

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

In the Matter of *
*
CITY OF BOSTON * Case No. MUP-10-5895
*
and * Date Issued: August 8, 2014
*
BOSTON POLICE SUPERIOR OFFICERS *
FEDERATION *
*

Board Members Participating:

Marjorie F. Wittner, Chair
Elizabeth Neumeier, Board Member
Harris Freeman, Board Member

Appearances:

Joseph P. McConnell, Esq. - Representing the City of Boston
Leah Marie Barrault, Esq. - Representing the Boston Police Superior
Ian Russell, Esq. Officers Federation

DECISION ON APPEAL OF HEARING OFFICER'S DECISION

1 Summary

2 In May 2010, the City of Boston (City) eliminated the position of Street Sweeping
3 Initiative (SSI) supervisor in the Boston Police Department (Department) and
4 discontinued its practice of assigning members of the Boston Police Superior Officers
5 Federation (Federation or Union) bargaining unit to this position on a regularly-
6 scheduled overtime basis during the SSI season. The Federation filed a charge with
7 the Department of Labor Relations (DLR) alleging that the City's actions repudiated an
8 oral agreement and violated its bargaining obligation under M.G.L. c. 150E (the Law).

1 The DLR investigated the charge and issued a three-count complaint. Following a
2 hearing, a DLR hearing officer held that the City's decisions did not repudiate a May
3 2007 oral settlement agreement establishing this position because the agreement
4 impermissibly infringed on the Boston Police Commissioner's non-delegable authority to
5 organize and assign officers within the Department under Chapter 291, §§10 and 11 of
6 the Acts of 1906, as amended by Chapter 322 of the Acts of 1962. She also held that
7 the City did not have to bargain over its decision to eliminate the SSI supervisor and the
8 overtime assignment associated with that position, because this was a level of services
9 decision that fell within the City's exclusive managerial prerogative. The Hearing Officer
10 further held, however, that the City had unlawfully failed to bargain over the *impacts* of
11 these decisions. Based on the impacts-only bargaining obligation that she found, the
12 Hearing Officer declined to order a full retroactive make-whole remedy, instead,
13 ordering the City to restore the economic equivalent of the status quo ante during the
14 period of impact bargaining. Both parties filed timely-cross appeals from this decision
15 with the Commonwealth Employment Relations Board (Board). For the reasons set
16 forth below, we affirm the Hearing Officer's decision and remedy in its entirety.

17 FACTS

18 Neither party challenges the Hearing Officer's findings, which were based on the
19 parties' stipulations, admissions and the hearing record as a whole. After a thorough
20 review of the record, we adopt the Hearing Officer's findings and summarize them
21 briefly below. Further reference may be made to the facts set out in the Hearing
22 Officer's decision, reported at 40 MLC 126 (October 29, 2013) and attached hereto.

1 The Union represents those uniformed personnel in the Department who hold the
2 rank of sergeant, lieutenant and captain. This case concerns staffing in the
3 Department's Operations Division, which is responsible for managing all incoming
4 telephone calls, including 911 calls, internal communications and dispatch. Pursuant to
5 a 2005 settlement agreement, the City assigned three supervisors who are members of
6 the Union's bargaining unit to each shift in the Operations Division (for a total of nine
7 daily supervisors). The Operations Division includes a telephone line, referred to as the
8 "Tow Line," that is staffed by civilian call takers and supervised by bargaining unit
9 supervisors. Before 2007, two bargaining unit supervisors supervised each shift in the
10 main room, which handled dispatch, and one supervisor oversaw the civilian call takers
11 who worked in backroom. The backroom handled calls from the various Operations
12 subdivisions, including the Tow Unit.

13 In April 2007, the City launched the SSI, which covered City-wide street
14 sweeping, on the day shift only (8:00 a.m. to 4:00 p.m.), from Monday through Friday,
15 between April 1st and November 30th, annually. The City established four additional
16 telephone lines to take SSI towing-related calls and assigned four additional civilian call
17 takers to staff these tow lines. The City assigned the bargaining unit members already
18 assigned to supervisory duties in the Operations Division to supervise them.

19 In May 2007, the Union filed an unfair labor practice charge regarding the staffing
20 of the SSI tow lines (Case No. MUP-07-4942). After the charge was filed, Union Vice
21 President Mark Parolin (Parolin) and Commander of Operations Kenneth Fong (Fong)
22 discussed settling the charge and, on May 22, 2007, the parties reached an oral
23 agreement. The City agreed to hire another bargaining unit SSI supervisor on an

1 overtime basis to supervise the four SSI civilian call takers and the SSI tow lines on the
2 day shift during SSI season if the Union withdrew Case No. MUP-07-4942. The Union
3 withdrew the charge and Fong instructed a captain to hire an SSI supervisor on
4 overtime to cover the SSI day shift beginning June 1, 2007. For three consecutive
5 years between June 1, 2007 and May 1, 2010, the SSI supervisor worked regular
6 overtime day shifts during the SSI season and oversaw the four civilian call-takers who
7 answered the SSI tow lines.

