





weekend care of animals at the Town facility. Section 8 of Article 28 requires fire dispatchers to obtain EMT Certification as a condition of employment and grants a \$600 stipend to fire or police dispatchers who obtain this certification. Traffic Supervisors obtaining Red Cross certification are entitled to receive an annual stipend under the same provision. Article 34 sets forth the shifts, holidays, overtime, and other terms and conditions of employment for the fire and police dispatchers.

The BMEA Agreement contains no reference to police details or to special police officers. The Town Administrator bargains on behalf of the Town with the BMEA.<sup>3</sup> The Police Chief typically does not participate in bargaining sessions, although Town officials have occasionally invited police chiefs into bargaining sessions for clarification purposes.<sup>4</sup>

#### Other Town Bargaining Units

The IBPO represents all captains, lieutenants, and sergeants employed by the Department. The BPPA represents all police officers and permanent intermittent full-time police officers, excluding the Chief of Police, lieutenants, sergeants, all civilian employees, all casual and emergency employees, and all other Town employees. There are no civilians or retirees in the IBPO's or the BPPA's bargaining units. The Town also bargains with a separate unit of Department of Public Works (DPW) employees.

#### Police Details - Generally

Police details vary, but they generally consist of either traffic details or other circumstances where an extra police presence is needed because of crowd control or the potential for violence. The Town's police chief determines whether to classify certain details as "gun details," requiring the detail officer to be armed.

Only regular and special police officers (Special Police Officers) can perform paid police details. Both the IBPO's and the BPPA's collective bargaining agreements in effect from July 1, 2003 to June 30, 2004 and from July 1, 2004 to June 30, 2007 mandate that no paid details shall be worked in the Town by a Special Police Officer when a regular officer is available.<sup>5</sup> As set forth below, if no regular police officers agree to work a detail, the detail is then offered to qualified individuals according to a method and a pecking order that has varied over the years. All the Department's civilian employees, with the exception of two dispatchers, work during the day shift, generally making them unavailable to perform daytime detail work.<sup>6</sup>

The Board of Selectmen appoints Special Police Officers each year from a list of names that the Police Chief sends to the Town Administrator.<sup>7</sup> The appointments become effective unless vetoed by the Selectmen within fifteen (15) days of submission. The Town's Special Police Officers include members of the BMEA's, DPW's, and firefighters' bargaining units, but one does not have to be a Town or Department employee to be appointed as a Special Police Officer. No Town or Department employee is required to perform police details as a condition of employment. In 2000, eleven (11) out of a total of seventeen (17) Special Police Officers held no other positions with the Town.

For a period of less than a year in or around 1996, the Town unilaterally ceased using Town employees who were Special Police Officers to perform details, because the state's conflict of interest law, M.G.L. c. 268A, prohibits municipal employees from being paid by two separate departments, unless they are designated "Special Municipal Employees." On June 12, 1996, the Board of Selectmen voted to designate Special Police Officers as Special Municipal Employees, rendering them eligible to resume performing details. The record does not reflect that the Town bargained with any union that includes members who are Special Police Officers regarding this matter.

In 2002-2003, the Department implemented a new policy for Special Police Officers, setting forth training requirements, selection criteria, uniforms and equipment, and duties and responsibilities.<sup>8</sup> The policy prohibits assigning Special Police Officers to regular patrol assignments and requires individuals seeking appointment as Special Police Officers to attend reserve officer training academy, qualify with a firearm, and attend annual in-service training at the Lowell Police Academy.<sup>9</sup> The Town pays its regular officers to attend this training and allows Special Police Officers to fill any unfilled seats. Special Police Officers who complete this training are considered "regular specials," who are then eligible to perform all police details. The Town, nevertheless, has continued to allow Traffic Supervisors who do not qualify with firearms to perform non-gun or "pure" traffic details. In this sense, the Department considers the Traffic Supervisors to be "modified" specials. The record does not reflect that the Town or the Department permits anyone other than the Traffic Supervisors to serve as "modified" specials. The Town did not bargain with any union that includes members who are Special Police Officers over this policy.

3. When the Traffic Supervisors comprised a separate bargaining unit, they bargained with the Town Administrator and the Town Accountant. The police chief did not participate in collective bargaining.

4. This finding has been modified in response to a challenge by the Town.

5. Article 13:02 of the BPPA agreement in effect in fiscal year 2004 (BPPA Agreement) states in pertinent part:

No extra details shall be worked in the Town of Burlington by any special officer when a regular officer is available.

Section 14:02 of the IBPO agreement in effect in fiscal year 2004 (IBPO Agreement) contains essentially the same terms.

6. The Traffic Supervisors are available to work details between school drop-off and pick-up times.

7. The Town Administrator used to send letters to Special Police Officers notifying them of their annual appointment or re-appointment. For reasons not made clear on the record, the Town stopped sending these letters in or around 2002 or 2003.

8. Police Chief Francis Hart (Chief Hart), who was appointed in 2002, could not remember precisely when the new policy went into effect but placed its inception between January of 2002 and October of 2003.

9. The Department previously conducted in-service training in-house.

### Compensation

The Town pays all individuals working police details, including members of the IBPO's bargaining unit, at the rates set forth in Article 13 of the BPPA Agreement.<sup>10</sup> These rates vary according to the detail's purpose and time. For example, Section 13:09 of the BPPA Agreement states in pertinent part:

Saturday road jobs will be compensated at a rate of time and one-half the applicable rate while Sunday and Holiday road jobs will be paid at double the applicable rate. Saturday road jobs are considered to be from 4:00 p.m., Friday to Midnight Saturday. Sunday road jobs are from Midnight Saturday to 8:00 a.m. Monday morning. (Road jobs starting after 6:00 a.m. Monday morning will be compensated at the regular daily rate unless same is a Holiday.) Holiday road jobs are from Midnight of holiday to 8:00 a.m. of next day. All non-road Sunday details are time and one-half.

The number of available detail hours fluctuates from year to year, except for recurring traffic details, which are scheduled five days a week all year long. For example, up until around 2000, Traffic Supervisor Helen Dignan (Dignan) directed traffic at an industrial park on the Middlesex Turnpike for two to three hours a night for approximately twenty years until a traffic light was installed at the intersection. The record does not reflect how many detail hours each year are attributable to recurring or "Industrial Traffic Details," as they are referred to in Article 13 of the BPPA Agreement.

