

COMMONWEALTH OF MASSACHUSETTS
DIVISION OF LABOR RELATIONS
BEFORE THE COMMONWEALTH EMPLOYMENT RELATIONS BOARD

In the matter of *

*

NEWTON POLICE ASSOCIATION *

*

and *

Case No. MUP-02-3634

*

CITY OF NEWTON *

Date issued:

*

December 31, 2008

Board Members Participating:

Marjorie F. Wittner, Chair
Elizabeth Neumeier, Board Member

Appearances:

Mark Hickernell, Esq. - Representing the Newton Police Association

Joseph P. McConnell, Esq. - Representing the City of Newton

DECISION¹

Statement of the Case

1 Pursuant to 456 CMR 13.02(1) of the former Labor Relations Commission's (Commission) regulations in effect prior to November 15, 2007, this case was designated as one in which the Commission would issue a decision in the first instance. Pursuant to Chapter 145 of the Acts of 2007, the Division of Labor Relations (Division) "shall have all of the legal powers, authorities, responsibilities, duties, rights, and obligations previously conferred on the labor relations commission." The Commonwealth Employment Relations Board (Board) is the body within the Division charged with deciding adjudicatory matters. References to the Board include the Commission.

1 The City is an employer as defined in Section 1 of the Law. The Association is an
2 employee organization as defined in Section 1 of the Law and is recognized by the City
3 as the exclusive bargaining representative for patrol officers employed by the Newton
4 Police Department (Department).

5 The Department is divided into separate bureaus: Patrol, Traffic, Community
6 Services, "IT", Special Services, Detective, and Research. The separate bureaus
7 employ both patrol officers and non-police (civilian) employees. Patrol officers are
8 covered by successive collective bargaining agreements between the Association and
9 the City. Non-police clerical employees employed by the Department are covered by
10 collective bargaining agreement between the City and the American Federation of
11 State, County, and Municipal Employees (AFSCME), also an employee organization
12 under the Law. The non-police clerical employees have primary responsibility for
13 taking information by phone, entering information in computers, answering phones, and
14 some duties specific to the bureau to which they are assigned. Police officers also
15 compile data, enter information in computers, and answer phones when working inside.³

16 Newton and the Association are parties to a collective bargaining agreement
17 effective on its face from July 1, 2000 through June 30, 2003 (CBA). Under Article
18 34.01, the CBA remains in effect unless one party gives notice to the other 120 days
19 prior to the expiration date of a desire to terminate or amend specific provisions of the
20 CBA. There is no evidence that notice was given pursuant to this provision, and the
21 CBA was in effect at all times relevant to the issues in this case.

22 Article XII of the CBA, "Management Rights" states:

- 1 12.01 Except where such rights, powers, and authority, are specifically
- 2 relinquished, abridged, or limited by the provisions of this Contract, the
- 3 CITY has and will continue to retain, whether exercised or not, all of the
- 4 rights, powers, and authority heretofore had by it, and except where such
- 5 rights, powers and authority are specifically relinquished, abridged or
- 6 limited by the provisions of this Contract, it shall have the sole and
- 7 unquestioned right, responsibility and prerogative of management of the
- 8 affairs of the CITY and direction of the working forces, including but not
- 9 limited to the following:
- 10
- 11 A. To determine the care, maintenance and operation of the equipment
- 12 and property used for and on behalf of the purposes of the CITY.
- 13
- 14 B. To establish or continue policies, practices and procedures for the
- 15 conduct of the CITY business and, from time to time, to change or abolish
- 16 such policies, practices or procedures.
- 17
- 18 C. To discontinue processes or operations or to discontinue their
- 19 performance by employees.
- 20
- 21 D. To select and to determine the number and types of employees
- 22 required to perform the CITY's operations.
- 23
- 24 E. To employ, transfer, promote or demote employees, or to lay-off,
- 25 terminate or otherwise relieve employees from duty for lack of work or
- 26 other legitimate reasons when it shall be in the best interests of the CITY
- 27 or the Department.
- 28
- 29 F. To prescribe and enforce reasonable rules and regulations for the
- 30 maintenance of discipline and for the performance of work in accordance
- 31 with the requirements of the CITY, provided such rules and regulations are
- 32 made known in a reasonable manner to the employees affected by them.
- 33
- 34 G. To insure that related duties connected with Department operations,
- 35 whether enumerated in job description[s] or not, shall be performed by
- 36 employees.
- 37
- 38 H. To establish contracts or sub-contracts for municipal operations,
- 39 provided that this right shall not be used for the purpose or intention of
- 40 undermining the UNION or of discrimination against its members.
- 41

³ The term "inside" refers to the kinds of duties performed by bureau offices; "outside" refers to the work police officers perform while "on the street".