8 On May 1, 2010, Police Chief Daniel Linskey (Chief Linskey) eliminated the SSI
9 supervisor position and assigned the regularly-scheduled backroom supervisors to
10 assume the SSI supervisor's duties and responsibilities, including supervising the four
11 civilian call takers and supervising the SSI Tow Line, in addition to their other duties.
12 On May 20, 2010, Linskey met with Operations Division supervisors to discuss why he
13 eliminated the position and invited them to discuss ways to restore the position. The
14 Union filed this charge instead.

15 Opinion¹

16 The parties appealed almost all aspects of the Hearing Officer's decision. We
17 address their respective arguments below.

18 Repudiation

19 The Hearing Officer concluded that the City had not repudiated the May 2007
20 oral agreement. Relying on City of Boston v. Boston Police Superior Officers
21 Federation, 466 Mass. 210 (2013), the Hearing Officer found that the terms of the
22 settlement agreement were unenforceable because they infringed on the Police

¹ The Board's jurisdiction is not contested.

1 Commissioner's non-delegable statutory authority pursuant to Chapter 291, §§10 and
2 11 of the Acts of 1906, as amended by Chapter 322 of the Acts of 1962, to make
3 assignments. In particular, the Hearing Officer held that this statute prohibited Foley
4 from delegating away the right to assign the SSI supervisor

5 On appeal, the Union claims that the 2007 agreement did not implicate the
6 Commissioner's right to assign because it did not require that any specific officer be
7 assigned to the SSI supervisor role. Rather, the agreement merely required the
8 Department to offer guaranteed overtime hours to the Federation during the SSI
9 season, the elimination of which was a mandatory subject of bargaining. The Union
10 therefore argues that the Hearing Officer erred by not enforcing the agreement.

11 We reject this argument because it mischaracterizes the City's decision here as
12 one relating to overtime only and in so doing ignores the Hearing Officer's undisputed
13 finding that the parties agreed in May 2007 that the City would "assign" or "hire" an
14 *additional* Operations Division supervisor, albeit on a regular overtime basis. 40 MLC at
15 129. Chief Linskey's decision to eliminate this position necessarily resulted in one less
16 supervisor assigned to the Operations Division. We agree with the Hearing Officer that
17 enforcing the parties' agreement to hire an SSI supervisor on overtime would therefore
18 interfere with the Police Commissioner's non-delegable authority under Chapter 291,
19 §§10 and 11 of the Acts of 1906, as amended by Chapter 322 of the Acts of 1962,, to
20 "appoint, establish and organize the [Boston] police department," and to "make all
21 needful rules and regulations for the efficiency of said policy." St. 1962, c. 322, §1. As
22 the Court stated in City of Boston, "an assignment or deployment cannot be irrevocable

1 or managers would have no ability to react to changing conditions in arranging the
2 police force into necessary bureaus, units and divisions." 466 Mass. at 215-216.

3 The fact that the decision to eliminate the SSI supervisor also resulted in the
4 elimination of regularly scheduled overtime does not alter our conclusion. Because the
5 eliminated overtime here resulted from the decision to eliminate the SSI title, this case is
6 distinguishable from City of Peabody, 9 MLC 1447, MUP-4750, MUP-4767 (October 15,
7 1982) where the Board found that the City unlawfully failed to bargain over its decision
8 to cease its practice of paying officers overtime for performing their regularly scheduled
9 duties, but did not otherwise eliminate titles or change staffing levels within the
10 department. Id. at 1450 – 1451. In this case, however, the City decided to eliminate the
11 additional SSI supervisor position entirely and thereby stop assigning a bargaining unit
12 member to that position on a regularly-scheduled overtime basis. Under City of Boston,
13 any agreement that prohibited the Department from eliminating the SSI supervisor
14 assignment is unenforceable regardless of how the eliminated title was compensated.

15 Level of Services

16 We reach a similar conclusion with respect to the Union's arguments contending
17 that the decision to eliminate the SSI Supervisor title was not a level of services
18 decision insulated from the statutory obligation to bargain. Citing Town of Dennis, 12
19 MLC 1027, 1030, n. 4, MUP-5247 (June 21, 1985), the Union argues that the City's
20 decision did not change the level of SSI services provided to the citizens because there
21 was no reduction in the number of superior officers working for the City or a change in
22 any particular assignment. Once again, however, this argument ignores the undisputed
23 fact that the decision resulted in one less bargaining unit position. Moreover, after Chief

1 Linskey eliminated the SSI supervisor title, he assigned its duties to the remaining
2 Operations supervisors. Thus, the City's decision to eliminate the SSI supervisor title
3 but to continue to have the services performed by existing bargaining unit Operations
4 Division supervisors is, in essence, a decision to reorganize the Department over which
5 an employer cannot be required to bargain. Commonwealth of Massachusetts, 228
6 MLC 351, 362, SUP-4457 (May 17, 2002) (citing Commonwealth of Massachusetts, 26
7 MLC 228, 229, SUP-4288 (June 12, 2000)) (decision to reorganize or restructure a
8 department and reduce the level of services provided lies within the governmental
9 entity's exclusive managerial prerogative).