### Method of Distribution

The introductory paragraph of Article 13 of the BPPA Agreement, "Details and Distribution and Payment," states:

A roster of all weekly details to include industrial traffic and other permanent details shall be set up to include all permanent and full-time permanent intermittent officers on an hours offered basis.

Article 13:03 of the BPPA Agreement states: "Details shall be distributed by the Chief or his designee, in conjunction with a designated BPPA official, on a fair and equitable basis." Since 2000, police details have been distributed by Scheduling Officer James Tigges (Tigges).<sup>11</sup> Tigges maintains and updates the daily detail roster sheets, which contain the names of eligible individuals grouped according to the particular category into which they fall like BMEA, Retiree, Special, and Permanent Intermittent. The categories are listed on the detail roster sheet according to the pecking order currently in use.

As noted above, the scheduling officer must first offer all police details to regular officers. If no regular officers accept the detail, it is then offered to the person who has worked the fewest detail hours in the next group in the pecking order.<sup>12</sup> If that individual refuses the detail, the scheduling officer notes the refusal on the roster sheet and continues down the list until someone accepts the de-

tail. Several times during the day, according to scheduled "calling periods," the detail clock is reset and the scheduling officer starts over at the top of the list.<sup>13</sup> Individuals who refuse details are not penalized or charged, but they are not offered another detail in the same calling period until all individuals on the roster have been offered the opportunity to accept one. There is one exception to this practice. If only gun details are offered during a particular calling period, the scheduling officer will offer the first available non-gun detail to a Traffic Supervisor, even if a new calling period has begun.

*The Pecking Order from 1976 to 1999*  
Traffic Supervisors

Traffic Supervisors have been performing road/traffic details since 1974 and came first in the detail pecking order, after regular police officers, from at least 1976 until approximately 1994. In 1976, Head Traffic Supervisor Madeline Burwell wrote the following memo/file note:

Spoke with Chief after hearing some dissension from the Special Police Officers concerning Traffic Supervisors having seniority over them on traffic details.

Chief ruled: The Traffic Supervisors are regular members of the department and as such will have seniority over the Special Police on all traffic details. The women, however, are excluded from gun details.

The Traffic Supervisors' place in the pecking order in the 1970's was also described in the following memo written by Captain Charles T. Ferguson on November 26, 1979:

The order for calling personnel for Road Details shall be as follows:

1. Regular Officers shall be called first according to the work schedule
2. Women traffic officers
3. Special Police Officers
4. Special Police Officers who live out of town
5. Out of town police officers personnel for road details

Any officer who does not adhere to this order will be subject to removal from the detail list.

In 1992, the Town hired around twenty-four (24) new permanent intermittent officers, causing the Traffic Supervisors to approach Police Chief William Soda (Chief Soda) regarding the pecking order. On June 4, 1993, Chief Soda issued the following memo to the command officers and the detail officer:

This is a reminder that the filling of traffic details shall be in the following order:

Regular Officers

11. Other police officers serve as the scheduling officer in Tigges's absence.

12. Tigges will not call a person that is working at the time of the detail or is out on a scheduled leave. If an individual declines a detail because he/she is sick, injured, or otherwise ineligible, Tigges will not count that as a refusal.

13. The BPPA established the practice of using calling periods several years ago. Calling periods are tied to shift changes. The calling periods are from 6:00 a.m. to 11:59 a.m., noon to 3:59 p.m., 4:00 p.m. to midnight, and midnight to 6:00 a.m.

10. Article 14:07 of the IBPO collective bargaining agreement in effect from 2004 to 2007 states:

Detail rate shall be set at (The Town and the Union mutually agree to whatever the detail rates are negotiated with the BPPA) \$38.00 per hour effective July 1, 2005, and shall charge for private details per the following schedule:

Effective July 1, 2006: \$39.00 per hour

Effective June 30, 2007: \$40.00 per hour



Traffic Supervisors  
 Permanent Intermittent Officers  
 Special Officers

The BPPA filed a grievance over this memo, claiming that the permanent intermittent police officers were part of their unit and should be offered the opportunity to perform road details before the Traffic Supervisors. The Town upheld the BPPA's grievance, causing AFSCME to file a charge of prohibited practice with the Commission in 1994 that alleged the Town had repudiated an agreement with them. An administrative law judge dismissed the charge on the grounds of timeliness.<sup>14</sup>

The collective bargaining agreement between the Town and the Traffic Supervisors contained no reference to police details. There is no evidence that the Town ever bargained with the Traffic Supervisors union over their placement in the police detail pecking order, except for one instance when the Traffic Supervisors union made a proposal regarding this issue. The Town rejected the proposal.<sup>15</sup>

The Animal Control Officer

Gerald Mills, Jr. (Mills) was appointed the Town's Animal Control Officer on August 20, 1998. He works 7 a.m. to 3 p.m., Monday through Friday. Mills was appointed as a Special Police Officer in 1985 and has been performing paid police details since that time. From 1985 to 1989, Mills did not hold any position with the Town other than Special Police Officer. From 1989 to 1998, Mills worked for the DPW and was president of the DPW union. Since 2002 or 2003, the Town has paid for, and Mills has completed, the requisite training to be a "regular special," rendering him eligible to perform all police details.

Each year since 1998, Mills has received a letter from the Town confirming his reappointment as Animal Control Officer. Each year until approximately 2002 or 2003, the Town sent Mills a separate letter notifying him that he had been reappointed as a Special Police Officer.<sup>16</sup>

The Town's job description for Animal Control Officer lists the following qualifications:

High school graduation with supplemental courses, training or education in animal handling, animal behavior or related field highly

desirable; two years of experience in animal control or related field; or any equivalent combination of education and experience.

Under "Knowledge, Ability and Skill" the job description states:

Working knowledge of animal handling procedures and practices. Ability to deal with the general public tactfully and appropriately. Knowledge of state and local laws related to animal control and protection. Possession of valid Class III driver's license.

Neither the job description nor the posting for Mills's position requires the Animal Control Officer to be a Special Police Officer and that requirement is not evident from the record.<sup>17</sup>

Mills had more opportunities to work details after he had stopped working for the DPW and became the Animal Control Officer. On May 3, 1999, about seven months after his appointment as Animal Control Officer, Mills wrote a letter to Chief Soda asking to be placed after Bulman, but before the part-time Traffic Supervisors, on the detail list. Chief Soda implemented Mills's request after discussing the matter with Bulman.