1 12.02 All work customarily performed by the employees of the bargaining
2 unit shall be continued to be so performed unless in the sole judgment of
3 the CITY, it can be done more economically or expeditiously otherwise.
4

5 12.03 The above rights, responsibilities and prerogatives are inherent in
6 the Mayor and by virtue of statutory and charter provisions are not subject
7 to review or determination in any grievance or arbitration proceeding, but
8 the manner of exercise of such rights may be subject to the Grievance
9 Procedure described in this contract.

10
11 Bianchi's Employment Background
12

13 Paul Bianchi (Bianchi) has been employed with the Department, approximately
14 23 years. He first started as a night officer. Bianchi had been working inside the Traffic
15 Bureau for approximately 14 years when the Department made the below-described
16 changes in 2002. Throughout his tenure, whether he was doing inside work or work on
17 the street, Bianchi held the title of Traffic Officer, and maintained the physical ability to
18 perform the outside duties of a Traffic Officer.⁴ Regardless of whether he worked inside
19 or outside, Bianchi also kept up with the training required of a Traffic Officer. During
20 relevant times, he was the only Traffic Officer assigned inside the Traffic Bureau.
21 When Traffic Officer Tony Penzo (Penzo) retired, Bianchi assumed Penzo's full-time
22 position inside the Traffic Bureau.⁵

⁴ Employees covered by the City/Association CBA are "patrol officers". Patrol officers are informally referred to by the bureau to which they are assigned. For example, patrol officers assigned to the Traffic Bureau are referred to as Traffic Officers. For the sake of clarity, this decision refers to the officers by bureau assignment. This finding has been clarified at the Association's request, which was supported for the record.

⁵ This finding has been modified at the Association's request, which is supported by the record evidence.

1 2002 Traffic Bureau Changes

2 Police Chief Jose Cordero (Cordero) was appointed in February of 2002. In the
3 spring of that year, he began evaluating personnel, job descriptions, and assignments in
4 all bureaus in the Department, including the Traffic Bureau. Chief Cordero in
5 association with Superintendent Robert McDonald (McDonald) decided that changes
6 needed to be made in the Community Service Bureau and the Traffic Bureau. The
7 changes resulted in the transfer of one civilian clerk, Debbie Gentile (Gentile), from the
8 Community Services Bureau to the Traffic Bureau.⁶ After the transfer, clerical work
9 formerly done by Gentile for the Community Service Bureau was divided among the
10 Police Officers in that Bureau. After the transfer, Gentile did clerical work in the Traffic
11 Bureau that, in part, had been done by Bianchi. The Parking Control Officers, who had
12 been part of the Traffic Bureau since 1999, continued to do the same work following the
13 transfer.⁷ Their paper work was handled in the Traffic Bureau both before and after the
14 transfer. After the transfer, the Traffic Bureau did their performance evaluations.
15 At the time these changes were made, Bianchi was employed inside the Traffic Bureau,
16 and not on the street. The functions performed by personnel inside the Traffic Bureau
17 are listed⁸ as:

- 18 • Enter all moving citations on sheet by each Officer.

⁶ This finding has been modified at the Association's request, which is supported by the record.

⁷ The Board has added this finding about the date the Parking Control Officers were assigned to the Traffic Bureau for the sake of clarity.

⁸ The list is an attachment to a memorandum from Captain Alexander Sbordone to Chief Jose M. Cordero, dated August 16, 2002 (Exhibit CP-1).

