

LABOR RELATIONS CONNECTION
Before Arbitrator Will Evans, Esq.

In the matter of between:

SALARIED EMPLOYEES OF NORTH
AMERICA, LOCAL 9158

-and-

CITY OF BOSTON

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Grievant: J [REDACTED] O [REDACTED]
Case No.: 587-22

Appearances:

Alfred Gordon O’Connell, Esq. Representing SENA Local 9158

Michael S. Berry, Esq. Representing the City of Boston

The parties received a full opportunity to present evidence, exhibits, and arguments and to examine and cross-examine witnesses at a hearing. I have considered the issues and, having studied and weighed the evidence presented, conclude as follows:

OPINION AND AWARD

The City violated Article 13, Section 2 by not paying O [REDACTED] out-of-grade pay beginning in September 2021 after P [REDACTED] retirement. As a remedy, the City shall pay O [REDACTED] as a MM-10 beginning five days prior to the filing of the grievance and continuing until O [REDACTED] no longer performs P [REDACTED]s prior duties.

Will Evans, Esq., Arbitrator
June 23, 2023

INTRODUCTION

Salaried Employees of North America, Local 9158 (SENA or Union) filed a Demand for Arbitration with the Labor Relations Connection, Inc. relating to a grievance dated March 4, 2022, alleging that the City of Boston (City or Employer) violated the parties' agreement by assigning J [REDACTED] O [REDACTED] ([REDACTED]) out-of-grade work. In accordance with the grievance procedures contained in Article 10, the undersigned was selected by the parties as the arbitrator in the matter. An arbitration hearing was held remotely via Zoom on March 14, 2023, at which time both parties had an opportunity to be heard, call witnesses, and introduce evidence. On or about May 15, 2023, counsel for the parties filed post-hearing briefs and I now issue this decision.

STIPULATED ISSUES

1. Was the grievance timely filed?
2. If so, did the City violate Article 13, Section 2 by not paying the grievance out-of-grade pay beginning in September 2021?
3. If so, what shall be the remedy?

RELEVANT CONTRACT PROVISIONS

Article 8 Management Rights

Section 1. The Municipal Employer reserves and retains the sole and exclusive right to manage, operate and conduct all of its department operations and activities, except as otherwise specifically and expressly provided in this Agreement. The enumeration of management rights in this Article is not to be construed as a limitation of management's rights, but rather as an illustration of the nature of the rights inherent in management.

Section 2. The Municipal Employer, subject to the express and specific provisions of this Agreement, reserves and retains the exclusive right to hire, promote, assign, transfer, suspend, discipline, discharge, lay off and recall personnel; to establish, create, revise and implement reasonable work rules and regulations including performance evaluations and the criterion upon which bargaining unit members shall be evaluated which shall be used to determine promotions, demotions, layoffs, compensation, and discipline and discharge; to require bargaining unit members to assist the Appointing Authority/designee in the conduct of performance evaluations of those employees supervised by bargaining unit employees whether these employees are members of this or any other bargaining unit; to establish positions and job descriptions and the classifications thereof; to reclassify existing positions based on assigned duties and responsibilities, or make changes in assigned duties and responsibilities; to schedule work as require; to study and use, introduce, install new or improved methods, systems, facilities and/or equipment; to determine methods, processes and procedures by which work is to be performed; to subcontract out work where the purpose is not to undermine the bargaining unit, to schedule and assign work; and in all respects to carry out the ordinary and customary functions of municipal management.

Article 13

Temporary Service In A Higher Or Lower Classification

Section 1. While an employee is performing, pursuant to assignment, the duties of a position classified in a grade lower than the grade of the position in which he/she performs regular service, he/she shall be compensated at the rate of pay for the grade of the position in which he/she performs regular service.