2000-2003

Article 13 of the collective bargaining agreement in effect between the BPPA and the Town from July 1, 2000 to June 30, 2003, "Details: Distribution and Payment," states in pertinent part:

13.02 For the safety of the public, no details requiring traffic control shall be worked in the Town of Burlington, by anyone other than properly trained and appointed Burlington Police Officers, Permanent Intermittent Officers, Specials and Traffic Matrons,<sup>18</sup> when available.

No extra details shall be worked in the Town of Burlington by any special officer when a regular officer is available.

Any non-permanent Saturday or Holiday details requiring traffic control as a pre-detail condition shall be considered a road job and paid as such.

13.03 Details shall be distributed by the Chief or his designee, in conjunction with a designated BPPA official, on a fair and equitable basis

\* \* \*

In December of 2000, Tigges prepared a detail roster sheet reflecting the pecking order then in use. The categories listed on the left of the roster sheet, from top to bottom, and the number of individu-

14. In making these findings, the Hearing Officer took administrative notice of the administrative law judge's decision in *Town of Burlington*, 23 MLC 73 (H.O. 1996). This finding has been modified to reflect that AFSCME, not the BMEA, filed the charge of prohibited practice.

15. The record does not reflect when this incident occurred; however, because it occurred while there was still a separate Traffic Supervisors union, the Hearing Officer found that it had to have been sometime between 1981 and 2002.

16. See footnote 6, above.

17. Mills testified that he believed that some of his authority as Animal Control Officer stemmed from being a Special Police Officer. He based his belief, in part, on a Town bylaw that was not introduced into the record, which purportedly authorized regular police officers or the Animal Control Officer to issue citations. Mills testified that the Town passed this bylaw knowing that he was a Special Police Officer and reasoned that the Town would not have given him this authority if he were not a Special Police Officer. Mills also noted that the state maintains animal control laws

that are enforceable by animal control officers, and that the Town pays for his annual training as a Special Police Officer. However, the Town also pays for the training of other Special Police Officers. Moreover, without seeing the statutes or bylaws to which Mills had referred, the Hearing Officer found that there was not sufficient evidence for her to conclude that the Town required the Animal Control Officer to be a Special Police Officer as a condition of employment. The Hearing Officer noted in particular the absence of that requirement from the Animal Control Officer's job description, job posting, and the BMEA Agreement, which required fire dispatchers to obtain EMT certification as a condition of employment. The Hearing Officer further noted that, on August 20, 1998, the Town Administrator recommended Mills's initial appointment as Animal Control Officer based on his "extensive experience dealing with dogs and wildlife" but did not mention Mills's twelve years of experience as a Special Police Officer, a fact that Mills had made known in his employment application.

18. The Traffic Supervisors are sometimes referred to as "Matrons."

als in each category were: Permanent/Intermittents (4); full-time Department employees (3);<sup>19</sup> Traffic Supervisors (7); Retiree Specials (6); and Specials (17). Eileen Barnard, the only Traffic Supervisor qualified to perform gun details at the time, is listed twice, under both the Traffic Supervisors and Specials categories.

Shortly after Chief Hart had become the Chief of Police, in or around the spring of 2002, he asked every sworn and civilian Department employee about what they would like to keep or to change about the Department. A number of people mentioned police details, causing Chief Hart to issue a Department-wide e-mail soliciting suggestions on this subject.

Chief Hart received three responses. BPPA President Robert Aloisi (Aloisi) told Hart that the BPPA wanted retired police officers to be called first, after regular officers. Chief Hart disagreed and told Aloisi that the BPPA should try to achieve this result through negotiations. Mills also responded to the e-mail and sent a letter to Chief Hart on April 26, 2002, stating in pertinent part:

I would like you to consider the following proposal for detail pecking order for the BMEA members of the Burlington Police Department who are eligible to work details. I submit this proposal as an employee of the Burlington Police Department, not as a union official.<sup>20</sup> If you would consider this proposal, it would not have to be negotiated, although it should be, with the BMEA Union who covers all of the Traffic Supervisors, the full-time Police Dispatchers, and the full-time Animal Control Officer because it does not have a negative impact on the BMEA members and does not change the order in which they are called.

This proposal would only cover all of the above-mentioned eligible BMEA members who are covered by the BMEA contract as employees of the Burlington Police Department. The BMEA members covered would be in two groups immediately following the full-time Brass and Patrolman's groups. The full-time members would be in a group ahead of the part-time members of the eligible BMEA Union members as it currently stands. This agreement shall not cover other Town of Burlington union members who are not employed by the Burlington Police Department as part of their union position, such as Special Police Officers who work in a Union position in other Town of Burlington Departments or other Towns.

All members in these two groups shall be listed by seniority and shall be called by hours charged starting with the person with the least amount of hours being called first and move down the list in that order as it currently stands.

The current pecking order is the full-time Brass and Patrolmen's union employees, non-union part-time Intermittent Officers, full-time union BMEA, part-time union BMEA, non-union Retirees and non-union Special Police Officers.

My proposal would only put the non-union part-time intermittent officers behind our BMEA union members and then if the Town chooses, they could place them after the non-union retirees which would benefit the Brass and Patrolman's unions in part by accomplishing their goal of moving the retirees further up on the list. Al-

though I support the Brass and Patrolman's argument, that if someone works here for twenty or thirty years, they should be rewarded by having a separate retirees group, I do not feel they should be placed ahead of other union members who also have to work here for twenty or thirty years[.] I agree and feel we should also have the benefit of our full-time members going in this group upon their retirement.

\* \* \*

I believe whereas there is an established past practice for at least the past three years for the order of BMEA employees to be called, the Town cannot regress those members further down the list.

On May 8, 2002, Chief Hart issued a decision establishing the following pecking order:<sup>21</sup>

Group 1: All BMEA employees, ranked by seniority

Group 2: Retirees from the police department, ranked by their date of employment as a Special Officer upon retirement

Group 3: Intermittent and special officers, in a combined group, ranked by date of appointment.