- 1 • Assign (according to complaint streets and areas) and schedule all of the
2 Parking Control Officers.
3
- 4 • Monitor the Parking Control Officers productivity.
5
- 6 • Do the daily attendance for the Parking Control Officers and coordinate
7 vacation and sick time etc.
8
- 9 • Separate parking tickets.
10
- 11 • Count parking tickets and send to Data Processing.
12
- 13 • Type out sheets on total citations and parking tickets for Chief, Patrol
14 Captain and Community Services.
15
- 16 • Enter parking tickets in computer.
17
- 18 • Enter Civil and Criminal moving citations in computer.
19
- 20 • Process Civil and Criminal citations to Registry and Court.
21
- 22 • Enter all moving citations (warnings) in computer.
23
- 24 • Run a computer check for any mistakes on all moving citations entered in
25 computer each day.
26
- 27 • Enter citation books signed out by Officer in computer.
28
- 29 • Run a computer check in total citation field daily for bad citations entered
30 (meaning not enough numbers or letters in field to print an audit sheet).
- 31 • Print audit sheets from computer.
32
- 33 • Stamp and cross-reference audit sheets with signed out books to make
34 sure books are complete.
- 35 • Separate all moving citations.
36
- 37 • Order moving and parking citation books.
38
- Investigate all pending hit and run accident reports.
- Process all insurance requests for accident reports.
- Make copies of reports and mail to insurance companies.

- 1 • Record in book all checks received from insurance companies.
- 2 • Process all taxi applications including doing license and background
3 checks.
- 4
- 5 • Type taxi cards and file when approved.
- 6 • Check files for expirations on all drivers.
- 7 • Investigate all complaints on taxi drivers.
- 8 • Investigate all complaints on motor vehicle operators.
- 9 • Record all checks and money on sheets for Chief's Office and City Hall.
- 10 • Inspect all [taxis, private autos and limos]. Prepare reports for the Public
11 Safety Transportation Committee.
- 12
- 13 • Order and issue all taxi medallions.
- 14 • Order all resident and municipal parking permits.
- 15 • Process and file all parking permit applications.
- 16 • Coordinate all City ordinances with City Clerks Office pertaining to Traffic
17 and Police Duties.
- 18
- 19 • Assist citizens at the counter and on the phone.
- 20 • Check with Chief's Office to confirm the status of the Public Safety
21 Account before ordering parking permits, taxi medallions, mouth pieces for
22 intoxilyzer, test cards etc.
- 23

24 Most of the listed activities do not require training as a patrol officer.

25 With respect to the above-listed functions, Bianchi generally did the clerical work
26 concerning moving violations, taxi licensing, accident investigation, and medallions, and
27 the civilian clerical employees did work related to parking violations. Other duties, such
28 as assisting citizens at the counter and on the phone, were shared. Although Bianchi
29 primarily monitored Parking Control Officers' productivity, entered civil and criminal
30 moving citations in the computer, and typed taxi cards and filed them after approval,
31

1 civilian personnel performed these duties when he was not present in the office.
2 Bianchi and civilian personnel both processed all insurance requests for accident
3 reports, made copies of reports and mailed them to insurance companies, recorded all
4 checks received from insurance companies, recorded all checks and money on sheets
5 for the Chief's Office and City Hall, and processed and filed all parking permit
6 applications.

7 Traffic Officers assigned "outside" are sent to areas of Newton where there are
8 high levels of traffic violations, accident rates, citizen complaints or other enforcement
9 issues. In general, they are responsible for investigating motor vehicle accidents,
10 issuing citations for ordinance violations, taxi medallions, and ordinance changes
11 related to traffic. Their specific duties include selective enforcement of motor vehicle
12 violations arising from citizen complaints and traffic accident analysis investigations;
13 investigation of fatal accident, other serious motor vehicle accidents, and hit and run
14 accidents when the alleged violator resides outside the City of Newton; photographing
15 serious accident scenes, serious crimes and accidents involving city vehicles and
16 incidents of injuries on city property; assisting in traffic control at special events; and
17 generally being alert to traffic safety condition which may endanger or inconvenience
18 the public and report such conditions to the Traffic Bureau Commander.

19 About early September 2002, Captain Alexander Sbordone (Sbordone) told
20 Bianchi that Cordero had decided that he (Bianchi) would be assigned to the street in
21 order to have more officers there. A short time after that, John J. Babcock (Babcock),
22 Association President, raised the transfer issue with Superintendent Robert McDonald.

1 (McDonald), and asked that it be placed on the agenda for a meeting to be held with
2 Cordero about a number of issues the Association had with the Department.⁹

3 In mid-September, 2002, Cordero, McDonald, and Babcock, with Bianchi in
4 attendance, met to address a number of different issues. Babcock raised Bianchi's
5 assignment to the outside at the meeting. Cordero, in response, said that the decision
6 had already been made, and "that was it".¹⁰

7 As a result, Bianchi's assignment to outside work for the Traffic Bureau remained
8 in place. However, he continued to perform some functions inside the Traffic Bureau.
9 As a Traffic Officer on the street, Bianchi had the functions listed above. In addition, he
10 continued to perform on a daily basis the duties he had while inside: inspection of all
11 taxis, private automobiles, and limousines; preparation of reports for the Public Safety
12 Transportation Committee; and ordering and issuing all taxi medallions. He no longer
13 investigates all reports of hit and run accidents. The remaining duties in the Traffic
14 Bureau are performed by Gentle and another civilian part-time employee.