Section 2. An employee who is performing, pursuant to assignment, temporary service in a position classified in a grade higher than the grade of the position in which he/she performs regular service, other than the purpose of filling in for an employee on vacation, shall commencing with the sixth (6th) consecutive day of actual service in such higher position be compensated at the rate to which he/she would have been entitled had he/she been promoted to such position. A superior shall not refuse to provide a written assignment form when requiring an employee to work in a position classified in a higher grade, as described above. Any remedy based on a grievance filed under this section shall be limited in effect to a period not to exceed five (5) days prior to the date of the filing of the grievance in writing.

FACTS

J [REDACTED] O [REDACTED] has worked for the City of Boston for 33 years in the Office of the Parking Clerk (OPC). OPC is structured under the Boston Transportation Department and has multiple units that report to the Assistant

Parking Clerk, including the Public Inquiries Unit (Unit), where O [REDACTED] currently works as a MM-9. In addition to O [REDACTED]'s position, there are 17 other staff members in the Unit including a grade MM-4 data entry processor, claims investigators, senior claims investigators, and chief claims investigators. As a customer-facing unit, the Public Inquiries Unit staffs a counter at City Hall to help constituents seeking resident stickers, paying tickets, filing appeals, or seeking a release for the registry. The Unit also staffs a phone bank dealing with the same issues, a correspondence desk dealing with hundreds of pieces of mail per day (tickets and appeals), and a desk issuing resident parking stickers.

Prior to being promoted to the MM-9 position, O [REDACTED] served as the MM-4 Data Entry Processing Coordinator beginning in 2008. As the MM-4, most of O [REDACTED]'s duties involved answering emails sent to the Parking Clerk's office through the web portal, as well as processing employee timesheets. At that time, O [REDACTED] reported to MM-9 C [REDACTED] P [REDACTED] ([REDACTED]). Also at the time, OPC employed T [REDACTED] M [REDACTED] in a stand-alone position of MM-10 Constituent Services and City Council Liaison. The MM-10 position, which was created for M [REDACTED], stood on its own, reporting directly to the Assistant Parking Clerk outside of the other units within the OPC. It dealt with constituent complaints coming through the Mayor's Office and the City Council, with M [REDACTED] serving as the contact person for elected officials dealing with parking issues.

M [REDACTED] left the City in January 2015, and sometime thereafter, P [REDACTED] was promoted to the MM-10 position. P [REDACTED]'s office did not change,

and she continued to perform much of the supervisory duties within the Unit. In August 2016, the City hired employee C [REDACTED] T [REDACTED] into a new position in BTD called the Constituent Relations & Social Media Specialist, which took over some of the liaison duties that M [REDACTED] had been performing prior to his departure.

After P [REDACTED] was promoted into an MM-10 position, the City posted P [REDACTED]'s former MM-9 position as the Principal Administrative Assistant in the Unit. O [REDACTED] applied and was appointed to the MM-9 position. O [REDACTED] continued doing all of the work she had previously performed (answering emails and handling timesheets) but also took on an enhanced role in assisting P [REDACTED] with the supervision and coordination of staff in the Unit. O [REDACTED]'s continued to report to P [REDACTED] when she became the MM-9. Even though O [REDACTED] recognized that the position description for the MM-9 position stated that she was to report directly to the Assistant Parking Clerk, S [REDACTED] M [REDACTED] ([REDACTED]), that did not happen. M [REDACTED] never exercised any degree of direct supervision over O [REDACTED]. O [REDACTED] continued to seek out P [REDACTED] for all supervisory matters during this time.

P [REDACTED] retired from her position with the City in August 2021. At that time, the City quickly took steps to backfill her position. On September 21, 2021, the City posted the position of MM-10 Customer Service Manager; however, it later decided to remove the posting and not to fill the position. The Transportation Commissioner determined that there was not enough work to support a MM-10 position at the time.