Chief Hart agreed with Mills that BMEA bargaining unit members deserved to be grouped first. He disagreed, however, that full-time employees should be grouped ahead of part-time employees and provided a chart ranking all the eligible BMEA employees by seniority. Bulman was first on the list, while Mills was second-to-last. Chief Hart did not bargain with representatives of the BPPA before issuing the decision. He also did not offer to bargain with the BMEA before or after issuing this decision, as he believed that the BMEA was happy with his resolution of this issue. The BMEA did not request bargaining before or after Chief Hart issued his decision. A roster sheet that Tigges had prepared on September 19, 2002 reflected the pecking order set forth in Chief Hart's decision. The categories on that sheet, from top to bottom, and the number of individuals in each category were as follows: BMEA (10); Retiree (6), including two "No Calls;" and Special (19).

At some point after Chief Hart had taken office, he decided to reclassify traffic details at cinemas as "gun details." This action disqualified Bulman and all but one of the part-time Traffic Supervisors from performing those details. Chief Hart did not bargain with the BMEA before making this determination, and the BMEA did not make a demand to bargain.

#### *Pecking Order 2003-2004*

The BMEA remained first in the pecking order, after regular officers, throughout most of 2003, when the Town and the BPPA were engaged in successor contract negotiations. At some point during negotiations, the BPPA proposed to Town Administrator Mercier, who was bargaining on the Town's behalf, that the Department offer details to the current and future retired police officers immediately after regular police officers. After obtaining some conces-

19. The full-time Department employees were Bulman, Mills and Dispatcher Gail Fay (Fay), who was qualified to perform gun details.

20. Mills was a BMEA Chapter Chair but was not involved in collective bargaining, other than to assist in drafting a drug and alcohol policy.

21. Chief Hart's memo was addressed to Aloisi, IBPO President Gerry Mills (Mills's father), and Mary Fay, BMEA Chapter Chairperson. Chief Hart copied Town Administrator Robert Mercier (Mercier), the Town's personnel director, Ann Marie Tucciaronc-Mahan (Tucciaronc-Mahan), Bulman, Dispatcher Fay, and Mills.



sions from the Union,<sup>22</sup> the Town agreed to the proposal for essentially two reasons: 1) an early retirement incentive program was underway; and 2) the retirees were trained police officers who were familiar with the community.

The Town did not notify the BMEA that it had been negotiating with the BPPA regarding the detail pecking order before finalizing and executing the BPPA Agreement on December 19, 2003.

Article 13.02 of the BPPA Agreement states:

For the safety of the public, no details requiring traffic control or other police duties shall be worked in the Town of Burlington by anyone other than properly trained and appointed Burlington Police Officers, Retired Burlington Police Officers, full-time department employees, Matrons and Special Police Officers.

An identical provision appears in the collective bargaining agreement in effect between the BPPA and the Town from July 1, 2003 to June 30, 2007.

On December 4, 2003, AFSCME staff representative James Breslin (Breslin) wrote a letter to Mercier demanding to bargain over the change in the detail pecking order. The letter states in part:

It has come to the attention of the membership of Local 1703/BMEA that you intend to unilaterally change the method by which overtime opportunities are offered to the members of Local 1703, with regards to calling Local 1703 members to perform Police Details (Detail Pecking Order).

As you are aware, in May 2002, Police Chief Hart issued a written policy regarding the order for which employees are called for details. In his written decision that memorialized the Detail Pecking Order, he stated that his decision was based on “consistency and fairness.” Chief Hart solicited proposals (bargained) from the affected bargaining unit prior to developing the policy. It is the understanding of Local 1703, that there was no challenge by any bargaining unit to Chief Hart’s policy regarding this issue and the policy was implemented and has been the practice to date. Further, for the record, you were personally involved in the development and implementation of the “Detail Pecking Order” policy.

Local 1703 demands to bargain any proposed changes to the “Detail Pecking Order” policy and demands that “status quo” be maintained during any discussions.

On December 10, 2003, Mercier sent a response to Breslin, stating in part:

To begin with, I would like to point out that the Special Police Details assigned to the Police Department belong to the Town of Burlington—not the Police Department or to the BMEA.

Mercier disputed that BMEA members were being denied overtime opportunities and noted that there is no mention of police details in the BMEA contract. He further stated that, to his knowledge, the issue had not been negotiated in the past. He nevertheless expressed his willingness to listen to the BMEA’s proposals as they began to bargain for a successor agreement in January of 2004. Mercier also disputed that Chief Hart had bargained with any employees. Mercier closed his letter by stating that he strongly believed that the Department pecking order was not an issue that required impact bargaining with the BMEA. On December 26, 2003, Breslin sent a letter to Mercier indicating his disagreement with the Town’s position and asking for reconsideration and restoration of the *status quo*.

On December 18, 2003, Tigges prepared a roster reflecting the negotiated pecking order as follows: “Retired BPD” (5, including one “No call”); “Full-time Department Employees/Matron” (11); and “Specials/Permanent Intermittents” (13). Mills appeared third-to-last in the second category, because he had performed the third highest number of detail hours thus far that year. The classifications and the order in which they appeared on this roster sheet remained in effect through at least October of 2005.

*Details Worked and Refused: 2002-2005*

The number of detail hours worked by Mills and other BMEA members fluctuated both before and after the December 2003 change in the pecking order. The following charts roughly reflect the number of hours worked by BMEA members, retired police officers, other Special Police Officers, and Intermittents from June 30, 2002 to October of 2005.<sup>23</sup>

The record contains no information regarding the number of detail hours refused by retirees, Permanent Intermittents, or other Special Police Officers.

**Detail Hours Worked and Refused from July 1, 2002-June 30, 2003**

Name	Detail Hours Worked	Detail Hours Refused
<b>BMEA</b>		
Hogaboom	0.0	n/a
Connolly	0.0 <sup>24</sup>	n/a
Bulman	4.0	n/a
Goodwin	4.0	n/a
Dignan	6.50	n/a
Bilbey	46.00	n/a
Robillard	94.25	n/a

22. Mercier could not recall what those concessions were.

23. The Hearing Officer obtained the numbers in the “Detail Hours Worked” column from BMEA Exhibit 3, which is a sampling of Tigges’s daily roster sheets showing the number of detail hours worked by retired officers, Special Police Officers, Permanent Intermittents, and BMEA Department employees. In preparing these charts, the Hearing Officer used rosters showing the cumulative number of detail hours worked during the following time periods: June 30, 2002 to July 1, 2003; July 1, 2003 to December 18, 2003; July 1, 2003 to May 24, 2004; July 1, 2004 to June 30, 2005; and July 1, 2005 to October 13, 2005.

