher of the resultant amounts from 2) and 3) above to the salary rates for the higher job group into which the employee is being promoted.

5. The employee's salary rate shall be the first rate in the higher job group that at least equals the higher of the resultant amounts from 4) above.

B. For the purpose of this section, the Educational Incentive shall be included with base pay when calculating step placement when an employee moves from a title that does not have a degree requirement to a title that has a degree requirement.

ARTICLE 19
TRAINING AND CAREER LADDERS

Section 10 Educational Incentive

Effective January 1, 2002, employees who possess the following education degrees and for whom such degree:

A. is not required as a condition of employment or, in the absence of such requirement; and

B. is beyond what is necessary for a license or certification that is required as a condition of employment, shall receive the following education differential payment:

Baccalaureate degree Thirty dollars ($30.00) per bi-weekly pay period Masters degree Sixty dollars ($60.00) per bi-weekly pay period Doctorate degree Eighty dollars ($80.00) per bi-weekly pay period. …

C. Effective January 7, 2007 employees in the Human Services Coordinator job series who have the functional title of Qualified Mental Retardation Professional and who possess Bachelor's Degrees shall receive the educational incentive

ARTICLE 23A
GRIEVANCE PROCEDURE

Section 2

The grievance procedure shall be as follows:

Step I

An employee and/or the Union shall submit a grievance in writing, or by facsimile machine, on the grievance form included in Appendix F of this Agreement, to the person designated by the agency head for such purpose not later than twenty-one (21) calendar days after the date on which the alleged act or omission giving rise to the grievance occurred or after the date on which there was a reasonable basis for knowledge of the occurrence. …

Section 15

Arbitrators will issue a decision within 30 days of receipt of the parties post-hearing brief or oral argument. Upon request of either the Employer

or the Union, the arbitrator will retain jurisdiction for sixty (60) days after the issuance of a decision in the event of a dispute over implementation.

FACTUAL BACKGROUND

In negotiating what became their 2014-2016 Agreement, the parties agreed to a Union proposal amending Article 12 to add what is now Section 5 (B). According to the Union, its proposal was seeking to address a situation faced by promoted employees who were receiving an educational incentive in the position from which they were promoted. Under the parties' predecessor agreement, that calculation of the pay rate for the newly promoted employee did not include the educational incentive. Thus, it is claimed, newly promoted employees were receiving unreasonably small pay increases. The grievance asks the arbitrator to determine whether the parties agreed to resolve that issue in the manner sought by the Union.

The Union represents more than eight thousand Commonwealth employees. The overwhelming number of those employees are in Bargaining Unit 8 which includes the 3,000 employees in the Social Worker job title. The Department employees 2,600 employees in that job title.

Since 2002, all employees in the Social Worker job title have been required to have at least a Bachelor's Degree and it remains a requirement for what was referred to during the hearing as Social Worker I and II, now Social Worker A/B. As employees progress in the Social Worker classification to Social Worker III or IV, now Social Workers C and D, a Master's Degree is required for promotion. Employees in the Clinical Social Worker classifications must have at least a Master's Degree.

The Union also represents employees in job titles that do not degree requirements. For example, employees in the Social Worker Tech series, various Human Service

Coordinator job titles and in the Community Resource Developer C titles are not required to possess Bachelor's Degrees. Thus, employees in those titles receive an educational incentive even if they have a Bachelor's Degree or more. Those titles are occupied by a relatively small number of bargaining unit employees. Indeed, when the language in dispute was added, there were no employees in the Social Worker Tech series and that situation remained unchanged until approximately 2019.

Under the Agreement, employees in the Social Worker I and II classifications who possess Master's Degrees receive an educational incentive because only a Bachelor's Degree is required for that position. Social Workers in the higher classifications with doctoral degrees also receive the incentive because it is a more significant educational achievement than the required Master's Degree.

The problem in this case arises from the methodology provided by Article 12 for computing the salaries of employees upon being promoted. The first part of the process is relatively straightforward. The first step is to ascertain the employee's current salary rate, that is the salary grade and step currently occupied by the employee. Thereafter, the Agreement commands looking at the salary rate for the next step in the particular job grade. For example, for an employee being paid at Step 5 of a particular grade, the first level of inquiry would be to determine the salary that would be paid to an employee at Step 6. The problem arises after this point.