Since P [REDACTED]'s retirement, O [REDACTED] is now responsible for approving the time off for the other seventeen (17) employees in Public Inquiries. Prior to P [REDACTED]'s retirement, O [REDACTED] might check the calendar for conflicts but never had on-line approval authority. O [REDACTED] is now responsible for assigning and directing the workforce. She must ensure that all four areas within the Unit (i.e., front counter, phone bank, correspondence desk, and issuing parking stickers) are properly covered by assigning staff their daily tasks. Although O [REDACTED] performed this function previously when P [REDACTED] was not in the office, it is now completely her responsibility.

O [REDACTED] must now coordinate the hiring process and the training and development of new staff. O [REDACTED] sat in on interviews with P [REDACTED] before, but O [REDACTED] had never been responsible for coordinating the hiring process. O [REDACTED] now reviews the resumes to determine which candidates are qualified, she schedules the interviews, and she submits the selections of the hiring committee. And once the new staff member joins the Unit, O [REDACTED] determines what training the staff member needs and assigns other staff members to perform the training functions. These were all tasks that P [REDACTED] performed prior to her retirement. Additionally, O [REDACTED] is now responsible for certain levels of employee discipline. Prior to P [REDACTED]'s retirement, if O [REDACTED] noticed a conduct or performance issue with a staff member, she would bring that matter to P [REDACTED]'s attention. Since P [REDACTED]'s departure, O [REDACTED] has had to resolve the issue herself and has in fact given a verbal warning to one of her staff members.

Since P [REDACTED]'s retirement, O [REDACTED] is the last line in customer escalations within the Unit before a matter will be referred directly to the Parking Clerk. In this regard, while O [REDACTED] would often take on customer escalations from lower-level staffers, she would always have the option of forwarding those customers on to P [REDACTED], and if the customer was dissatisfied with P [REDACTED], the customer would be directed to put the concern in writing to the Parking Clerk. Now that P [REDACTED] is gone, O [REDACTED] is the highest ranking official in the Public Inquiries Unit to handle these customer escalations before they are sent off to the Parking Clerk. Finally, P [REDACTED] regularly attended monthly Department meetings with M [REDACTED]. Since P [REDACTED]'s retirement, attendance at these meetings is part of O [REDACTED]'s job duties.

On March 4, 2022, the Union filed a grievance alleging O [REDACTED] was working out-of-grade.

POSITIONS OF THE PARTIES

THE UNION

On the issue of timeliness, the Union contends that not only was the grievance timely filed as based on a continuing violation, but also the contract specifically provides for the filing of such grievances at any time by specifically limiting the backpay award to five days prior to the grievance filing. In support of its argument, the Union cites several arbitration decisions standing for the proposition that for payrate grievances, such as the one in this case, the employer violates the agreement every day that the payrate is incorrect even if the rate has been wrong for weeks, months or even years. Every day that an employee performs work without proper pay is another violation of the contract. Furthermore,

the Union argues that the parties recognize the concept of continuing violation for out-of-grade cases by contractually limiting backpay in such cases to five days prior to the filing of the grievance.

With respect to the merits, the Union contends that the City violated Article 13, Section 2 by requiring O██████ to perform the work of P██████ after her retirement. Citing prior arbitration awards by Arbitrator Tammy Brynie, the Union contends that the proper analysis is whether the grievant's job duties and responsibilities materially changed and expanded after filling a higher classified role previously performed by another employee. "Due to the Grievant's [newly increased] level of on-site responsibility, as the buck stopped with her, she is entitled to higher classification pay." The Union also cites to a more recent decision by Arbitrator Joan Martin who adopted the same standard as Arbitrator Brynie. Brynie found unpersuasive the City's argument that so long as the duty can be found in the job description, it cannot be a higher graded duty. The Union argues that the question is not whether the duties can be found in the job description, but rather was the grievant actually performing the duties previously before the supervisor's departure. In the present case, the Union contends that O██████ took on the responsibilities of P██████ for the first time after she retired.