It should be noted that the figures in the “Detail Hours Worked” column do not reflect the actual number of detail hours worked, but, as explained by Tigges, the dollar amount earned by an individual divided by the regular detail rate. Thus, if an individual works one hour at the time and a half detail rate, Tigges records that indi-

vidual as having worked 1.5 hours. In addition, when an individual is first added to the detail list, Tigges records that individual as having the highest number of hours worked by any individual in that category. The figures in the “Detail Hours Refused” column appear to be the actual number of hours refused.

The figures contained in the “Detail Hours Refused” columns are derived from Town Exhibits 9-16, which reflect the number of detail hours worked and refused from December 18, 2003 to March 2006 (except where noted) by the following Traffic Supervisors: Bulman, Barnard, Dignan, Robillard, Goodwin, and Fay. The Town also provided charts showing Mills’s refusals and those of civilian dispatcher Sharon Srabian. To obtain the refusal figures contained in these charts, the Hearing Officer added up the number of hours refused by these BMEA unit members during the applicable period.

24. Hogaboom and Connolly rarely, if ever, accept details.

Barnard	184.00 <sup>25</sup>	n/a
Mills	199.00	n/a
Srabian	395.00	n/a
Fay	466.50	n/a

Retirees

Moglia - NO CALL	0.00	n/a
Petersen	18.00	n/a
Crocker	18.50	n/a
Hovasse	68.50	n/a
Sawyer	85.50	n/a
Duffey	218.00	n/a
Thompson	222.00	n/a

The number of hours worked by the nineteen Special Police Officers in this period ranged from 0 to 438.93.

	<u>Detail Hours Worked</u>	<u>Detail Hours Refused</u>
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<u>Retirees</u>		
Sciuto - NO CALLS YET	0.00	n/a
Crocker	27.50	n/a
Sawyer	37.00	n/a
Joyce	172.25	n/a
Thompson	212.25	n/a

BMEA

Bibbey	0.00	n/a
Goodvin	0.00	n/a
Hogaboom	0.00	n/a
Connolly	0.00	n/a
Dignan	10.00	n/a
Robillard	10.00	n/a
Bulman	15.50	n/a
Barnard	179.75	n/a
Mills	244.25	n/a
Srabian	263.25	n/a
Fay	363.50	n/a

The number of hours worked by the Special Police Officers in that time period ranged from 15.50 to 168.25.

Detail hours worked and refused from July 1, 2003 - May 24, 2004

<u>Name</u>	<u>Detail Hours Worked</u>	<u>Detail Hours Refused</u> <sup>26</sup>
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Retirees

Sciuto	0	n/a
Crocker	55.75	n/a
Sawyer	66.00	n/a
Joyce	283.50	n/a
Thompson	407.00	n/a

BMEA

Bibbey	0.00	n/a
Goodvin	0.00	6
Hogaboom	0.00	n/a
Connolly	0.00	n/a
Bulman	15.50	12.00
Dignan	18.00	21.00
Robillard	40.00	22.00
Barnard	230.75	69.50
Mills	258.00	137.50
Srabian	300.25	75.00
Fay	470.00	37.00 <sup>27</sup>

The detail hours worked by the Special Police Officers in that time period ranged from 23.50 to 207.75.

Detail hours worked and refused from July 1, 2004 to June 30, 2005

<u>Name</u>	<u>Detail Hours Worked</u>	<u>Detail Hours Refused</u>
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Retirees

Duffey	101.75	n/a
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Hovasse	124.50	n/a
Sawyer	207.75	n/a
Crocker	280.75	n/a
Sciuto	316.75	n/a
Chicarello	376.25	n/a
Joyce	414.75	n/a
Sullivan	515.25	n/a
Aloisi	538.75	n/a

BMEA Unit Members

Bibbey	0.00	n/a
Hogaboom	0.00	n/a
Goodvin	4.00	60.00
Dignan	12.50	50.00
Bulman	33.50	44.00
Robillard	107.50	166.00
Mills	107.50	433.00
Srabian	111.00	171.00
Barnard	160.00	311.50

The detail hours worked by the eleven Special Police Officers in that time period ranged from 13.50 to 315.50.

Detail Hours worked and refused from July 1, 2005 to October 13, 2005

<u>Retirees</u>	<u>Detail Hours Worked</u>	<u>Detail Hours Refused</u>
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Duffey	25.00	n/a
Hovasse	36.50	n/a
Sawyer	104.00	n/a
Crocker	175.75	n/a
Joyce	185.75	n/a
Sullivan	234.75	n/a
Aloisi	257.75	n/a

BMEA Unit Members

Bulman	0.00	64.00
Bibbey	0.00	n/a
Goodvin	0.00	56.00
Mills	4.00	185.5
Dignan	8.00	69.00
Robillard	24.00	44.00
Barnard	33.75	160.00

The number of hours worked by the Special Police Officers during this period ranged from 9.00 to 109.25.

Opinion

A public employer violates Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law when it unilaterally changes an existing condition of employment or implements a new condition of employment involving a mandatory subject of bargaining without first giving its employees' exclusive collective bargaining representative notice and an opportunity to bargain to resolution or impasse. *Commonwealth of Massachusetts v. Labor Relations Commission*, 404 Mass. 124 (1989); *School Committee of Newton v. Labor Relations Commission*, 388 Mass. 557 (1983). To establish a unilateral change violation, a charging party must show that: 1) the respondent has changed an existing practice or instituted a new one; 2) the change affected employee wages, hours, or working conditions and thus implicated a mandatory subject of bargaining; and 3) the change was implemented without prior notice and an opportunity to bargain. *Town of Hudson*, 25 MLC 143, 146 (1999), citing, *Town of North Andover*, 1 MLC 1103, 1106 (1974).

The Board has held that the method of distributing paid details impacts wages and hours and is therefore a mandatory subject of bar-

25. Eileen Barnard works the 4 p.m. to midnight shift.

26. Because the Town did not provide data about refusals before 12/18/03, this column reflects refusals from 12/18/03 to 5/24/04 only.