10 Impact Bargaining

11 The loss of the overtime compensation associated with the SSI title is not without
12 legal significance, however. In cases where a managerial decision results in the
13 elimination of scheduled overtime, the Board treats the loss of overtime as an impact of
14 the managerial decision that must be bargained. Town of Tewksbury, 19 MLC 1189,
15 MUP-6923 (August 14, 1992) (Town's decision to appoint provisional lieutenant to
16 perform work of lieutenant absent on a medical leave not subject to bargaining, but
17 impacts of decision on scheduled overtime opportunities of bargaining unit members
18 was subject to bargaining).

19 On review, the City claims that once it made its non-delegable decision to
20 eliminate the title, no "freestanding" impact bargaining obligation attached because the
21 impact of this decision was merely a loss of potential assignments, which happened to
22 be paid through overtime. The City contends, that regardless of whether the overtime

1 was scheduled or scheduled, a duty to impact bargain over the elimination of a position
2 does not arise simply because the employees are paid for performing the work.

3 We disagree. Our case law makes clear that an employer must bargain over the
4 impacts of managerial decisions on mandatory subjects of bargaining prior to
5 implementation. City of Boston, 31 MLC 25, 31, MUP-1758 (August 2, 2004). Further,
6 regularly scheduled overtime, as opposed to unscheduled overtime, is a mandatory
7 subject of bargaining. Compare City of Peabody, 9 MLC at 1450 with Town of Billerica,
8 8 MLC 1957, 1962-63, MUP-4122 (March 19, 1982).

9 Here, the Hearing Officer found, and the City does not challenge, that the SSI
10 supervisor position was a regularly scheduled overtime shift. Therefore, we affirm the
11 Hearing Officer's conclusion that an impact bargaining obligation attached when the
12 bargaining unit lost the opportunity to perform this overtime as a result of the elimination
13 of the title. Town of Tewksbury, 19 MLC at 1191. We also agree with the Hearing
14 Officer that the City was obligated to bargain over other impacts on terms and
15 conditions of employment prior to implementing the decision. This included the
16 remaining Operations supervisors' increase in workload as a result of assuming the SSI
17 Supervisor's duties.

18 The City alternatively claims that the Hearing Officer erred when she concluded
19 that the Union did not waive its right to bargain by inaction. The City asserts that the
20 facts show that Chief Linskey was willing to listen to the Union's argument and that by
21 choosing to file this charge instead of bargaining, the Union waived its bargaining rights.

22 We disagree. In the absence of special circumstances not present here, post-
23 implementation bargaining does not satisfy an employer's bargaining obligation, City of

1 Everett, 2 MLC 1471, 1476, MUP-2126 (May 5, 1976). Further, an employer's duty to
2 notify the union of a potential change before it is implemented is not satisfied by
3 presenting the change as a fait accompli and then offering to bargain. Town of Hudson,
4 25 MLC 143, 148, MUP-1714 (April 1, 1999). Here, the facts show that the City notified
5 the Union of its decision to eliminate the SSI title on the same day it was implemented
6 and then did not offer to discuss it with the Union until twenty days later. Under those
7 circumstances, the Union had no reasonable opportunity to negotiate about the impacts
8 of eliminating the SSI supervisor prior to implementation. The Union was therefore
9 under no obligation to make a demand to bargain and the Hearing Officer committed no
10 error when she concluded that the Union did not waive its right to bargain by inaction.
11 Id.²

12 CONCLUSION

13 Based on the record and for the reasons explained above, we affirm the Hearing
14 Officer's conclusion that the City violated Section 10(a)(5) and, derivatively, Section
15 10(a)(1) of the Law when it failed to bargain with the Union to resolution or impasse
16 over the impacts of the decisions to eliminate the SSI supervisor position and
17 discontinue the practice of assigning bargaining unit members to that position on a
18 regularly-scheduled overtime basis. We further conclude that the City did not repudiate
19 the May 2007 oral agreement or fail to bargain with the Union over the decisions to
20 eliminate the SSI supervisor position and discontinue the practice of assigning
21 bargaining unit members on an overtime basis to that position.

