

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS

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In the Matter of the Arbitration Between: \*

TOWN OF BILLERICA \*

-and- \*

ARB-19-7525 \*

BILLERICA FIRE FIGHTERS  
ASSOCIATION, LOCAL 1495 \*

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Arbitrator:

Timothy Hatfield, Esq.

Appearances:

Daniel Brown, Esq. - Representing Town of Billerica

Ian Russell, Esq. - Representing Billerica Fire Fighters  
Association, Local 1495

The parties received a full opportunity to present testimony, 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:

**AWARD**

The grievance is arbitrable, and the Town violated the collective bargaining agreement when it failed to promote a Lieutenant to Captain since July 1, 2019. The Town is hereby ordered to promote a Lieutenant to Captain, following all lawful procedures as required by M.G.L. c.31. The successful candidate will be made whole for all wages and benefits retroactively to July 1, 2019.



\_\_\_\_\_  
Timothy Hatfield  
Arbitrator  
March 3, 2021

### **INTRODUCTION**

Billerica Fire Fighters Association, Local 1495 (Union) filed a unilateral petition for Arbitration. Under the provisions of M.G.L. Chapter 23, Section 9P, the Department of Labor Relations (Department) appointed Timothy Hatfield, Esq. to act as a single neutral arbitrator with the full power of the Department. The parties agreed to have the matter decided by the undersigned Arbitrator based on stipulations of fact and submitted exhibits and briefs.

The parties filed briefs on August 24, 2020.

### **THE ISSUE**

- 1) Is the grievance arbitrable?
- 2) Did the Town violate the parties' collective bargaining agreement by failing to promote a Lieutenant to Captain since July 1, 2019? If so, what shall be the remedy?

### **RELEVANT CONTRACT LANGUAGE**

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

#### **ARTICLE 15 (In Part)**

...

#### **SECTION 3: MANAGEMENT RIGHTS**

The listing of the following specific rights of management in this Article is not intended to be a waiver of any of the rights of the Town or the Chief not listed herein. Such inherent management rights shall remain with the Town or the Chief subject to the provisions of the Agreement.

The employer shall have the exclusive right, subject to the provisions of this agreement and consistent with the applicable laws and regulations:

To direct employees of the employer in the performance of their duties;

To hire, promote, transfer, assign, and retain employees in positions within the Fire Department and to suspend, demote, discharge, or take other disciplinary action against such employees;

To maintain the efficiency of the operations entrusted to it; ...

### **ARTICLE 17 (In Part)**

#### **GRIEVANCE-ARBITRATION**

A grievance arising out of the interpretation or application of this Agreement may be processed in the following manner: ...

**STEP 3:** If the grievance remains unsettled after step 2, the Union may, within fifteen (15) calendar days of the due date of the Town Administrators response submit the grievance to the Massachusetts Board of Conciliation and Arbitration.

The Arbitrator shall have no authority to add to, subtract from, alter or amend this Agreement. His/her decision shall be binding upon the parties.

...

#### **RELEVANT MEMORANDUM OF AGREEMENT (IN PART)**

Town of Billerica and Billerica Firefighters Local 1495  
November 21, 2018

Cost of living increases (retroactive)

- July 1, 2016 2%
- July 1, 2017 2%
- July 1, 2018 2%

The following will be implemented on June 30, 2019: ...

The Town will reposition a current Deputy Chief to an administrative position to assist in directing the operation of the department. He will be second in command and no longer a member of the bargaining unit.

The Town will promote a Lieutenant to the rank of Captain assigned to either Training or Fire Prevention. Moving forward and upon retirement of one of the two Deputy Chiefs, the remaining Deputy Chief will move into that role and be replaced with a new Captains position (Whether assigned to Fire Prevention or Training is TBD).

**STIPULATED FACTS**

1. The Town of Billerica and the Billerica Firefighters Union, IAFF, Local 1495, are parties to a collective bargaining agreement.
2. On November 21, 2018, the parties signed a memorandum of agreement (MOA), which contained changes to the parties' collective bargaining agreement. The agreed upon amendments to the collective bargaining agreement were limited to those discussed in the MOA.
3. The MOA is included here as Exhibit 1.
4. During bargaining over the MOA, it was discussed and agreed that in exchange for the Town removing certain Deputy Chief positions from the Union's bargaining unit and increasing the number of administrative positions, the Town would increase the number of Captain positions in the bargaining unit by agreeing to make promotions from Lieutenant to Captain.
5. This agreement was memorialized in the MOA, which states, in part:

The Town will reposition a current Deputy Chief to an administrative position to assist in directing the operation of the department. He will be second in command and no longer a member of the bargaining unit.