15 Generally, Traffic Officers work four days on, and two days off, and begin their
16 shift at 7:30 a.m. or 3:30 p.m. While he was inside, Bianchi had worked a five days on

⁹ McDonald did not recall that Babcock asked to make the transfer issue an agenda item for the meeting with Cordero. However, Babcock testified clearly and forthrightly that he had made that request. It is not disputed that Bianchi's transfer was a subject of discussion at the meeting. The Hearing Officer therefore credited Babcock's testimony.

¹⁰ McDonald testified that the issue of Bianchi's transfer came up obliquely, when Bianchi mentioned that changes being discussed would affect him. Babcock testified that the Bianchi transfer was specifically discussed, that Cordero stated that the decision to put Bianchi on the street had been made, and "that was it". And that, when Babcock stated he would consult Association counsel and file a charge with the Commission, Cordero said, "do what you have to do." Because of Babcock's more detailed recollection of the conversation, the Hearing Officer credited his version of events at the meeting.

1 two days off schedule and began his shift at 7:00 a.m. At the time he was assigned to
2 outside duty, Bianchi consulted with Babcock about his work schedule. Following that
3 conversation, Bianchi initially asked Sbordone if he could work 6:30 a.m. to 2:30 p.m.
4 That request was denied. He then asked that he retain his inside schedule. That
5 request was granted. As a result, his outside schedule is five days on and two days off,
6 beginning his shift at 7:00 a.m. Some time later, starting the day shift at 7:00 a.m. and
7 working five days on and two days off became regular for other officers in the Traffic
8 Bureau, as well as Bianchi.

9 When Bianchi was inside, he had opportunities to work and receive
10 compensation for overtime. When available, he would stay about 2 hours following the
11 end of his shift. Bianchi "is not sure", but thinks that since his assignment to the outside
12 he has less than half the overtime opportunities available to him while working on the
13 inside. He no longer has overtime opportunities for "Cops and Kids", but does get
14 "safety seat belt" overtime. He also does fill in for the Safety Officer when she is not
15 available. Bianchi worked 139 overtime hours in calendar year 2002, and 139 hours
16 from January through October 25, 2003.¹¹

¹¹ Newton Exhibit R-1 is a computer printout showing the overtime Bianchi worked in calendar year 2002 and in January through October 23, 2003. Superintendent McDonald testified that this record was maintained in the regular course of business, and was the type of printout he would expect to see in response to an inquiry concerning Bianchi's overtime for the years in question. After reviewing these records for the two years, Bianchi testified that the descriptions in the "Justification" column of each printout shows of the kinds of overtime he worked. He stated, however, that the line item on page 2 of the 2003 printout of 5.0 hours for "B & E Squad" is improper, as he never worked B & E Squad. Based upon this testimony, the Hearing Officer found that the overtime printouts on R-1 for 2002 and 2003 accurately report overtime that Bianchi worked for Newton, except for the B & E Squad line item.

OpinionUnilateral Change and Calculated Displacement of Bargaining Unit Work

1
2
3 The issue to be decided by the Board in this case is whether the City unlawfully
4 transferred bargaining unit work outside of the bargaining unit. The City does not
5 dispute that it transferred certain duties performed by Bianchi inside the Traffic Bureau
6 to non-unit personnel without bargaining with the Association but argues that the work
7 could lawfully be transferred to non-unit personnel because: 1) the work had been
8 previously shared between unit members and non-unit personnel; and 2) the
9 management rights clause contained within the parties' CBA empowered the City with
10 the exclusive authority to do so without bargaining with the Association.