22 Remedy

² The Hearing Officer also concluded that the Union had not waived its right to bargain

1 Consistent with the impact bargaining obligation she found, the Hearing Officer
2 did not order the City to restore the SSI Supervisor title to the Department or order a full,
3 retroactive make-whole remedy. Rather, guided by the NLRB's decision in Transmarine
4 Navigation Corp., 170 NLRB 389 (1968) and Board cases following that decision, e.g.,
5 City of Boston, 31 MLC at 33-34, the Hearing Officer ordered the City to restore the
6 economic equivalent of the status quo ante prospectively by ordering the City to make
7 affected employees whole for their lost overtime during the period of impact bargaining.
8 The Hearing Officer reasoned that the more limited Transmarine remedy was
9 appropriate in this case because the effects of the decision were certain and impact
10 bargaining could only ameliorate, but not substantially change, the effects of the City's
11 decision to eliminate the SSI supervisor on overtime.

12 The Union raises a number of arguments challenging the remedy and seeks
13 reinstatement of the lost overtime shifts and a full make-whole remedy dating back to
14 May 10, 2010, the date the City eliminated the SSI Supervisor title and stopped
15 assigning bargaining unit members on an overtime basis to that shift. We decline to do
16 so for the reasons set forth below.

17 The Union first argues that the remedy was not supported by the record because
18 the decision was not a level of services decision. We reject this argument for the
19 reasons explained above.

20 The Union next argues that the Hearing Officer erred when she held that
21 bargaining over the impacts of the decision would have "been pointless." To this end,
22 the Union argues that there is no evidence to suggest that bargaining over the loss of

by contract. The City does not appeal from this holding.

1 overtime and increased workload would not have resulted in changes to these terms
2 and conditions of employment. However, the Hearing Officer neither found nor
3 suggested that bargaining over the elimination of the overtime or the increased
4 workload would have been pointless in the way the Union suggests. Rather, consistent
5 with the Transmarine analysis, she found that because the elimination of the title
6 necessarily resulted in the elimination of the assignment of overtime hours associated
7 with filling that title, bargaining could only have ameliorated but not changed the City's
8 decision to eliminate the SSI title in the first instance. We agree. As discussed above,
9 because bargaining unit members who were assigned to the SSI title were paid on an
10 overtime basis only, the City's decision to eliminate the SSI title necessarily eliminated
11 the overtime payments to bargaining unit members who filled the position. In analogous
12 circumstances, the Board has awarded a Transmarine remedy. Town of Tewksbury, 19
13 MLC at 1192 (citing Town of Burlington, 10 MLC 1387, MUP-3519 (February 1, 1984)).

14 The Union further contends that the elimination of the overtime and the resultant
15 increased workload for the remaining supervisors were not an inevitable result of the
16 City's decision. With respect to overtime, the Union argues that even if the City had the
17 non-delegable right to eliminate SSI supervisor title, and even if the City's concerns
18 regarding the supervision of the SSI civilian dispatchers were legitimate, there is no
19 reason that the City could not have addressed those concerns while still maintaining
20 overtime shifts for the remaining supervisors. This misses the point. Because the SSI
21 Supervisor was paid only through overtime, the elimination of the overtime was a certain
22 result of the elimination of the title. In this regard, this case is analogous to Town of
23 Wakefield v. Labor Relations Commission, 45 Mass. App. Ct. 630 (1998) and City of

1 Quincy, 8 MLC 1217, 1222, MUP-3908 (July 14, 1981). In both of those cases, a
2 Transmarine remedy was ordered where the managerial decision to eliminate the
3 services at issue necessarily identified the individuals that lost their positions and pay.

4 We further agree with the Hearing Officer that the increase in the workload was a
5 certain consequence of the City's decision to eliminate the SSI supervisor title while
6 requiring the remaining Operations Division supervisors to assume its duties. In any
7 event, the Board does not award a make-whole remedy for an increase in workload,
8 Commonwealth of Massachusetts, 27 MLC 70, SUP-4503 (December 6, 2000).
9 Accordingly, we find no basis to disturb the remedy.

10 The Union makes a variety of other arguments as to why the Hearing Officer
11 should have ordered a full restoration of the status quo ante.

12 The Union speculates that because the City's reasons for eliminating the title
13 were neither valid nor based on any specific policy decisions, and because its previous
14 efforts to settle Case No. MUP-07-4942 resulted in the 2007 agreement, bargaining
15 could have resulted in the reversal of the decision itself. However, in determining
16 whether a Transmarine remedy is appropriate, the Board looks to whether impact
17 bargaining will allow the employee organization to have meaningful input on impact
18 issues, not the original decision itself. City of Boston, 31 MLC at 33. That analysis is
19 not based on the employer's original reasons for making the managerial decision, but
20 whether the impacts were an inevitable result of the decision. Id. (ordering both
21 prospective Transmarine and retroactive remedy, distinguishing between impacts of
22 managerial decision that were inevitable (loss of detail opportunities resulting from

1 prioritization of details) and those that were not (penalizing employees for refusing a
2 paid detail).