The Town will promote a Lieutenant to the rank of Captain assigned to either Training or Fire Prevention. Moving forward and upon retirement of one of the two Deputy Chiefs, the remaining Deputy Chief will move into that role and be replaced with a new Captains position (Whether assigned to Fire Prevention or Training is TBD).
6. At the time the MOA was signed, there were two Deputy Chief positions in the bargaining unit. Deputy Chief Tom Ferraro was working in fire prevention. Deputy Chief Steve Kennedy was also working in fire prevention.
7. The MOA was ratified by the Union and fully funded by the Town, starting July 1, 2019. The approved funding included funding for a promotion from Lieutenant to Captain as of July 1, 2019.
8. On December 20, 2018, the Civil Service Commission issued a decision finding that the Town had improperly bypassed Lieutenant Jason Smith for a promotion to Captain. On October 4, 2019, a Motion to Stay the Commission's order filed by the Town was denied in Superior Court.
9. The Civil Service Decision is being appealed by the Town in Superior Court.

10. The Civil Service decision ordered the following relief for Lt. Smith:
  - The eligible list of candidates for Fire Captain in Billerica, upon which Lt. Smith is currently ranked first, shall remain in place until such time as Lt. Smith is promoted to Fire Captain.
  - HRD shall not establish any further eligible list for Fire Captain in Billerica until such time as Lt. Smith is promoted to Fire Captain.
  - Lt. Smith shall be placed at the top of any certification for Fire Captain in Billerica until such time as he is promoted.
  - In any future consideration of Lt. Smith for promotion to Fire Captain, the Town shall not bypass him as a result of any facts or circumstances which it had knowledge of prior to this most recent decision to bypass him.
  - No promotional appointment to Fire Captain in Billerica of any candidate ranked below Lt. Smith shall become effective until such time as: a) the Town has provided Lt. Smith with reasons for bypass; b) Lt. Smith has had the opportunity to file an appeal with the Commission; and c) the Commission has issued a final decision related to the bypass.
11. The Civil Service decision is included here as Exhibit 2.
12. The current Civil Service Eligible list for promotion to Captain is included here as Exhibit 3.
13. On July 1, 2019, Deputy Chief Ferraro was placed into an administrative position to assist in the directing of the department, per the MOA, and was removed from the bargaining unit.
14. Since July 1, 2019, the Town has not promoted a Lieutenant to the rank of Captain.
15. On July 9, 2019, the Union filed a grievance with the Chief over the Town's decision not to appoint a Lieutenant to Captain "in accordance with the contractually agreed upon Reorganization of the Dept."
16. The Grievance is included here as Exhibit 4.
17. The Chief denied the grievance on July 18, 2019.
18. The Chief's denial of the grievance is included here as Exhibit 5.
19. The Union moved the grievance to the next step by filing with the Town Manager on July 22, 2019.
20. The Union's filing with the Town Manager is included here as Exhibit 6.
21. On August 2, 2019, the Town Manager denied the grievance.

22. The Town Manager's denial is included here as Exhibit 7.
23. The collective bargaining agreement between the parties for 2013-2016, which was the existing agreement when the November 21, 2018 MOA was bargained, is attached hereto as Exhibit 8.

### **POSITIONS OF THE PARTIES**

#### **THE UNION**

This matter is straightforward. During bargaining for a successor collective bargaining agreement with the Union, the Town agreed to promote a Lieutenant to Captain as of June 30, 2019. This agreement was memorialized in a MOA, which was ratified by the Union and funded by the Town as of July 1, 2019. The language in the MOA obligating the Town to make this promotion is clear and unambiguous. The funding for the MOA included funding for the promotion. The Town has failed to promote a Lieutenant to the new Captain position in violation of the collective bargaining agreement.

#### **Clear and Unambiguous Language of MOA**

The Town cannot dispute that the MOA obligated it to promote a Lieutenant to Captain on June 30, 2019. The MOA states clearly and unambiguously, that various provisions of the MOA will be implemented on June 30, 2019, including the provision stating; "The Town will promote a Lieutenant to the rank of Captain assigned to either Training or Fire Prevention." Given the unambiguous nature of this language, the Town violated the collective bargaining agreement when it failed to promote a Lieutenant to Captain on June 30, 2019 or by July 1, 2019, when funding became available.