27. This reflects Fay's refusals from 11/13/03-5/24/04 only. There is no information about the detail hours that Fay worked or refused before 11/13/03. She was removed from the detail list on 9/20/04.



gaining. *See, Town of Winthrop*, 28 MLC 200, 201 (2002); *Town of Hudson*, 25 MLC at 146; *City of Boston*, 10 MLC 1238, 1242 (1983). The obligation to bargain extends to working conditions established through custom and practice as well as to working conditions contained in a collective bargaining agreement. *City of Gloucester*, 26 MLC 128, 129 (2000); *Town of Wilmington*, 9 MLC 1694, 1699 (1983).

Here, there is no dispute that, in December of 2003, the Town changed the order in which it distributed paid details that regular police officers refused. There is also no dispute that the Town did not give the BMEA prior notice and an opportunity to bargain before implementing this change.

Both the Town and the Intervenor offer a number of defenses to the Town's unilateral action. They argue that, because details are discussed in the BPPA, but not the BMEA, Agreement, the Town was obligated to bargain only with the BPPA before changing the order in which it distributed paid details. However, as set forth above, the statutory duty to bargain extends to terms and conditions of employment established by past practice as well as to those working conditions contained in a collective bargaining agreement. In this case, the Department employees and traffic supervisors have performed police details since 1976. There is no evidence that, at any time between 1976 and 2003, retired police officers, either standing alone or as part of the Special Police Officer category, ever preceded civilian Department employees in the pecking order. Based on this 27-year history, we conclude that this practice has occurred with regularity over a sufficient period of time, so it was reasonable for BMEA bargaining unit members to expect that the practice would continue. *See, Town of Chatham*, 21 MLC 1526, 1531 (1995). Thus, the BMEA Agreement's silence with respect to details does not excuse the Town's failure to bargain over changes to the established practice of distributing those details.

The Town further argues that it had no duty to bargain over the change in the pecking order, because police details were not BMEA bargaining unit work. In support of this argument, the Town notes that only BMEA members who previously have qualified as Special Police Officers are eligible to perform police details. The Town further notes that it does not require any BMEA member to become a Special Police Officer as a condition of employment. The Town concludes that it allows BMEA members to work details because of their separate appointment as a Special Police Officer and not because of their status as Department employees.

Although the factual underpinnings of the Town's argument are accurate, its conclusion is not. Rather, the record reflects that, for at least 27 years, the Town has offered civilian Department employees, *as a group*, preferential treatment to work police details over other Special Police Officers. The opportunity to work those details, under those conditions, is clearly a benefit offered to those employees solely by virtue of their status as Department employees and not merely because they have qualified as Special Police Officers. In this regard, the opportunity to work these details is analogous to the additional compensation sometimes offered to police officers or teachers who obtain advanced educational de-

grees. The fact that these employees may not be required to obtain the degrees as a condition of employment does not convert the otherwise mandatorily negotiable wage benefit into a permissive subject of bargaining. *See, e.g., Town of Framingham*, 20 MLC 1563, 1567 (1994) (police educational incentive constitutes a mandatory subject of bargaining). Consequently, we find that the opportunity for BMEA bargaining unit members to work paid police details is a term and condition of employment over which the Town was required to bargain before making any changes.

The Town next argues that, even if the police details constituted a condition of employment, the change in the pecking order did not constitute a change in practice. The Town claims that its practice was to negotiate and memorialize matters regarding police details with the BPPA only. To the extent that the BPPA Agreement was silent, it was left to the Police Chief to decide. The Town contends that there was no change to this practice when it negotiated changes to the pecking order with the Intervenor and not the BMEA. In essence, the Town asserts that, by failing to bargain with the BMEA over details in the past, the BMEA has forever waived its right to do so in the future.

This is inaccurate both as a matter of fact and law. First, as noted above, the silence of the BMEA Agreement with respect to police details is not dispositive of the issue of whether the Town was obligated to bargain with the BMEA before changing the pecking order. Second, the absence of any provisions in the BMEA Agreement regarding details does not mean that the BMEA or the predecessor Traffic Supervisors union never attempted to bargain over this issue. Rather, the record establishes that, over the years, the union representing the Department employees has attempted to assert bargaining rights over the pecking order on at least two occasions. The first occasion happened sometime between 1981 and 2002, when the Traffic Supervisors made a bargaining proposal over the pecking order, which the Town rejected. The second occasion occurred in 1994, when AFSCME filed a prohibited practice charge on behalf of the Traffic Supervisors, alleging that the Town had repudiated an agreement concerning the pecking order. Although the Traffic Supervisors and AFSCME were unsuccessful in their respective attempts to bargain and to enforce their rights under the Law, their efforts demonstrate that Department employees did not believe that they had ceded their rights to bargain over details.

Moreover, the record reflects at least two other occasions in 1979 and 2003 when the Traffic Supervisors and Department employees entered into discussions with the Police Chief over police details. On both occasions, these discussions resulted in a decision that placed this group of employees ahead of other Special Police Officers in the pecking order, rendering the need for further discussions or bargaining unnecessary at that time. When the Town and the BPPA changed the pecking order in late 2003, the BMEA promptly demanded to bargain. When the Town refused the BMEA's demand, the BMEA filed the instant charge of prohibited practice.

Based on the BMEA's efforts over the years to preserve and/or improve its place in the police detail pecking order, we conclude that the prior bargaining history between the Town and the BPPA did



not establish a binding practice precluding the BMEA from protesting all future changes to that order. Even assuming that the BMEA had somehow waived its rights to bargain over this issue in the past, this fact does not forever bar it from opposing all future recurrences of that action. *City of Gardner*, 26 MLC 72, 77 (2000), citing, *Town of Randolph*, 8 MLC 2244, 2252 (1982).

The Town finally argues that the BMEA has failed to provide any persuasive evidence that the change in the pecking order affected its members' detail opportunities or earnings. The Intervenor makes a similar argument, claiming that the change in the pecking order was simply an incidental variation from past assignment practices. The Intervenor contends that BMEA members continue to receive work, even though they may not have received as much work as in the past. The BMEA argues on the other hand that, to the extent the change in the pecking order benefited retirees, BMEA members were damaged to the same degree.