3 We finally reject the Union's more general arguments that the Board's application
4 of the Transmarine doctrine in this case is misguided. First, contrary to the Union's
5 suggestion, the award of such a remedy in the private sector is not limited to situations
6 where employees have lost their jobs. See, e.g., Rochester Gas & Electric Corp., 355
7 NLRB 507, 508 (2010) *enfd sub. nom. Electrical Workers Local 36 v. NLRB*, 706 F. 2d
8 73 (2d Cir. 2013), *cert den'd*, 134 S. Ct. 2898 (2014) (Transmarine remedy awarded
9 where employer failed to bargain over impacts of take-home vehicle benefits on
10 employee's commuting costs). Further, as the Union itself points out in its
11 supplementary statement, the goal of a Transmarine remedy is to recreate in a
12 practicable manner a situation in which the parties' respective bargaining positions are
13 not entirely devoid of economic consequences for the employer. Here, where we
14 cannot now determine the result that timely impacts bargaining would have produced, or
15 order the City to restore the position, the remedy in this case is consistent with that goal.

16 Order

17 WHEREFORE, based upon the foregoing, IT IS HEREBY ORDERED that the City of
18 Boston shall:

19
20 1. Cease and desist from:

- 21
22 a) Failing to bargain with the Union over the impacts of the decisions
23 to eliminate the SSI supervisor position and to discontinue the
24 practice of assigning bargaining unit members to that position on a
25 regularly-scheduled overtime basis.
26
27 b) In any like manner, interfering with, restraining and coercing its
28 employees in any right guaranteed under the Law.

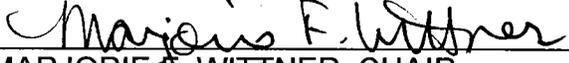
29
30 2. Take the following action that will effectuate the purposes of the Law.

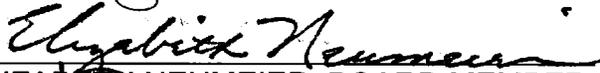
- 1
2 a) Upon request, bargain in good faith with the Union to resolution or impasse
3 concerning the impacts of the May 1, 2010 decisions to eliminate the
4 position of SSI supervisor and discontinue the practicing of assigning unit
5 members to that position on a regularly-scheduled overtime basis.
6
7 b) Beginning as of the date the Union demands to bargain, pay to employees
8 affected by the City's decision to eliminate the position of SSI supervisor
9 and discontinue the practice of assigning unit members to that position on
10 a regularly-scheduled overtime basis, an amount equivalent to the average
11 additional overtime compensation they formerly received as the SSI
12 supervisor, plus interest on any sums owed at the rate specified in G.L. c.
13 231, Section 6I, compounded quarterly,³ until one of the following occurs:
14
15 i. Resolution of bargaining by the parties;
16 ii. Failure of the Union to request bargaining within five
17 days of the receipt of this decision;
18 iii. The Union subsequently fails to bargain in good faith;
19 iv. The City and the Union reach impasse after
20 bargaining in good faith
21
22 c) Sign and post immediately in conspicuous places where members of the
23 Union usually congregate and where notices to employees are usually
24 posted, including but not limited to the City's internal e-mail system, and
25 maintain for a period of 30 consecutive days thereafter, signed copies of
26 the attached Notice to Employees; and,
27
28 d) Notify the DLR in writing of the steps taken to comply with this
29 decision within ten (10) days of receipt of this decision.

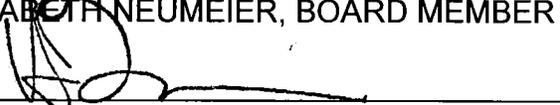
³ The Hearing Officer inadvertently declined to order the City to pay interest on the award. Because interest is a standard part of the Board's remedy in all cases, including Transmarine cases, we have modified the remedy accordingly. See, e.g., City of Boston, 31 MLC at 34. See also Rochester Gas & Electric Corporation, 355 NLRB 507, 355 NLRB at 508 (awarding interest on Transmarine remedy). See generally, Town of Brookfield v. Labor Relations Commission, 443 Mass. 315, 325-326 (2005) (quoting School Committee of Newton v Labor Relations Commission, 388 Mass 557, 575 (1983) ("[t]he decision to award interest was within the [Board's] authority under G.L. c. s. 11 and . . . is a policy question that the Legislature committed to the [Board's] discretion' in keeping with the broad scope of s. 11. . . .")