The well-established majority view among arbitrators is that “if the words [of a contract or provision] are plain and clear, conveying a distinct idea, there is no occasion to resort to interpretation, and their meaning is to be derived entirely from the nature of the language used.”<sup>1</sup> Here, not only is there no need to review any extrinsic evidence to interpret this language, there is no extrinsic evidence that this language means anything other than what it says. The parties have agreed in Stipulation of Fact 4 that:

During bargaining over the MOA, it was discussed and agreed that in exchange for the Town removing certain Deputy Chief positions from the Union’s bargaining unit and increasing the number of administrative positions, the Town would increase the number of Captain positions in the bargaining unit by agreeing to make promotions from Lieutenant to Captain.

#### Failure To Promote

The MOA clearly and unambiguously required the Town to promote a Lieutenant to Captain. As stated in Stipulation of Fact 2, the MOA contained changes to the parties’ collective bargaining agreement. Thus, the agreement to make a promotion to Captain is an express provision of the collective bargaining agreement. The Town failed to promote a Lieutenant to Captain. Accordingly, the Town has violated the parties’ collective bargaining agreement.

#### Removal of Deputy Chief

The agreement to promote a Lieutenant to Captain was part of a quid pro quo. In exchange for the Town being able to remove certain Deputy Chief positions from the bargaining unit and increasing the number of administrative positions, the

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<sup>1</sup> Elkouri, *How Arbitration Works*, at p. 9-8 (8<sup>th</sup> Ed. 2016)

Town agreed to increase the number of Captain positions in the bargaining unit. Rather than abiding by this agreement, the Town implemented the portion of the agreement that benefitted it, by removing the Deputy Chief from the bargaining unit, while failing to implement the portion of the agreement that benefitted the Union. Since this was a quid pro quo agreement, the Town's action is an additional violation of the collective bargaining agreement.

#### Captain Duties

All Captains are in the bargaining unit, and the MOA stated that the promoted Captain was to be assigned to either Training or Fire Prevention. In his grievance answer, the Town Manager stated that instead of making the required promotion, he assigned the duties of Training Captain to the Chief, a non-bargaining unit member. Since the MOA mandated that this work would be performed by a bargaining unit member, the assignment of the Chief to do the duties is a violation of the collective bargaining agreement.

#### Management Rights Provision

The Town Manager incorrectly argues that the Management Rights article of the collective bargaining agreement gives him the power to ignore the MOA. This is simply untrue as the Management Rights provision simply grants the Town rights that are "subject to the provisions of this agreement." The MOA at issue in this case was incorporated into the collective bargaining agreement, and, as such, it can't be overridden by the Management Rights article.



Lieutenant Smith

The Town refuses to make the required promotion to Captain because the Town Manager does not want to promote Lieutenant Smith and believes that it will be difficult to bypass Lieutenant Smith as long as the Civil Service Commission's decision remains in place. However, the Civil Service Commission's decision is irrelevant here. The Town agreed that it "will promote a Lieutenant to the rank of Captain." The MOA does not obligate the Town to promote Lieutenant Smith, and this grievance does not demand that Lieutenant Smith be promoted. The MOA simply requires that someone be promoted.

This is not a case where a public employer has determined that it wants to keep a position vacant. To the contrary, the Town requested and received funding to promote a Lieutenant to Captain on July 1, 2019. The Town is simply refusing to make the appointment until it believes it can successfully bypass Lieutenant Smith.

Appropriate Subject of Bargaining

The Town argues that it is an inherent management right to ignore the relevant provision of the MOA. Such an argument is meritless. The Town not only agreed to make a promotion from Lieutenant to Captain, it sought and received funding to make the promotion. The Union is not aware of any caselaw that states an agreement to make a promotion is unenforceable, especially where appropriate funding has been requested and received.

### Conclusion

The Arbitrator should find the matter is arbitrable and that the Town has violated the collective bargaining agreement by failing to promote a Lieutenant to Captain since July 1, 2019. The arbitrator should order the Town to:

1. Make a promotion from Lieutenant to Captain, retroactive to July 1, 2019,
2. Order the Town to cease having the Chief perform the Training Captain's duties,
3. Make whole any bargaining unit member harmed by the Town's failure to make a promotion,
4. Make whole any bargaining unit member harmed by the Town's assignment of the Captain's duties to the Chief,
5. Make the Union whole for lost dues caused by the Town's decision to remove a Deputy Chief from the bargaining unit without also promoting a Lieutenant to Captain.