Although it is difficult to draw definitive conclusions from the figures provided by the parties, it stands to reason that the higher a group ranks on a detail list, the more opportunities employees within that group will have to work those details. The Commission recognized the converse of this proposition in *City of Boston*, 31 MLC 25, 33 (2004), when, in dicta, it noted that the effects of the City of Boston's decision to prioritize details necessarily resulted in fewer details being offered to officers who held low rankings on the detail list. Moreover, after December 18, 2003, the number of retirees working details increased from four to nine. This increase likely decreased the number of detail opportunities offered to BMEA members, further diminishing the value of the benefit accorded to them by virtue of their placement in the pecking order. Thus, having already determined that the method of distributing paid details is a mandatory subject of bargaining, see, *Town of Winthrop*, 28 MLC at 201; *Town of Hudson*, 25 MLC at 146; *City of Boston*, 10 MLC at 1242, we find that the exact amount of monetary damages that unit members suffered, if any, is more appropriately suited to a compliance hearing. Nevertheless, we disagree with the Town that the BMEA has failed to provide any persuasive evidence that its members were adversely affected by their drop in rank on the detail list.

In this regard, it is instructive to compare the number of detail hours worked by three BMEA members and two retirees during the eighteen-month period before and after the December 18, 2003 change. For example, Mills worked a total of 443.25 detail hours from July 1, 2003 to December 18, 2003 (pre-change period). His detail hours from December 19, 2003 to June 30, 2004 (post-change period) decreased to 121.25<sup>28</sup> Srabian, another BMEA member, worked a total of 658.25 hours in the pre-change period. Her detail hours decreased to 148 in the post-change period. Barnard, the third BMEA member, worked a total of 363.75 detail hours during the pre-change period. Her detail hours declined to 211 during the post-change period.

The two retirees saw significant increases in their detail hours after the change. Sawyer worked a total of 122.50 detail hours during the pre-change period. His hours later increased to 236.75. Crocker worked 46 detail hours during the pre-change period. Those hours increased to 309.75 in the post-change period.

In sum, while the detail hours worked by the three BMEA members declined, the detail hours worked by both retirees rose sharply.<sup>29</sup> These figures belie the Town's claim that BMEA members suffered no damages as a result of the change in the pecking order.

The Town nevertheless argues that the change had no impact on bargaining unit members' opportunity to work details, because certain BMEA members refused more hours than they worked after December 18, 2003. While this appears to be the case, at least from July 1, 2004 to June 30, 2005, the absence of any figures showing how many detail hours that BMEA members refused during the pre-change period or how many hours retirees refused either before or after the change renders us unable to draw any conclusions from these figures. It is possible, however, that the number of hours refused by BMEA members after the change could be due to the fact that the details offered to them during this time period had already been rejected by regular police officers and retirees, increasing the likelihood that they were less desirable to begin with. This would not have been the case if BMEA bargaining unit members had retained their superior location in the pecking order. We are, therefore, not persuaded by the Town's argument that the change in the pecking order had no impact at all on the BMEA members' detail opportunities or income. Because the Town made this change without first giving the BMEA notice and an opportunity to bargain to resolution or impasse, we hold that the Town has violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law.

Having reached this conclusion, there is no need for us to address in any great detail the BMEA's argument that Article 13:02 is a nullity, because the BPPA has no standing to negotiate with the Town over the working conditions of BMEA members or retirees, or the BPPA's counterarguments that safety and the future retirement benefits of existing bargaining unit members are mandatory subjects of bargaining.

We will note, however, that, although an employee organization's right to bargain is limited to persons who are actually in its bargaining unit, see, *Boston School Committee*, 3 MLC 1063 (1977), this restriction does not necessarily prevent the BPPA or other employee organizations from bargaining over the future retirement benefits of existing bargaining unit members. See, generally, *Chemical Workers v. Pittsburg Glass Co.* 404 U.S. 157 (1971). Similarly, although the BPPA cannot bargain over the rights of individuals who are not unit members, it may bargain over mandatory subjects of bargaining affecting members within its unit, even

28. These numbers were obtained by adding the detail hours worked by each individual from July 1, 2002 to December 18, 2003. The post-change figures were obtained by subtracting the number of hours worked from July 1, 2003 to December 18, 2003 from the hours worked from July 1, 2003 to May 24, 2004 and then adding that figure to the hours worked from July 1, 2004 to June 30, 2005. These figures do

not include any detail hours worked from May 24, 2004 to July 1, 2004, because those figures were not available.

29. BMEA member Robillard is an exception to this trend. She worked 104.25 hours during the pre-change period but 137.50 hours in the post-change period.



if those subjects also happen to impact members of other units. Compare, *Saugus School Committee*, 7 MLC 1849 (1981) (employer obligated to bargain with school administrators' union over proposal that administrators bump less senior members of the teachers' bargaining unit in the event of layoff, notwithstanding potential impact on teachers) with *Chelmsford School Administrators Association*, 8 MLC 1516 (1981) (administrators' union may not bargain over seniority status of former member who already had bumped into teachers' union). Finally, although we agree with the BPPA that safety, generally, is a mandatory subject of bargaining, the existing record falls short of persuading us that safety considerations motivated the BPPA's proposal to put retirees ahead of the Department employees, or that details performed by retired police officers necessarily increase safety any more than details performed by Department employees who qualify as Special Police Officers.<sup>30</sup>

Even assuming, without deciding, that the Town appropriately bargained with the Intervenor over all aspects of the order of the distribution of paid details, this fact does not mean that the Town was free to ignore its bargaining obligations with the BMEA. As the Commission cautioned in *Saugus School Committee*, *supra*, “[e]mployers who negotiate contracts with one union without the cognizance of the other affected union face conflicting obligations, exposing [themselves] to liability to one bargaining unit or the other. . . . Such conflicts must be resolved through negotiation.” 7 MLC at 1850. The identical result must attain here. The Town's main failing in this case was not its decision to negotiate with the BPPA over the detail pecking order in the first instance, but its failure to take any action to reconcile its conflicting obligations between the BPPA, the IBPO, and the BMEA. As a result, the Town must be found liable for changing the paid detail pecking order without first bargaining with the BMEA to resolution or impasse. See, *Town of Falmouth*, 20 MLC 1555 (1994), *aff'd sub nom.*, *Town of Falmouth v. Labor Relations Commission*, 42 Mass. App. Ct. 1113 (1997) (town violated Section 10(a)(5) of the Law by voluntarily agreeing to conflicting obligations with two separate police bargaining units without taking any action to reconcile its conflicting obligations with one of the police unions).