Once the salary at the next higher step is ascertained, the employee's current base salary is multiplied by a factor of 1.03. We shall refer to this calculation as the promotion factor. The outcome of this calculation will differ depending upon whether the base salary subject to the multiplication includes the educational incentive. The outcome of

that calculation is then compared to the salary specified for the next higher step. The employee is placed at the grade and step on the salary scale that pays the higher of the two numbers. If the calculation produces a figure that is higher than the next step on the scale, the new rate is the one at the higher step closest to the rate determined by the calculation. The employee's new salary step will be higher if the educational incentive is included in the calculation than it would be without its inclusion.

Suppose for example, the Commonwealth performs the calculation established by Article 12, without including the educational incentive in the base rate. We can take the case of one Social Worker with a Master's Degree being promoted from Social Worker II to Social Worker III. As a Social Worker II, he was receiving the educational incentive for the Master's Degree or $60.00 every two weeks. He was on the top step, Step 12, of Grade 20. The new position was in Grade 23. His pay raise upon promotion was determined without considering the educational incentive. As a result, he was placed on Step 8 of Grade 23. This generated a net salary increase of $78.14, since the bi-weekly salary for Step 8 was $138.14 higher than his prior salary, but that increase was offset by the loss of the educational incentive for which he was no longer eligible because his new position required a Master's Degree. Thus, his annual pay increase was $2,031.64.

If the Department had included his educational incentive in calculating the promotional factor, he would have been placed at Step 9 of Grade 23. This would have produced a bi-weekly increase of $172.35 or an additional $2,449.46 on an annual basis. Even the math challenged among us can appreciate that difference and, according to the Union, Article 12, Section 5 (B) was intended to require this result.

Whether the Union is correct requires us to consider the language of the Agreement and the bargaining history of the new contract language. The record includes the Union's notes of the parties' bargaining, which admittedly, are not a verbatim transcript, as well as the testimony of its lead negotiator. It also includes a more limited set of notes taken by and the testimony of one of the Commonwealth's representatives.

The Commonwealth did not challenge the substance of the Union's notes on this issue. They reflect that the Union introduced its proposal to address this issue on August 27, 2013. The notes recite the Union's Chief of Staff, its chief negotiator, explained that the proposal was intended to address "situations in which there is little increase in pay after a promotion." The proposal was originally proffered as an amendment to Article 19, Section 10 of the Agreement, the contract article establishing the educational incentive. For reasons that are unclear from the record, it found its ultimate home in Article 12.

The Union's testified to having informed the Commonwealth's negotiators of the Union's intent to address the issue by requiring inclusion of the educational incentive in the promotion calculation. At no time, he testified, was there any discussion about limiting the language to those employees with degrees who were promoted from positions that did not have any degree requirement. Nor, he testified, was there any discussion effectively excluding Social Workers from benefitting from the new language because they were required to have a Bachelor's Degree.[1] He testified that the

[1] There was also specific evidence about employees hired into the Social Worker classification prior to 2002 when there was no degree requirement for entry. Those employees with degrees received the educational incentive and continued to receive it after the change in the entry requirements, effectively being treated as having been grand parented. Despite being treated as employees initially hired into positions without a degree requirement, the educational incentive was not included in calculating their new rate of pay upon being promoted.

Commonwealth understood the proposal's intent, but could not cite a specific statement reflecting the Commonwealth's acquiescence to the Union's view off the new language.

The Commonwealth's witness to the main table negotiations testified that the parties did not spend a lot of time discussing the new language and its potential implications. That testimony is consistent with the bargaining history notes maintained by both parties. Based on the Union's notes, the issue was not discussed at the main table again until June 9, 2014. At that time, there was an oblique reference to the issue in the context of discussion about a Commonwealth proposal to cease paying the educational incentive for degrees that were not deemed relevant to the employee's job. A Union representative simply referenced the proposal's existence, which was acknowledged by a Commonwealth representative.

The Commonwealth's bargaining notes indicate that the next and last time the disputed language was referenced was on June 20, 2014. On that occasion, the Union indicated that it could agree to a Commonwealth proposal on the educational incentive in exchange for the Commonwealth's agreement to what became Article 12, Section 5 (B). The precise Commonwealth proposal thus agreed to is not clear from either the parties' notes or the testimony of the witnesses.