## **THE EMPLOYER**

### Non-delegable Management Right

The Town's decision of whether to promote an employee involves a non-delegable and inherent management right. There are certain managerial rights that cannot be delegated in a contract and that an arbitrator may not contravene. Decisions regarding level of services, layoffs, and appointments are reserved to the sole discretion of municipal employers. One category of such non-delegable cases is when a municipal employer acts under the authority of a statute or law authorizing the employer to perform a specific, narrow function, or alternatively, acts with reference to a statute specific in purpose that would be undermined if the

employer's freedom of action were compromised by the collective bargaining process or by arbitration.<sup>2</sup>

In the instant matter, the Town's specific action of deciding to promote a civil service employee is authorized by the Civil Service Law, M.G.L. c. 31. That statute is not among those subject to contrary collective bargaining provisions under M.G.L. c. 150E, § 7(d). Further under Civil Service Law, the appointing authority retains sole power to decide whether to fill vacancies.<sup>3</sup>

The grievance is not arbitrable because it asks the arbitrator to decide an issue which is not subject to collective bargaining. The Town's decision whether and when to promote an employee is a non-delegable managerial prerogative and is therefore not subject to the collective bargaining process.

#### Exceeding Authority

The arbitrator is without authority to decide this matter, and specifically, would exceed his limited authority if he were to issue any type of substantive award. In municipal work forces covered by the Civil Service Law, arbitrators exceed their authority when ordering promotions or similar personnel actions pursuant to collective bargaining agreements.<sup>4</sup>

In the instant matter, the Town is facing a delay in promoting a lieutenant to captain due to an ongoing civil service bypass appeal which the Town has appealed to superior court. The arbitrator would be exceeding his authority in

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<sup>2</sup> Lynn v. Labor Relations Commission, 43 Mass. App. Ct. 172 (1997)

<sup>3</sup> City of Somerville v. Somerville Municipal Employees Association, 20 Mass. App. Ct. 594 (1985).

<sup>4</sup> *Ibid.*

issuing a substantive award in this case. The entire process for promoting someone to the rank of Captain is currently under the jurisdiction of the Civil Service Commission and the Judiciary. The arbitrator does not have the authority to decide this case and would certainly exceed his authority by ordering the promotion of any specific person because such an act can only take place under the conditions and procedures of the Civil Service Law and not pursuant to a collective bargaining agreement. Even a monetary award of some kind would be in material conflict with Civil Service Law.

### Conclusion

For all of the foregoing reasons, the Town of Billerica respectfully requests that the arbitrator deny the grievance.

### **OPINION**

The issues before me are:

- 1) Is the grievance arbitrable?
- 2) Did the Town violate the parties' collective bargaining agreement by failing to promote a Lieutenant to Captain since July 1, 2019? If so, what shall be the remedy?

For all the reasons stated below, I find the grievance is arbitrable, and the Town violated the collective bargaining agreement when it failed to promote a Lieutenant to Captain since July 1, 2019.

### Administrative Notice

I note for the record that since the time the parties agreed to the stipulations of facts in this case, the Superior Court of the Commonwealth has ruled on the

Town's appeal of the Civil Service Commission's decision concerning Lieutenant Smith's promotional bypass appeal. On November 4, 2020, the Town's appeal was denied, and the Plaintiff's Motion for Judgment on the Pleadings was allowed.

Arbitrability

The Town is arguing that the grievance filed by the Union in this matter is substantively non-arbitrable as it concerns a nondelegable management right. I disagree. The grievance filed by the Union is borne out of the Town's decision to negotiate over the removal of the Deputy Chiefs from the bargaining unit. In exchange for the Union's consent to allow for the removal of the Deputy Chiefs from the bargaining unit, the Town agreed to promote a Lieutenant to Captain upon the removal of the first Deputy Chief into an administrative position and ultimately promote a second Lieutenant to Captain under circumstances not relevant to this matter. Upon agreement of the MOA and ratification by both sides, the Town requested and received funding for the new Captain position and removed the Deputy Chief from the bargaining unit into the administrative position. The Town's compliance with the MOA ended here however, as it then refused to promote a Lieutenant to Captain as required under the ratified MOA.

Under the scenario outlined above, the Chief had already determined a need for another Captain position by agreeing in the MOA to add additional Captains. The Town unequivocally understood its obligation under the MOA and requested the appropriate funding for the first new position which was provided when the budget was approved. Finally, the Town acted upon the agreement and removed the Deputy Chief from the bargaining unit into an administrative position,

a condition precedent that triggered the requirement to promote a Lieutenant to Captain. The Town's refusal to subsequently promote as required because it disagrees with a prior Civil Service Commission decision does not absolve it from its contractual obligations, nor does it make the matter non-arbitrable.