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD


MARJORIE F. WITTNER, CHAIR


ELIZABETH NEUMEIER, BOARD MEMBER


HARRIS FREEMAN, BOARD MEMBER

APPEAL RIGHTS

Pursuant to the Supreme Judicial Court's decision in Quincy City Hospital v. Labor Relations Commission, 400 Mass. 745 (1987), this determination is a final order within the meaning of M.G.L. c. 150E, § 11. Any party aggrieved by a final order of the Board may institute proceedings for judicial review in the Appeals Court pursuant to M.G.L. c.150E, §11. **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
DEPARTMENT OF LABOR RELATIONS
BEFORE THE COMMONWEALTH EMPLOYMENT RELATIONS BOARD

NOTICE TO EMPLOYEES

**POSTED BY ORDER OF THE COMMONWEALTH EMPLOYMENT
RELATIONS BOARD
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS**

The Commonwealth Employment Relations Board (Board) has held that the City of Boston (City) violated Section 10(a)(5) and, derivatively Section 10(a)(1) of Massachusetts General Laws, Chapter 150E by failing to bargain with the Boston Police Superior Officers Federation (Union) over the impacts of the decisions to eliminate the SSI supervisor position and discontinue the practice of assigning unit members to that position on a regularly-scheduled overtime basis. The City posts this Notice to Employees in compliance with the Board's order.

Section 2 of the Law gives all employees: (1) the right to engage in concerted protected activity, including the right to form, join and assist unions, to improve wages, hours, working conditions, and other terms of employment, without fear of interference, restraint, coercion or discrimination; and, (2) the right to refrain from either engaging in concerted protected activity, or forming or joining or assisting unions.

The City assures its employees that

WE WILL NOT:

- fail or refuse to bargain collectively in good faith with the Union over the impacts of the May 1, 2010 decisions to eliminate the SSI supervisor position and discontinue assigning unit members to that position on a regularly-scheduled overtime basis;
- in any like manner, interfere with, restrain and coerce its employees in the exercise of their rights guaranteed under the Law.

WE WILL:

- upon request, bargain in good faith with the Union to resolution or impasse concerning the impacts of the May 1, 2010 decisions to eliminate the position of SSI supervisor and discontinue the practicing of assigning unit members to that position on a regularly-scheduled overtime basis.
- Beginning as of the date the Union demands to bargain, pay to employees affected by the City's decision to eliminate the position of SSI supervisor and discontinue the practice of assigning unit members to that position on a regularly-scheduled overtime basis an amount equivalent to the average additional overtime compensation they formerly received as the SSI supervisor, plus interest, until we have discharged our duty to bargain as detailed in the Board's Order in Case No. MUP-10-5895.

City of Boston

Date

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED OR REMOVED

This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Department of Labor Relations, Charles F. Hurley Building, 1st Floor, 19 Staniford Street, Boston, MA 02114 (Telephone: (617) 626-7132).

HEARING OFFICER DECISION

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS**

In the Matter of *
*
CITY OF BOSTON * Case No. MUP-10-5895
*
and * Date Issued:
*
BOSTON POLICE SUPERIOR OFFICERS *
FEDERATION *
*

Hearing Officer:

Kendrah Davis, Esq.

Appearances:

- Robert J. Boyle, Jr., Esq. - Representing the City of Boston
- Joseph P. McConnell, Esq.

- Leah Marie Barrault, Esq. - Representing the Boston Police Superior Officers Federation

HEARING OFFICER'S DECISION AND ORDER

SUMMARY

1
2
3
4
5
6
7
8
9

The issues in this case are whether the City of Boston (City or Employer) violated Sections 10(a)(5) and, derivatively, 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by repudiating a May 2007 oral settlement agreement with the Boston Police Superior Officers Federation (Union or Federation) and by failing to bargain with the Union to resolution or impasse over the decisions to: (1) eliminate the position of Street Sweeping Initiative (SSI) supervisor and the impacts of that decision on employees' terms and conditions of employment and (2) discontinue the practice of assigning bargaining unit members to the SSI supervisor position on a regularly-scheduled overtime basis during the

1 Monday-Friday day shift of the April – November SSI Season, without giving the Union prior
2 notice and an opportunity to bargain to resolution or impasse over those decisions and the
3 impacts of those decisions. I find that the City did not repudiate the May 2007 oral
4 agreement and did not violate the Law when it failed to bargain with the Union over the
5 decisions to eliminate the SSI supervisor position and discontinue the practice of assigning
6 bargaining unit members to the SSI supervisor position on a regularly-scheduled overtime
7 basis during the Monday-Friday day shift of the April – November SSI season. However, I
8 find that the City did violate Section 10(a)(5) of the Law when it failed to bargain with the
9 Union to resolution or impasse over the impacts of those decisions.

10 STATEMENT OF THE CASE

11 On June 25, 2010, the Union filed a charge of prohibited practice (Charge) with the
12 Department of Labor Relations (DLR) alleging that the City had violated Section 10(a)(5) and,
13 derivatively, Section 10(a)(1) of the Law by repudiating an oral agreement and failing to
14 bargain in good faith with the Union over the SSI supervisor/overtime position. A duly-
15 designated DLR investigator investigated the Charge and issued a Complaint of Prohibited
16 Practice (Complaint) on January 21, 2011. The City filed its Answer to the Complaint on
17 February 1, 2011.