A few observations are in order. It is not clear when, how or why the Union's proposal migrated from Article 19 to Article 12. Nor does there appear to have been any discussion about how the application of the new language to specific job classifications, most notably the Social Worker classification. Indeed, there does not appear to have been much discussion about the proposal's impact. Either the parties did not consider it

important, or the principal negotiators fully understood the Union's reason for making the proposal and the manner in which the Union proposed resolving the issue.

The proposal adopted was reflected the one introduced by the Union on August 27, 2013. Notably, the parties adopted the Union's language referring to movement from titles that do "not have a degree requirement to a title that has a degree requirement." The major change was that the original proposal stated that the educational incentive "would be counted on top of base pay", while the language adopted provides that it will be "included with" the base pay in calculating the new salary.

Once the 2014-2016 Agreement was ratified in July 2014, the Department commenced making promotions consistent with its understanding of the new contract language. It is unclear how its implementation may have been guided by input from the Commonwealth's negotiators and the record does not contain any implementation memorandum that may have been issued after the new agreement was reached.

The Department understood that the new language was applicable only when the position from which the employee was being promoted did not have any degree requirement. Since Social Workers were required to have a Bachelor's Degree, promotions from within their ranks were not deemed subject to the new language and thus the educational incentive was not included in calculating the promotion factor. The Department has consistently applied this interpretation from 2014 to the present. There is also evidence that other departments within the Executive Office of Health and Human Services utilized the same methodology. A Union witness testified that there were no complaints from employees in other departments subject to Article 12, Section 5 (B) and thus assumed that the calculations in those departments were consistent with its

understanding of that language. There was no concrete evidence to that effect. All we know is that no grievances were filed by employees from other departments.

There was evidence submitted by the Commonwealth of situations in which the contract language would operate in the manner envisioned by the Department. As noted, for example, the classification of Social Worker Tech does not have a degree requirement. Thus, an individual in that classification with a degree being promoted to Social Worker would have the educational incentive included in calculating the employee's pay rate following promotion.

There was also testimony about employees in the position of Human Services Coordinator, a position also lacking a degree requirement. Apparently, a very small number of such employees have sought and received promotion to the position of Clinical Social Worker. In those few cases, the Department has included the educational incentive in calculating their new rate of pay. There was also discussion about the position of Community Resource Developer C, a classification with few employees, which does not have a degree requirement. Employees with degrees seeking promotion to positions with the Social Worker classification would receive the incentive under the Department's view. A Commonwealth witness acknowledged that there had been no applications from incumbents in that position for promotion to Social Worker. There is no evidence of the frequency with which employees in that position sought promotion to other positions, such as Substance Abuse Specialist, in which their degree would have been counted in computing their new rate of pay.

Given the number of Social Workers represented by the Union employed by the Department, one would have expected there to be multiple grievances generated by the

Department's implementation of the new proposal. That was not the case. There was a grievance contesting the Department's application of the new language filed by an employee on December 14, 2016. According to the Union, this was the only complaint received from an employee contesting the Department's application of the new language in the wake of its adoption. For reasons that are not explained in the record, the Commonwealth did not respond to the grievance at either Steps 1 or 2, and it was not moved to Step 3 until January 31, 2018. A Step 3 meeting never occurred and at some point during the pendency of this proceeding, the Union submitted the grievance to arbitration. Although such a timeline may strike some as strange, as it is, it is not without precedent in the parties' ongoing relationship.

The Union may have assumed that the 2016 grievance was an outlier, but facts appear to have come to its attention prompting it to file this grievance filed after the parties had negotiated a successor to the 2014-1016 Agreement. There was no evidence as to whether Article 12, Section 5 (B) was discussed in the negotiations for that Agreement. This grievance, filed prior to the movement of the 2016 grievance to Step 3, was filed on behalf of the entire class of employees, presumably including the grievant in the 2016 case. The Union demanded arbitration on October 21, 2019 and the arbitrator was selected in March 2020. The Union did not initiate the scheduling process for this case until the first quarter of 2021. Such a lag time between the Union's demanding arbitration and its commencing the scheduling process is not unusual based upon this arbitrator's experience with the parties.