The Union also contends that the City failed to show any duties that P██████ was performing immediately prior to retirement that O██████ did not take over. Even if P██████ was performing a liaison function at some point previously, those duties were transferred to C██████ T██████ in August 2016 before P██████'s retirement. Finally, the Union argues that the City created and posted a job

description for the Customer Service Manager that contained P [REDACTED]'s supervisory functions over Public Inquiries employees and graded it as an MM-10. The first function of the job in the description is "supervises staff engaged in responding to parking violation inquiries and disputes." Accordingly, the Union contends that both the job posting, as well as the testimony at hearing, confirm that the Customer Service Manager's responsibilities were to supervise the Public Inquiries employees.

For all the foregoing reasons, the Union asks the arbitrator to conclude that the grievance was timely, and that the City violated the contract as alleged.

THE CITY

The City argues that this case is about management's discretion not to fill an obsolete position that was no longer necessary for the functioning of the Office of the Parking Clerk. It contends that, after the retirement of P [REDACTED], the Department decided not to fill P [REDACTED]'s vacated position, the Customer Service Manager. O [REDACTED] was at the head of the Public Inquiries unit and was never assigned any further duties or responsibilities after P [REDACTED]'s retirement. But rather, O [REDACTED] could no longer rely on P [REDACTED] covering O [REDACTED]'s job for her. O [REDACTED] was never assigned work outside of her job duties as the head of the Public Inquiries unit and as such the City need not compensate her beyond the compensation appropriate for the head of the Public Inquiries unit.

Furthermore, in noting that the Union bears the burden of proof, the City argues that the Union failed to establish that O [REDACTED] was assigned would outside

her pay grade. First, the City contends that O [REDACTED] was not performing any new duties pursuant to an assignment, as understood by Article 13, Section 2 of the CBA. The work that O [REDACTED] indicates was assigned to her in 2021 was the work of the Public Inquiries Manager, a role she was promoted into in 2016. Second, the City argues that O [REDACTED] was not performing work outside of her grade since the work was expressly in her job description. Moreover, management retains the power to schedule and assign work under Article 8, Section 2, of the CBA.

The City also argues that O [REDACTED]'s failure to perform the work assigned to the Head of Public Inquiries Unit does not entitle her to compensation for out-of-grade work. It reasons that O [REDACTED] should not be compensated at a higher pay grade merely for beginning to do the work she was assigned to be doing all along. The fact that P [REDACTED] had been doing O [REDACTED]'s job should not result in O [REDACTED] getting compensation for out-of-grade work.

For all the foregoing reasons, the City asks the arbitrator to find that it did not violate the contract as alleged and to deny the grievance.

OPINION

Timeliness

The first issue before me is whether the matter is procedurally arbitrable. The City has the burden of persuasion and must overcome the presumption of arbitrability. That presumption effectuates the principle of labor arbitration favoring the resolution of disputes on their merits, rather than on the basis of procedural defaults. Nevertheless, the presumption is rebuttable because an employer, like

the City, is entitled to the benefit of its bargain. Based on the record, the City has not sustained its burden of persuasion.¹

As the Union notes, the present case involves the question of whether the City failed to pay O [REDACTED] for working out-of-grade after P [REDACTED]'s retirement. Arbitrators generally agree that payrate cases constitute "continuing violations" that can be treated as a new occurrence each workday. Although most arbitrators permit a union to file a continuing violation grievance beyond contractual grievance timelines, the remedy granted is usually limited to the time period beginning when the grievance was filed. In the present case, the parties have recognized that working out-of-grade constitutes a continuing violation and agreed to limit back pay to no more than five days prior to the filing of the grievance. Given the contractual language and the ongoing nature of payrate cases, I find that grievance to be procedurally arbitrable.

Merits

Having decided that the grievance is procedurally arbitrable, I must now look at the merits of the case. Namely, did the City violate Article 13, Section 2 by not paying O [REDACTED] out-of-grade pay beginning in September 2021.