This decision and award in no way infringes on the Chief's ability to decide to promote a Lieutenant to a Captain's position. He had already made that decision by agreeing to the bargaining proposal and removing the Deputy Chief from the bargaining unit. As outlined in further detail below, this decision and award does not tell the Town who to select for the new Captain position; only that the Town is obligated to abide by its contractual agreement and select a candidate for the new position. Finally, this decision and award does not bypass M.G.L. c. 31, but rather, anticipates that the Town will follow its legal obligations under M.G.L. c.31 when it promotes a Lieutenant to Captain.

Finally, the Town's argument that the decision to promote is a management prerogative covered under the Management Rights article of the collective bargaining agreement and thus not arbitrable fails as the language of the Management Rights article clearly states that:

"The employer shall have the exclusive right, subject to the provisions of this agreement and consistent with the applicable laws and regulations"

Once ratified by the parties and funded by the Town, the MOA became a provision of the collective bargaining agreement. The agreement to promote a Lieutenant to Captain in exchange for removing the Deputy Chiefs from the bargaining unit removed the "exclusive right" of the Management Rights provision and instead

placed it “subject to the provisions of this agreement.” The violation of the MOA is properly the subject of a grievance by the Union and thus substantively arbitrable.

### Merits

The Town’s reluctance to honor its obligations under the MOA centers on its displeasure with a ruling by the Civil Service Commission in the Smith by-pass appeal. The Town’s argument in this area is twofold, first that the Civil Service decision in question is under judicial appeal. The second argument is that a decision in this arbitration will infringe upon the Civil Service Commission’s jurisdiction in setting the rules for the promotional process. Neither argument is persuasive. As noted above, the Massachusetts Superior Court has denied the Town’s appeal in that matter and entered judgment for the plaintiff, removing the Town’s reliance on the litigation as a shield for protection against its violation of the collective bargaining agreement. Additionally, nothing in this decision and award infringes in any manner on the Civil Service Commissions’ jurisdiction over promotions. The Town agreed in the MOA to promote a Lieutenant to Captain in exchange for removing the Deputy Chiefs from the bargaining unit. The MOA was ratified by both sides, the position was funded in the new departmental budget and the Town removed the Deputy Chief from the bargaining unit. The only thing that did not take place was the promotion from Lieutenant to Captain. The Town refused to make the promotion because it was unhappy with a Civil Service Commission decision that places restrictions on the next promotion to Captain from the Civil Service list. The decision in this matter is that the Town violated the collective bargaining agreement when it failed to promote a Lieutenant to Captain

on July 1, 2019. The award requires the Town to promote a Lieutenant to Captain retroactive to the date of its violation July 1, 2019. The Town will follow all rules and regulations of the Civil Service Commission in making this promotion and is free to promote whomever it chooses subject to the continuing oversight of the Civil Service Commission as outlined in the Smith ruling. This award makes no judgment on who should be promoted, just that someone must be promoted as agreed upon by the parties. What role, if any, the Civil Service Commission plays after the promotion is finalized is of no concern in this arbitration.

In this regard, the Town's reliance Somerville v. Somerville Municipal Employees Association, supra. 594 (Somerville) is misguided. In Somerville, the Appeals Court ruled that the "arbitrator exceeded his authority by making an award which conflicts with the civil service law." Id. At 595. Here, the award of back pay under the collective bargaining agreement is compensation for a violation of the collective bargaining agreement and does not require ongoing payments for performance of a job to which the employees have not been properly appointed. Because the award does not appoint individuals to vacant positions without compliance with Civil Service law, Somerville is not controlling. See. City of Springfield v. Local Union No. 648, International Association of Firefighters, 88 Mass.App.Ct. (2015). (Arbitrator's decision, ordering back pay as a remedy for city's unlawful placement of firefighters, was not prohibited by the civil service statute.)



For all the reasons stated above, I find that the grievance is arbitrable, and the Town violated the collective bargaining agreement when it failed to promote a Lieutenant to Captain since July 1, 2019.<sup>5</sup>

**AWARD**

The grievance is arbitrable, and the Town violated the collective bargaining agreement when it failed to promote a Lieutenant to Captain since July 1, 2019. The Town is hereby ordered to promote a Lieutenant to Captain, following all lawful procedures as required by M.G.L. c.31. The successful candidate will be made whole for all wages and benefits retroactively to July 1, 2019.



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Timothy Hatfield, Esq.  
Arbitrator  
March 3, 2021

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<sup>5</sup> Based on my decision that the Town violated the collective bargaining agreement for the reasons stated above, I decline to rule on the validity of the Union's remaining arguments.