11 A public employer violates Section 10(a)(5) and, derivatively, Section 10(a)(1) of
12 the Law when it unilaterally changes an existing condition of employment or implements
13 a new condition of employment involving a mandatory subject of bargaining without first
14 giving its employees' exclusive collective bargaining representative notice and an
15 opportunity to bargain to resolution or impasse. Commonwealth of Massachusetts v.
16 Labor Relations Commission, 404 Mass. 124, 127 (1989); School Committee of Newton
17 v. Labor Relations Commission, 388 Mass. 557, 572 (1983); Town of Andover, 28 MLC
18 264, 268 (2002); City of Newton, 27 MLC 74, 81 (2000). The obligation to bargain
19 extends to working conditions established through custom and practice as well as to
20 working conditions contained in a collective bargaining agreement. Town of Andover, 28
21 MLC at 268 (citing City of Gloucester, 26 MLC 128, 129 (2000)); Town of Wilmington, 9
22 MLC 1694, 1699 (1983). To establish a unilateral change violation, the charging party

1 must establish the following: (1) the employer changed an existing practice or instituted
2 a new one; (2) the change affected a mandatory subject of bargaining; and (3) the
3 change was implemented without prior notice or an opportunity to bargain. Town of
4 Andover, 28 MLC at 268 (citing Commonwealth of Massachusetts, 27 MLC 70, 72
5 (2000); City of Boston, 26 MLC 177, 181 (2000); Massachusetts Port Authority, 26 MLC
6 100, 101 (2000).

7 Where job duties have traditionally been shared by bargaining unit members and
8 non-unit employees, the Board has held that the work in question will not be recognized
9 as bargaining unit work. City of Quincy/Quincy City Hospital, 15 MLC 1239 (1988). In
10 shared-work situations, bargaining must occur where there is a “calculated
11 displacement” of bargaining unit work, City of Boston, 10 MLC 1539,1541 (1984), or
12 where the employer unilaterally changed a previously existing pattern of shared work.
13 City of Quincy, 15 MLC at 1241. The Board may also examine whether non-unit
14 employees subsequently constitute a greater percentage of the work force performing
15 the disputed duties than they had previously. City of New Bedford, 15 MLC 1732, 1737
16 (1989). In determining whether there has been a calculated displacement of unit work,
17 the Board “considers whether unit members have traditionally performed an
18 ascertainable percentage of the work and whether the employer has taken action that
19 results in a significant reduction in that percentage, with a corresponding increase in the
20 percentage of the work performed by non-unit personnel.” Town of Bridgewater, 25
21 MLC 103, 104 (1998) (citing City of Somerville, 23 MLC 256, 259 (1997); City of Boston,
22 6 MLC 1117, 1126 (1979)).

23 Here, the uncontroverted evidence demonstrates that, in the spring of 2002,

1 Chief Cordero began evaluating personnel, job descriptions, and assignments in all
2 bureaus in the Department, including the Traffic Bureau. Thereafter, Cordero, in
3 association with McDonald, determined that changes needed to be made in the
4 Community Services Bureau and the Traffic Bureau. The changes resulted in the
5 transfer of Gentile, a non-unit clerical employee, from the Community Services Bureau
6 to the Traffic Bureau. After the transfer, Gentile performed clerical work in the Traffic
7 Bureau that, in part, had been done by Bianchi. Then, in September 2002, Cordero
8 decided that more Traffic Officers were needed on the street and assigned Bianchi
9 "outside" on the street to help fulfill that need. Bianchi continued to perform some
10 functions "inside" the Traffic Bureau, as well: inspecting all taxis, private automobiles
11 and limousines; preparing of reports for the Public Safety Transportation Committee;
12 and ordering and issuing all taxi medallions.

13 The record reflects that the City has employed non-unit civilian personnel to
14 perform administrative duties within the Department and that unit members sometimes
15 performed these administrative duties attendant to their police work. While "inside" the
16 Traffic Bureau, Bianchi generally did the clerical work concerning moving violations, taxi
17 licensing, accident investigation, and medallions, and the civilian clerical employees did
18 work related to parking violations. Other duties, such as assisting citizens at the counter
19 and on the phone, were shared. Although Bianchi primarily monitored Parking Control
20 Officers' productivity, entered civil and criminal moving citations in the computer, and
21 typed taxi cards and filed them after approval, civilian personnel performed these duties
22 when he was not present in the office. Bianchi and civilian personnel both processed all
23 insurance requests for accident reports, made copies of reports and mailed them to

1 insurance companies, recorded all checks received from insurance companies,
2 recorded all checks and money on sheets for the Chief's Office and City Hall, and
3 processed and filed all parking permit applications. Following Bianchi's reassignment to
4 the "outside", Bianchi no longer investigated reports of hit and run accidents, and the
5 remaining duties inside the Traffic Bureau were performed by non-unit civilian
6 employees.