POSITIONS OF THE PARTIES

Union Position:

The Union claims to have demonstrated entitlement to relief because the Commonwealth's application of Article 12, Section 5 (B) violates both the express contract language and contravenes the parties' intent. It thus asks that the grievance be sustained, with an appropriate make whole remedy.

The evidence demonstrates, it says, that the Union proposed the critical language to redress the inequity resulting from unit members losing the benefit of the educational incentive upon being promoted. The bargaining history, it says, does not reflect any distinction between employees being promoted out of positions with no degree requirements those in positions with a lower degree requirement than the one to which the employee was promoted. There is no evidence, the Union continues, that the parties excluded social workers from Section 5(B), yet that is the necessary implication of the Commonwealth's contrary position.

The governing contract language, the Union continues, is consistent with its bargaining history evidence. Section 5 (B), it argues, must be read in conjunction with Article 19, Section 10 which provides the educational incentive for employees holding degrees that are not required for their license or certification. That purpose, it says, is clearly encompassed within so much of Section 5 (B)'s concern with titles that to not have a degree requirement. By its terms, that language is not confined to titles without "any" degree requirement. Fairly construed, it argues, it encompasses an employee with a Master's Degree in a job title for which only a Bachelor's Degree is required.

The Commonwealth's efforts to confine the language's application to job titles without any degree requirements must be rejected, the Union continues. In the case of Social Worker Techs, it says, the Commonwealth did not employ anyone in that classification when the language was agreed to and did not employ anyone in that title until at least 2019. The Commonwealth also admitted, the Union says, that there are few instances of Human Service Coordinator's being promoted to Clinical Social Workers. The Union, it contends, was unlikely to have proposed contract language that would benefit few if any of its members, while ignoring the interests of the large number of Social Workers in the bargaining unit.

The Commonwealth's anticipated reliance upon past practice must also be rejected, the Union continues. There is no evidence, the Union argues, that it was aware of the Department's view of the controlling language until the Step 2 answer in this case on June 25, 2019. The Department's view of the language, it observes, appears to have been formed with little consultation with the Commonwealth's negotiators or the Union.

As a remedy, the Union seeks make whole relief for the class and that would include all employees affected. Moreover, as a continuing violation, the make whole remedy should commence with the time period twenty-one days prior to the filing of the grievance since each paycheck constituted a new injury under well-established continuing violation doctrine. It also asks the arbitrator to retain jurisdiction to resolve any disputes over the implementation of any remedy.

Commonwealth Position:

The Commonwealth argues that the Union failed to demonstrate that its application of Article 12, Section 5 (B) violated the Agreement. Most notably, it avers,

its application of the controlling provision comports with the plain language of the Agreement. This is so, it avers, because the Social Workers on whose behalf this grievance was filed were all required to have a Bachelor's Degree and thus were not promoted from a title without a degree requirement. Since they were not promoted from a position without a degree requirement, the Commonwealth argues, those employees are not entitled to have the educational incentive included in determining their rate of pay upon promotion are the express language of the Agreement.

Neither the past practice nor the bargaining history evidence, the Commonwealth argues, undermine the meaning of the contract language. There was no evidence, it contends, that any Social Workers or other similarly situated employees promoted after 2014 had the incentive calculated in their promotion rate. That this reflected the parties' intentions, it continues, is reflected by the absence of any change in the governing language in in the two subsequent collective agreements.

Properly understood, the Commonwealth avers, Article 12, Section 5 (B) requires inclusion of the incentive when an employee is being promoted from a position lacking any degree requirement. The language, it argues, is susceptible of no other interpretation. The controlling language, it avers, can only be understood as applying to employees promoting out of a position with no degree requirement into one that has such a requirement. The Union's proffered interpretation, it says, does not reflect the plain meaning of the parties' agreed upon language.

The bargaining history evidence, it continues, is not to the contrary. There is no evidence, it contends, that the Union ever communicated to the Commonwealth the precise nature of the problem its proposal was intended to address. Thus, it argues, the

Commonwealth cannot be deemed to have agreed that the governing language had the effect now urged by the Union, That the parties knew how to craft such language, it says is reflected in Article 19, Section 10 (D).