18 On October 27, 2011 and November 1, 2011, the City filed a Motion to Continue
19 Hearing and a Motion in Limine, respectively, seeking to exclude any parol evidence related
20 to the May of 2007 oral agreement. On November 1 and 4, 2011, respectively, the Union
21 filed its opposition to both motions. I conducted an evidentiary hearing on November 8, 2011,
22 and on November 14, 2011, I issued a ruling denying the City's motion in limine. On
23 November 18, 2011, the City appealed my ruling to the Commonwealth Employment
24 Relations Board (CERB). On November 30, 2011, the Union filed its response to the City's

1 appeal. On December 6, 2011, in its Ruling on Interlocutory Appeal, the CERB upheld my
2 ruling, denying the City's motion in limine.

3 I conducted a hearing regarding the underlying Complaint on December 21, 2011,
4 January 20, 2012, March 30, 2012 and April 30, 2012, at which both parties had the
5 opportunity to be heard, to examine witnesses and to introduce evidence. Both the City and
6 the Union filed their post-hearing briefs on July 10, 2012. Based on the record, which
7 includes witness testimony, stipulations of fact, and documentary exhibits, and in
8 consideration of the parties' arguments, I make the following findings of fact and render the
9 following opinion.

10 STIPULATIONS OF FACT

- 11 1. The City is a public employer within the meaning of Section 1 of the Law.
- 12 13 2. The Union is an employee organization within the meaning of Section 1 of the Law.
- 14 15 3. The Union is the exclusive bargaining representative for uniformed personnel in the
16 Boston Police Department (Department) who hold the rank of sergeant, lieutenant
17 and captain.
- 18 19 4. The parties signed a settlement agreement on May 9, 2005, which provides that
20 upon the effective date, the City shall at all times have three Federation
21 members/supervisors assigned to each shift in the Operations Division of the
22 Department.
- 23 24 5. The Operations Division includes a telephone line, referred to as the "Tow Line,"
25 that is staffed by civilian call takers and supervised by the supervisors described in
26 paragraph 4.
- 27 28 6. In April of 2007, the City added four additional telephone lines referred to as the
29 "Street Sweeping Initiative Tow Lines" (SSI Tow Lines), to operate annually from
30 April through November in the Operations Division.
- 31 32 7. In April of 2007, the City assigned civilian call takers to staff the SSI Tow Lines and
33 assigned the supervisors described in paragraph 4 to supervise the SSI Tow Lines
34 and the civilian call takers.
- 35 36 8. On May 22, 2007, the Union filed a charge of prohibited practice with the DLR in
37 case number MUP-07-4942, alleging that the Department had unilaterally staffed

1 the Operations Division's Tow Line with four additional civilians paid on an overtime
2 basis during the day tour and three additional civilians paid on overtime during the
3 first half.

4
5 9. Federation members assigned to supervisory duties in the Operations Division are
6 now required by the Department to supervise the additional civilians described in
7 paragraph 8.

8
9 10. The work performed by the civilians described in paragraph 8 was previously
10 performed and supervised by the Boston Transportation Department.

11
12 11. The Department's actions [in MUP-07-4942] violated Section 10(a)(1) and (5) of the
13 Law because they increased the duties and workload of Federation members in the
14 Operations Division and they were implemented without affording the Federation
15 prior notice and an opportunity to bargain.

16
17 12. The parties signed a settlement agreement that withdrew with prejudice MUP-07-
18 4942, described in paragraph 8, which affected the Operations Divisions Tow Line.
19 The Union signed that agreement on June 14, 2007 and the City signed it on June
20 15, 2007.

21
22 ADMISSION OF FACT

23
24 1. On June 22, 2007, the Union withdrew case number MUP-07-4942.

25
26 FINDINGS OF FACT

27 The City and the Union were parties to a collective bargaining agreement (Agreement)
28 effective from July 1, 2007 to June 30, 2010, with a memorandum of agreement (MOA)
29 signed by the parties on February 6, 2009. Article IV of the Agreement pertains to
30 "Management Rights" and states:

31 The Municipal Employer shall not be deemed to be limited in any way by this
32 Agreement in the performance of the regular and customary functions of
33 municipal management, and reserves and retains all powers, authority and
34 prerogatives including, without limitation, the exclusive right of the Police
35 Commissioner to issue reasonable rules and regulations governing the conduct
36 of the Police Department, provided that such rules and regulations are not
37 inconsistent with the express provisions of this Agreement.