7 Although some tasks were more often performed by Bianchi and some tasks
8 were more often performed by non-unit clerical staff inside the Traffic Bureau, the
9 clerical nature of the majority of the work Bianchi performed when he worked "inside"
10 was shared with non-unit clerical staff. When Bianchi was transferred to the "outside," a
11 greater percentage of clerical duties were then performed by non-unit civilian personnel
12 inside the Traffic Bureau. Accordingly, there was a calculated displacement of
13 bargaining unit work to non-unit civilian personnel following Cordero's decision to
14 transfer Bianchi "outside."

15 Opportunity To Bargain

16 The Association argues that the City should have provided the Association with
17 notice and an opportunity to bargain prior to reassigning Bianchi to the "outside" and
18 transferring certain "inside" duties to non-unit personnel. The City defends its actions by
19 arguing that the Association had waived its right to bargain over these matters by virtue
20 of the management rights clause of the parties' CBA, which explicitly provides that the
21 City has the "sole and unquestioned right to transfer work outside of the unit if "in the
22 sole judgment of the CITY, it can be done more economically or expeditiously
23 otherwise." (emphasis in original). Further, the City argues that the Association failed to

1 adequately make a demand for bargaining over the subject of Bianchi's partial
2 reassignment of duties. In rebuttal to the City's argument, the Association maintains
3 that, even if the City were not obligated to bargain over its decision to transfer
4 bargaining unit work to non-unit personnel, the City should have bargained over the
5 impacts of that decision.

6 Contrary to the City's argument, the Hearing Officer noted in his recommended
7 findings that he credited the testimony of Babcock over McDonald, finding that Babcock
8 had asked for the Bianchi transfer issue to be included on the agenda for the
9 Association's meeting with Cordero. See n. 6 & 7, supra. The Board will not disturb a
10 hearing officer's credibility determination absent a clear preponderance of all relevant
11 evidence that the determination is incorrect. City of Somerville, 23, MLC 11, 12 (1996).
12 If the reason for the hearing officer's determination is clearly stated and the evidence
13 does not require a contrary finding, we will not disturb the determination. Vinal v.
14 Contributory Retirement Appeal Board, 13 Mass. App. Ct. 85 (1982); Greater New
15 Bedford Infant Toddler Center and District 65. United Auto Workers, 13 MLC 1620,
16 1622 (1987).

17 Here, the record reflects that the Association, through Babcock, raised the issues
18 of Bianchi's reassignment and transfer of duties with McDonald and requested that the
19 parties discuss the issues at a meeting with Cordero. During the Association's meeting
20 with Cordero, Cordero indicated that his decision had already been made regarding
21 Bianchi's reassignment, and "that was it." The Hearing Officer explained that he did not
22 credit McDonald's testimony because he found that Babcock's recollections were more
23 persuasive. There is no evidence in the record that requires a contrary finding and thus

1 we will not disturb the Hearing Officer's credibility determination. Based on the
2 foregoing, we find that the Association made an adequate demand to bargain over the
3 transfer of Bianchi's duties, but the City refused to negotiate the issue.

4 Management Rights Clause

5 Notwithstanding the Association having demanded to bargain over the decision
6 to transfer Bianchi's duties, the City is correct in asserting that the management rights
7 clause contained in the CBA gave the City the right to reassign Bianchi to the "outside"
8 and transfer certain of his "inside" duties to non-unit personnel without first having to
9 bargain to resolution or impasse over that decision. Where an employer raises the
10 affirmative defense of contract waiver, it must show that the union knowingly and
11 unmistakably waived its right. Town of Andover, 28 MLC at 270 (citing Town of
12 Mansfield, 25 MLC 14, 15 (1998)). The employee bears the burden of proving that the
13 contract clearly, unequivocally and specifically authorizes its actions. Town of Andover,
14 28 MLC at 270 (citing City of Boston v. Labor Relations Commission, 48 Mass. App. Ct.
15 169, 174 (1999)); see School Committee of Newton v. Labor Relations Commission,
16 388 Mass. 557, 569 (1983) (a waiver must be shown clearly, unmistakably, and
17 unequivocally and cannot be found on the basis of a broad, but general, management
18 rights clause). Where the parties' agreement is silent on an issue, it must be shown that
19 the matter allegedly waived was fully explored and consciously yielded. Commonwealth
20 of Massachusetts, 5 MLC 1097, 1099 (1978) (citing City of Everett, 2 MLC 1471, 1475
21 (1976)); Press Co., Inc., 121 NLRB 976, 42 LRRM 1493 (1958). Where contract
22 language exists but is ambiguous, bargaining history or the manner in which the parties
23 have implemented the disputed contract provision are helpful. Commonwealth of