The past practice evidence, the Commonwealth continues, is fully consistent with its longstanding application of Article 12, Section 5 (B). There is no evidence, it says, reflecting that the governing language in the manner sought by the Union. In addition to this grievance, it avers, there was only one other grievance making a similar allegation and that 2016 grievance, it says, was only recently submitted for arbitration.

Granting relief to the Union, the Commonwealth contends would effectively rewrite Article 12, Section 5 (B). This is so, it says, because it would effectively cover employees already receiving an educational incentive who are promoted to a higher title with such an incentive. In the unlikely event the arbitrator finds a violation of the Agreement, the remedy should only be prospective and no more expansive than the twenty-one days prior to the filing of the grievance.

OPINION

The resolution of this grievance is controlled by the language of Article 12, Section 5 (B) of the Agreement. The language, on its face, requires the inclusion of the educational incentive in calculating the promotion factor when an employee is promoted from a position that does not require "a" degree for entry to a position. For example, an employee in the classification of Social Worker Tech is not required to have a degree. A Social Worker Tech with a Bachelor's Degree would receive the incentive provided by Article 19 of the Agreement. If that individual was promoted to Social Worker, a

classification with a degree requirement, Article 12, Section 5 (B) requires its inclusion in determining the promotion factor.

Suppose, however, we have an employee hired into the Social Worker classification after 2002, and thus required to possess a Bachelor's Degree. Suppose further that this employee has a Master's Degree and is receiving the educational incentive provided by Article 19 because that degree is more advanced than the one required for entry into the classification. Suppose further that this employee is promoted to a position requiring a Master's Degree. Does Article 12, Section 5 (B) require inclusion of the Master's Degree incentive in calculating the promotion factor because the employee's prior position did not require incumbents to possess a Master's Degree and thus can be said to lack that degree requirement? The Union says Yes and the Department says No. Only one of them can be right.

Looking at this case from a number of perspectives supports finding that the Department is right. Section 5 (B) applies only to a promotion from a "title that does not have a degree requirement to a title that has a degree requirement." Since Social Workers hired after 2002 had a degree requirement, on the face of it at least, they are excluded from the benefit provided by Section 5 (B).

The Department has interpreted the language in that fashion since its inclusion in the Agreement. Despite there having been multiple promotions of Social Workers following the parties' agreement to the new language, the Department's calculations produced only one grievance in 2016, on behalf of one individual, until this class action grievance was filed in 2018. This grievance was filed after the parties had negotiated a successor agreement without changing or seemingly even discussing the governing

contract language, arguably suggesting their mutual acceptance of the Department's interpretation. Other departments in the secretariat appear to have followed the same interpretation without generating any grievances from the Union.

One would think that this issue was of great concern to the Union and its members since the prior practice produced a less than desirable outcome for employees deemed worthy of promotion. Under the practice in effect at the time of the 2014 negotiations, a Social Worker with an advanced degree was rewarded for being promoted by losing the economic benefit of the educational incentive. Since it is unlikely that more than a few of those promoted had doctoral degrees and would have kept the incentive for that degree, the impact of the loss over the course of their careers was considerable. It is also normal for employees to pay close attention to the size of their paychecks and protest any perceived shortfalls. Experience thus suggests that there should have been far more protest activity over the Department's practices or the practices in other departments than is evident on this record. The absence of more such activity suggests that it was generally understood that the Department's practices reflected the parties' intentions. Arbitral jurisprudence pays special attention to how the parties treat new contract language upon its implementation by the people present at its creation.[2] The absence of more grievances and the pace at which the 2016 grievance proceeded through the grievance procedure could suggest that the parties viewed the Department's practices as being in harmony with the Agreement.[3]

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[2]There is insufficient evidence in the record for the arbitrator to make any finding on how much substantive discussion about the language change occurred between those who were present at the main table negotiations and the Department personnel charged with implementing the new language. Neither party produced the implementation memorandum that typically is published when new agreements are reached.