The Employer argues that O [REDACTED] was not assigned any further duties or responsibilities after P [REDACTED]'s retirement and that she was merely asked to

¹ The Employer did not address procedural arbitrability in its post-hearing brief. However, in its opening statement at hearing it argued that the grievance was untimely. The Employer noted that there is a 10-day grievance filing requirement in the CBA. As such, even if there was a violation, the grievance should have been filed within the 10-day period when P [REDACTED] retired, and O [REDACTED] allegedly began receiving new job responsibilities.

perform the duties in her job description as a MM-9. The Union argues that O [REDACTED] was assigned the work of P [REDACTED] after her retirement. As noted by both parties, there have been at least two prior awards that have interpreted the contract language relevant to this case and applied a common standard of review.

Prior arbitration awards that interpret the existing terms of a contract between the same parties are not binding in exactly the same sense that authoritative legal decisions are, yet they may have a force that can be fairly characterized as authoritative. Elkouri & Elkouri, *How Arbitration Works* at 11-8 (Kenneth May, ed., 8th ed., 2016).

In examining the prior arbitration awards of Arbitrator Tammy Brynie in *SENA, Local 9158 and City of Boston*, LRC Case No. 312-15 (2016) and Arbitrator Joan Martin *SENA and City of Boston*, LRC Case No. 785-19 at 20 (Martin, Arb. 2021), I am persuaded to apply the same standard of review as applied by both arbitrators in interpreting Article 13, Section 2. Namely, have O [REDACTED]'s job duties and responsibilities materially changed and expanded since P [REDACTED]'s retirement.

Based on the evidence presented at hearing, I find that O [REDACTED]'s job duties and responsibilities did materially change and expand as a result of P [REDACTED]'s retirement. Even after being promoted to the MM-10 position, P [REDACTED] retained much of her supervisory duties in the Public Inquiries Unit. Her office location did not change, and she continued to serve as the highest-ranking employee in the Unit. O [REDACTED] continued to report and to bring customer complaints to P [REDACTED] after she became the MM-9, notwithstanding the fact that her position description position stated that she was to report directly to M [REDACTED].

While the City argues that O [REDACTED] **should** have been managing the day-to-day operations of the Public Inquiries Unit as a MM-9, the evidence

demonstrated that she did not; it was P [REDACTED]. P [REDACTED] continued to grant final approval for time off requests, she assigned employees to various functions within the Unit, she coordinated the hiring process and training for new employees, handled employee discipline, attended management meetings with M [REDACTED], and was the final word in the Unit for customer complaints before being directed to the Parking Clerk. O [REDACTED] did not perform any of these duties prior to P [REDACTED]'s retirement. The City's argument that P [REDACTED] was merely helping out O [REDACTED] as a friend and mentor is not persuasive, considering that M [REDACTED] also seemed to treat P [REDACTED] as the head of the Unit. Nothing in the record suggests that M [REDACTED] provided direct supervision to O [REDACTED] or required her to attend monthly meetings.

The Union has sufficiently demonstrated that, from 2016 through 2021, P [REDACTED] acted as the highest-ranking employee in the Unit and thus acted as the on-site supervisor for the employees, as well as the highest-ranking supervisor for customer inquiries and complaints. After P [REDACTED]'s retirement, O [REDACTED] for the first time was responsible for leave approval, for assigning and directing the workforce, for hiring and training new personnel, for disciplining employees, and for handling customer escalations as the highest ranking official in the Unit. The addition of these responsibilities is enough to entitle O [REDACTED] to be paid at P [REDACTED]'s grade level.

AWARD

For all the foregoing reasons, the City violated Article 13, Section 2 by not paying O [REDACTED] out-of-grade pay beginning in September 2021 after P [REDACTED]'s retirement. As a remedy, the City shall pay O [REDACTED] as a MM-10 beginning five

days prior to the filing of the grievance and continuing until O [REDACTED] no longer performs P [REDACTED]'s prior duties.



Will Evans, Esq., Arbitrator
June 23, 2023