1 Massachusetts, 5 MLC 1097, 1099 (1978) (citing City of Boston, 3 MLC 1450, 1461,
2 n.13 (1977)). However, where contract language contained in a management rights
3 clause is not ambiguous, it is necessary only to examine the specificity of the clause
4 and to determine whether the disputed action is within its scope. Commonwealth of
5 Massachusetts, 5 MLC 1097, 1099 (1978); see Ador Corp., 150 NLRB 1658, 58 LRRM
6 1280(1965).

7 Here, the management rights clause in the CBA is more than a broad or general
8 clause. The contract is not silent with respect to the City's authority to have bargaining
9 unit work performed outside the bargaining unit.

10 Section 12.02 of the management rights clause clearly identifies the work subject
11 to and within the scope of that Section as that work done by members of the bargaining
12 unit. Section 12.02 unequivocally states that such work shall continue to be performed
13 by the bargaining unit unless in the *sole judgment* of the City it can be done more
14 economically or expeditiously otherwise. (Emphasis added.) Section 12.02 thus
15 specifically permits the City to exercise its sole judgment, as Chief Cordero did in
16 September 2002 when he determined that more Traffic officers were needed "outside"
17 and reassigned Bianchi and some of the clerical duties he previously performed to the
18 non-unit clerical employees.

19 The Association contends that the language of Section 12.02 is ambiguous and
20 does not explicitly deal with the transfer of bargaining unit work to non-unit civilian
21 personnel. That language, however, does explicitly permit the City to have the work
22 done "otherwise" than by the bargaining unit.

23 Further, the Association contends that the City must present evidence to

1 establish that this transfer of work actually permitted the City to conduct its affairs more
2 economically or expeditiously. That is, in the Association's view, the City must justify its
3 judgment. The Association has not pointed to any ambiguity in the language, explained
4 by bargaining history, to indicate that the parties intended to apply the words "sole
5 judgment" in that manner. To the contrary, the parties have agreed in this CBA
6 provision that the City may exercise its "sole judgment." In sum, the management rights
7 clause, as negotiated by the Association and the City, grants to the City the exclusive
8 right to determine the number and types of employees required to perform the City's
9 operations in an economical and expeditious manner without first having to bargain to
10 resolution or impasse. Accordingly, the City did not violate Sections 10(a)(5) or (1) of
11 the Law when it refused to bargain over its decision to transfer Bianchi's duties to non-
12 unit personnel.

13 Impact Bargaining

14 The Association next offers the argument that, even if the Board finds that
15 the City was not obligated to bargain over the decision to transfer Bianchi's
16 duties, the City was still obligated—but failed—to bargain over the impacts of that
17 decision. We agree. Although Article 12.02 permitted the City to transfer certain
18 duties outside of the bargaining unit without bargaining first with the Union over
19 the decision to do so, that clause does not eliminate the City's duty to bargain the
20 impacts of that decision, which had an adverse and calculable impact on the
21 bargaining unit, as described above. See City of Worcester v. Labor Relations
22 Commission, 438 Mass. 177, 185 (2002); Burlington v. Labor Relations
23 Commission, 390 Mass.157, 164-167 (1983); School Committee of Newton v.

1 Labor Relations Commission, 557, 564 (1983). The impacts in this case also
2 include loss of "inside" work in the Traffic Department, possible loss of overtime
3 opportunities and an increase in the workload of police officers in the Community
4 Services Bureau.

5 Conclusion

6 For the reasons set forth above, we conclude that the City violated Section
7 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by failing to bargain over the
8 impacts of its decision to transfer inside work in the Traffic Bureau to a civilian
9 employee, who is not a bargaining unit member.