[3]One could argue that the contract language should be construed narrowly to disfavor the Union's position since it drafted the language. Contract provisions like Section 5 (B) providing a benefit to employees are,

This approach is not without its difficulties. Contract language is usually the best evidence of the parties' intentions. Experience in collective bargaining has shown that claims that contract language is clear and unambiguous are frequently asserted and less frequently accepted. This reflects the complexity of a bargaining process for contacts governing ongoing relationships where the process must account for what happened in the past and what may happen in the future.

If we consider contract language in a vacuum, without the context in which it was negotiated, real dangers are present. It is possible that promises made might not be enforced, while promises that were not made could wind up being given effect. We hope to avoid those possibilities by considering the entire context in which new contract language was developed. Otherwise, what should be an inquiry into the intention of the parties becomes a grading exercise for the parties' drafting skills.

The context evidence in this case provides considerable support for the Union's position. The language relied upon by the Commonwealth is not as clear and unambiguous as it suggests when read in the context of the entire Agreement, as required by basic tenets of contract interpretation jurisprudence. Article 12, Section 5 (B) must be read together with Article 19, Section 10 establishing the educational incentive because the Union proposal on which the language was initially designed to amend Article 19, rather than Article 12. The governing contract language was thus presumably drafted with Article 19's structure and language in mind.

When read in conjunction with Article 19, Section 10, the governing language loses some of its seeming clarity. Article 19, Section 10 provides for employees to

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however, generally construed broadly. The two canons of construction thus cancel each other out and put us back to where we started.

receive the educational incentive if they have a particular degree and that degree "is not required as a condition of employment" or absent such a requirement "is beyond what is necessary for a license or certification that is required as a condition of employment." If one reads this language in conjunction with what ultimately became Article 12, Section 5 (B) an ambiguity appears. In drafting a proposal intended for inclusion in Article 19 the Union could and appears to have intended the phrase "does not have **a** degree requirement" (emphasis added) to mirror so much of Article 19, Section 10 (B) as provides the incentive for employees who possess a degree that is "not required as **a** condition of employment." (emphasis added). Since Social Workers can qualify for the Article 19 educational incentive, from this vantage point the Union's proposal cannot easily be understood as excluding them from the coverage of Section 5 (B). Accepting the Department's position produces such a result. Indeed, the Department's view requires understanding the Union's proposal for what became Section 5 (B) as encompassing positions without "any" degree requirement. That arguably makes the indefinite article used in the Union's proposal do more work than seems reasonable. Given this ambiguity, Section 5 (B) conceivably applies to titles without any degree requirement **and** to titles with degree requirements lower than those possessed by the employee.[4] The latter situation reflects how Article 19, Section 10 operates since the incentive is paid only to employees who possess higher degrees than those required for a particular position.

The bargaining history evidence is, in a way, consistent with the Union's suggested interpretation. The evidence demonstrates that the Union's lead negotiator introduced the proposed language by referencing the small size of the pay increases in

[4] Certainly, the Union could have chosen better language as was done in Article 19, Section 10 (D). That only reposes the question of whether arbitration is supposed to be a search for the parties' intent or a grading exercise in drafting. From this arbitrator's perspective, it is an inquiry into the parties' intentions.

cases of promotion resulting from the parties' then existing practices. Nobody appears to have asked him to explain what he meant, suggesting that the Commonwealth's representatives were familiar with the Union's concerns.

The parties were presumably aware that the practice prior to the 2014-2016 Agreement was to exclude the educational incentive from rate used to compute the promotion factor. This resulted in the newly promoted employee's being placed on a lower step than would have been true had the educational incentive been considered. The lower placement effectively resulted in the employee's losing the economic benefit of the educational incentive upon being promoted, producing bi-weekly pay increases that could be deemed objectively disappointing to a successful promotion candidate. The Commonwealth's bargaining history evidence does not conflict with the Union's.

Based on the record before the arbitrator, there appears to have been little, if any, substantive discussion about the proposed language. Since it was changing existing practice, one would have expected more dialogue. The absence of such dialogue suggests that the parties' principal negotiators already knew what the Union was seeking to achieve and why and how it was seeking to achieve that goal.

So viewed, the arbitrator cannot conclude that Article 12, Section 5 (B) is as clear and unambiguous as claimed by the Commonwealth. That does not make this case a slam dunk for the Union. It is only a plausible reading and plausible is not the same as finding that it more likely than not that its reading reflects the parties' intent. Other facts suggest that the Union's reading of the language is more persuasive.