#### Conclusion

Based on the record before us, we conclude that the Town violated Sections 10(a)(5) and, derivatively, 10(a)(1) of the Law.

#### Remedy

Our goal in fashioning appropriate remedies is to place the parties in the positions in which they would have been but for the unfair labor practice. Thus, the traditional remedy for an employer's unilateral change in bargaining unit members' terms and conditions of employment is, in addition to making affected employees whole, to restore the *status quo ante* and order it maintained until the bargaining obligation has been fulfilled. *Natick School Committee*, 11 MLC 1387, 1400 (1985); *Amesbury School Committee*,

11 MLC 1049, 1058 (1984); *City of Gardner*, 10 MLC 1218, 1222 (1983). Citing *Chemical Workers v. Pittsburg Glass Co.*, *supra*, the Intervenor argues that their agreements with the Town were legally enforceable, and that to place BMEA members or anyone else above retired police officers in the pecking order would result in an infringement of this bargained-for benefit. The Intervenor contends that the Supreme Court prohibits this infringement.

We disagree that *Chemical Workers* goes so far. In this case, the Intervenor argued that they were bargaining on behalf of present bargaining unit members over the terms of future retirement benefits. In this regard, although the Supreme Court has stated that vested retirement rights may not be altered without the pensioners' consent, 404 U.S. at 181, n.20, this case does not involve vested retirement rights or the rights of the retirees or pensioners to enforce provisions of the parties' agreements. Instead, the issue before us is the remedy to be imposed when an employer makes an unlawful unilateral change that has had an impact on two bargaining units. We therefore see no reason to deviate from our traditional restoration of the *status quo* remedy.

In *Town of Falmouth*, *supra*, as here, the employer entered into conflicting agreements with two separate police bargaining units regarding the prioritization of paid police details. The patrolmen's union filed a grievance alleging that the employer had violated the terms of its collective bargaining agreement. *Id.* at 1557. That grievance went to arbitration, which resulted in an order that conflicted with the employer's earlier oral promises to the sergeant's union. *Id.* at 1557-58. The sergeant's union filed a prohibited practice charge with the Commission, alleging that the employer had unlawfully repudiated the terms of an oral agreement. *Id.* at 1555. The Commission agreed. *Id.* at 1560. In so holding, the Commission rejected the employer's argument that it was legally obligated to implement the arbitration award, because the employer had not justified its failure to fulfill its “equally binding obligation” to implement its agreement with the sergeant's union. *Id.* The Commission accordingly ordered the employer to restore the *status quo ante* by reinstating the system of assigning paid detail work in effect before the employer implemented the arbitration award. *Id.* at 1561. Under similar circumstances, we find the same *status quo ante* order to be appropriate here.

Regarding a make-whole remedy, as noted above, the Town claims that there is no evidence that BMEA bargaining unit members have suffered any economic harm as a result of its unilateral action. However, as previously discussed, this record does not permit us to draw that conclusion. Therefore, we order the Town to make whole any employee represented by the BMEA for any loss of earnings suffered as a result of the Town's unlawful change. Any uncertainty about which employees have suffered economic harm can be resolved by the parties or, if necessary, by a compliance proceeding.<sup>31</sup>

30. Notably, the Town did not raise any safety considerations as a defense to its actions here.

31. The parties may find the Commission's supplemental decision in *Town of Falmouth*, 25 MLC 24 (1998), useful in this regard.



Order

WHEREFORE, based on the foregoing, IT IS HEREBY ORDERED that the Town shall:

1. Cease and desist from:

- a. Refusing to bargain collectively in good faith with the BMEA by not providing the BMEA with prior notice and an opportunity to bargain to resolution or impasse over the changes to the order in which paid police details are distributed.
- b. In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights guaranteed under the Law.

2. Take the following affirmative action that will effectuate the purposes of the Law:

- a. Restore the *status quo ante* by reinstating the order in which the Town distributed paid police details immediately before December 18, 2003.
- b. Provide the BMEA with notice before changing the order in which the Town distributes paid police details, and upon request of the BMEA, bargain in good faith to agreement or impasse concerning any proposed changes.
- c. Make whole any employees represented by the BMEA for any loss of earnings suffered as a result of the Town's change to the order in which it distributed paid police details, plus interest at the rate specified in M.G.L. c. 231, § 61, compounded quarterly.
- d. Post immediately in all conspicuous places where members of the BMEA's bargaining unit usually congregate and where notices to these employees are usually posted, and maintain for a period of thirty (30) consecutive days thereafter, signed copies of the attached Notice to Employees; and,
- e. Notify the Division in writing within thirty (30) days of receiving this Decision and Order of the steps taken to comply with it.

SO ORDERED.

**NOTICE TO EMPLOYEES**

POSTED BY ORDER OF THE MASSACHUSETTS DIVISION OF LABOR RELATIONS—AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

The Commonwealth Employment Relations Board has determined that the Town of Burlington (Town) has violated Sections 10(a)(5) and, derivatively, 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by not providing AFSCME, Council 93, Local 1703, AFL-CIO, also known as the Burlington Municipal Employees Association (BMEA), with prior notice and an opportunity to bargain to resolution or impasse over its decision to change the order in which it distributed paid police details.

The Town posts this Notice to Employees in compliance with the Commonwealth Employment Relations Board's Order.

WE WILL NOT fail to bargain in good faith with the BMEA by not providing the BMEA with prior notice and an opportunity to bargain to resolution or impasse over the decision to change the order in which paid police details are distributed.

WE WILL NOT in any like manner, interfere with, restrain and coerce any employees in the exercise of their rights guaranteed under the Law.

WE WILL restore the *status quo ante* by reinstating the order in which paid police details were distributed immediately before December 18, 2003.

WE WILL provide the BMEA with prior notice before changing the order in which paid police details are distributed, and upon request of the BMEA, bargain in good faith to agreement or impasse concerning any proposed changes.

WE WILL make whole any employees represented by the BMEA for any loss of earnings suffered as a result of the change to the order in which paid police details are distributed, plus interest at the rate specified in M.G.L. c. 231, §61, compounded quarterly.

[signed]  
Town of Burlington

\* \* \* \* \*