10 Remedy

11 The Union requests an order to restore the status quo ante, pending bargaining
12 for the bargaining unit members affected by the City's decision to transfer inside work in
13 the Traffic Bureau to non-bargaining unit employees. In cases where an employer's
14 refusal to negotiate is limited to the impacts of a managerial decision, the Board
15 traditionally orders restoration of the status quo ante applicable to the affected
16 mandatory subjects rather than to the decision itself. Town of Plymouth, 26 MLC 220,
17 224 (2000) citing Commonwealth of Massachusetts, 26 MLC 118, 121-122 (2000)
18 further citing, Town of Dennis, 12 MLC 1027, 1033 (1985). This remedy attempts to
19 place the parties in the position they would have been in absent the employer's unlawful
20 conduct. Town of Plymouth, 26 MLC at 224, citing City of Malden, 20 MLC 1400, 1406-
21 1407 (1994). Accordingly, we order the City to bargain with the Association over the
22 impacts of its decision to transfer inside work in the Traffic Bureau to non-bargaining
23 and to make whole any bargaining member who lost wages or other benefits as a result

1 of the transfer of bargaining unit work.

2 Order

3 WHEREFORE, based on the foregoing IT IS HEREBY ORDERED that the City of
4 Newton shall:

5 1. Cease and desist from:

6 a. Refusing to bargain collectively in good faith with the Association by not
7 providing the Association with prior notice and an opportunity to bargain to
8 resolution or impasse over the impacts of its decision to transfer
9 bargaining unit work to non-bargaining unit employees.

10 b. In any like manner, interfering with, restraining and coercing its employees
11 in any right guaranteed under the Law.

12 2. Take the following affirmative action which will effectuate the purposes of the
13 Law:

14 a. Upon request, bargain in good faith to resolution or impasse with the
15 Association over the impacts of its decision to transfer inside work in the
16 Traffic Department to non-bargaining unit employees.

17 b. Make whole any bargaining unit members who lost wages or other
18 benefits as a result of the transfer of inside work in the Traffic Department
19 to non-bargaining unit employees, plus interest on any sums owing at the
20 rate specific in M.G.L. c. 231, §6I, compounded quarterly.

21 c. Post in conspicuous places where employees represented by the
22 Association usually congregate, or where notices are usually posted, and
23 display for a period of thirty (30) days thereafter, the attached Notice to
24 Employees.

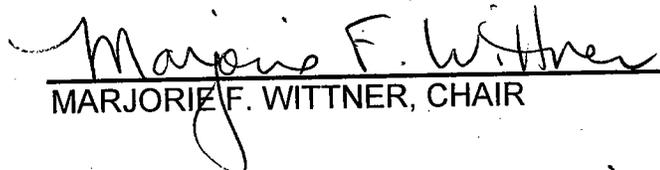
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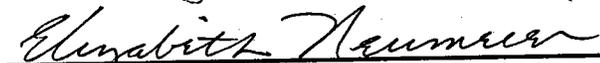
d. Notify the Division in writing within thirty (30) days of service of this Order of the steps taken to comply herewith.

SO ORDERED

COMMONWEALTH OF MASSACHUSETTS
DIVISION OF LABOR RELATIONS

COMMONWEALTH EMPLOYMENT
RELATIONS BOARD


MARJORIE F. WITTNER, CHAIR


ELIZABETH NEUMEIER, BOARD MEMBER

APPEAL RIGHTS

Pursuant to M.G.L. c.150E, Section 11, decisions of the Commonwealth Employment Relations Board are appealable to the Appeals Court of the Commonwealth of Massachusetts. To claim such an appeal, the appealing party must file a notice of appeal with the Commonwealth Employment Relations Board within thirty (30) days of receipt of this decision. No Notice of Appeal need be filed with the Appeals Court.

THE COMMONWEALTH OF MASSACHUSETTS
DIVISION OF LABOR RELATIONS



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 City of Newton (City) has violated Sections 10(a)(5) and, derivatively, 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by not providing the Newton Police Association (Association) with prior notice and an opportunity to bargain to resolution or impasse over the impacts of a decision to transfer bargaining unit work to non-unit employees.

WE WILL NOT transfer bargaining unit work to non-bargaining unit employees without first giving the Association prior notice and an opportunity to bargain to resolution or impasse about the impacts of that decision

WE WILL NOT refuse to bargain in good faith with the Association over the impacts of a decision to transfer bargaining unit work in the Traffic Department unit work to non-bargaining unit personnel.

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

WE WILL, upon request, bargain in good faith to resolution or impasse with the Association over the impacts of a decision to transfer bargaining unit work in the Traffic Department to non-bargaining unit employees.

WE WILL make whole any employees represented by the Association for any loss of earnings suffered as of the decision to transfer bargaining unit work in the Traffic Department to non bargaining unit employees, plus interest at the rate specified in M.G.L. c. 231, §6I, compounded quarterly.

City of Newton