Accepting the Department's view is tantamount to finding that the parties agreed upon new contract language that provided little, if any, benefit to the bargaining unit.

The Department's understanding of the Agreement excludes all Social Workers from having the educational incentive included in the promotion calculation. It is unlikely that the Union would propose broad based language such as Article 12, Section 5 (B) that was designed to exclude a large segment of the bargaining unit from its reach.

More critically, if we accept the Department's view, it is not clear that the new language benefitted almost anyone when it was adopted. To be sure, it would cover promotions out of the Social Worker Tech classification. If, as the record suggests, there were no incumbents in that position in 2014, one wonders why the Union would have wasted any negotiating capital for a ghost classification. Since there were no incumbents in that classification until sometime later, one cannot conclude that the language was negotiated in anticipation of people being hired into that classification. Similarly, the evidence demonstrates that there were not many promotions from the position of Human Service Coordinator to Clinical Social Worker. The Community Resource Worker classification encompasses only a small number of employees. None of those people sought promotion to Social Worker Classifications. It's not clear that this small number of employees sought promotion to positions with degree requirements with any frequency. It is unlikely that the parties intended a broad command like Section 5 (B) to apply to a classification with only a small number of employees.

Indeed, the Department's evidence largely consisted of hypothetical situations showing how the language could operate, as opposed to situations in which the parties intended it to operate. Experience suggests that the parties do not negotiate about hypotheticals. The parties deal with conditions on the ground and the conditions on the ground in 2014 do not reflect any reason for the parties to have included Section 5 (B)

unless it was intended to apply to Social Workers. Otherwise, it seems, the language would have little practical effect. Basic principles of interpretive jurisprudence counsel against adopting a construction rendering contract language without real meaning.

While the question is agonizingly close, it is more likely than not that the parties intended the result urged by the Union. Thus, Article 12, Section 5 (B) requires inclusion of the educational incentive in calculating the promotion factor when the employee has a higher level of educational achievement in the position from which they are being promoted than is required for holders of that position. Thus, the grievance must be sustained. We now turn to the question of remedy.

A make whole remedy for those employees injured by the violation of the Agreement is appropriate, but this case requires more than a simple declaration to that effect. The arbitrator has considered but ultimately cannot accept the Commonwealth's view that any remedy should be prospective only from the date of this Award. It certainly took the Union a long time to get this issue to arbitration. The history of this grievance, however, fits within the arbitrator's experience about the way in which the parties have administered their grievance arbitration process over an extended time period. The arbitrator may not understand it, but it apparently works for the parties and that is what counts. That mutual acceptance of their practices suggests that the best guidepost is the one contained in the Agreement, and thus the make whole remedy should commence with the period beginning twenty-one days prior to July 18, 2018.[5]

As claimed by the Union, the violation of the Agreement gives rise to a continuing violation since every paycheck received by an employee based upon the

[5] In view of this result, it does not appear as if separate treatment must be accorded to those Social Workers hired prior to 2002. They should be treated in the same fashion as the other members of the class.

improper calculation is a new violation of the Agreement. The violation encompasses both the improper calculation and the rate of pay it produced in employees' paychecks. Thus, the remedy extends to employees promoted within twenty-one days of this grievance and thereafter. It also applies to the pay received by employees during the remedial period (twenty-one days prior to the filing of this grievance and thereafter) who were promoted subsequent to the effective date of Article 12, Section 5 (B) as their paychecks during the remedial period were impacted by the Department's continuing violation of the Agreement. Otherwise, the remedy would create two classes of promoted Social Workers and that would not be consistent with the Agreement.

An appropriate Award shall enter.

AWARD

1. The Department violated Article 12, Section 5 (B) of the Agreement in calculating the step placement of promoted employees.

2. As a remedy, the employees injured by the Department's violation of the Agreement shall be made whole retroactive to twenty-one days prior to the filing of the grievance.

3. Pursuant to Article 23, Section 15, the arbitrator shall retain jurisdiction for sixty days following the issuance of this Award to resolve any disputes over its implementation.

Marc D. Greenbaum, Arbitrator
Dated: April 11, 2022