38
39 Article V, Section 2 of the parties' Agreement addresses the "Grievance Procedure"
40 and states, in part:

1 Grievances shall be processed as follows:

2 Step #1. The Federation representative, with or without the aggrieved
3 employee, shall present the grievance orally to the employee's immediate
4 supervisor outside of the bargaining unit, who shall attempt to adjust the
5 grievance informally.
6

7 Step #2. If the grievance is not settled at Step #1, it shall be presented in
8 writing to the Police Commissioner by a Federation Grievance Committee not to
9 exceed three (3) persons.
10

11 Step #3. If the grievance is not resolved at Step #2 within six (6) working days,
12 the grievance may be submitted to the City's Office of Labor Relations, which
13 shall schedule a hearing within ten (10) working days after it receives the
14 grievance. Conducting the hearing shall be one or more of the staff of the
15 Office of Labor Relations. In addition, the City's committee to hear grievances
16 may include such other persons as the Office of Labor Relations may from time
17 to time designate.
18

19 **The Parties' Pre-2007 Settlement Agreements**

20
21 In 1987, the City, the Department and the Union signed a settlement agreement that
22 stated, in part:

23 In full and final settlement of the above-captioned matter the...[City and the Union]
24 agree as follows:

- 25
- 26 1) Instructors from the Boston Police Academy observed and evaluated Boston
27 Police Recruits who were detailed to areas A and D during the 1987
28 Christmas holiday season.
29
 - 30 2) Instructors from the Boston Police Academy did not supervise those recruits
31 who were detailed to Areas A and D during the 1987 Christmas Holiday
32 season. Superior Officers in Areas A and D supervised those recruits
33 [detailed] to Areas A and D during the 1987 Christmas holiday season.
34
 - 35 3) In consideration of the above, the [Union] agrees to withdraw the above-
36 captioned grievance.
37

38 On or about May 9, 2005, the City and the Union entered into a six-paged, 17-
39 paragraphed settlement agreement to resolve "several on-going disputes" and "to
40 simultaneously resolve a Fair Labor Standards Act [(FLSA)] litigation." Paragraph 11 of that
41 agreement stated, "Upon the [e]ffective date the City shall, at all times, have three (3)

1 supervisors assigned to each shift in the Operations Division.” The City and the Union, but
2 not the Department, signed this agreement.

3 On or about June 13, 2005, the City, the Department, and the Union executed a
4 second settlement agreement; however, only Department Director of Labor Relations Kevin
5 Foley (Foley) and Union President Joseph Gillespie (Gillespie) signed the agreement, which
6 included the following terms:

7 The...[Union and the Department] hereby agree as follows:

8
9 1. The parties agree that attendance at the training for “IACP Leadership In
10 Police Organization” being held in Lowell during the weeks of May 2-6 and May
11 9-13, 2005 will be voluntary.

12
13 2. The parties agree that there will be no overtime incurred for traveling to
14 and from the training.

15
16 3. The parties agree that the Federation members will be carried as on-duty
17 while traveling to and from the training and for time spent attending the training.

18
19 4. The Agreement shall not prejudice any party or constitute a precedent for
20 any other matters, pending or future, between the parties. The Agreement shall
21 not be introduced in any forum, by any party, for any reason, save for
22 enforcement of its terms.⁴

23
24 5. The signatories to the Agreement are authorized to bind their principals.

25
26 On or about June 13, 2005, the Department and the Union entered into another
27 separate settlement agreement that concerned the Union’s withdrawal of an arbitration case
28 in exchange for the Department’s withdrawal of certain “Specifications” and provision of back
29 pay, personal file modifications and training for the grievant. Again, only Foley and Gillespie
30 signed that agreement.

31 **The City’s Office of Labor Relations and the Department’s Labor Relations Office**

⁴ During its case-in-chief, the Union offered this settlement agreement into evidence and the City objected to the offer. I initially marked the document for “identification purposes only.”

1 Chapter V of the City of Boston Code of Ordinances (Code) establishes the City's
2 "Supervisor of Labor Relations," commonly referred to by the parties as the Office of Labor
3 Relations (OLR). At all relevant times the OLR included a Director of Labor Relations, John
4 Dunlap (Dunlap), Deputy Director of Labor Relations Paul Curran, Esq. (Curran) and Legal
5 Counsel Robert Boyle (Boyle), Esq. Section 5-1.4 of the Code outlines the duties of the
6 Supervisor of Labor Relations, which states in part:

7 The Supervisor of Labor Relations shall, under the direction of the Mayor, and
8 in consultation with the Director of Administrative Services, review all aspects of
9 the labor relations of the City and make recommendations for their
10 improvement, represent the Mayor in all collective bargaining in which the City
11 is involved, and by himself or through assistants appear in all grievance,
12 arbitration and court proceedings involving labor relations.

13
14 The Department's Labor Relations Office (LRO) is distinct from the OLR because the
15 LRO is primarily responsible for developing policies that concern labor relations within the
16 Department. The LRO represents the Commissioner at all conferences, collective bargaining
17 negotiations and grievance discussions. The City appointed Foley to Director of the LRO
18 from February of 2005 through 2008. During Foley's tenure as LRO Director, Department
19 Commissioners Kathleen O'Toole (O'Toole) and Edward Davis (Davis) gave Foley "broad
20 discretionary powers" to settle grievances and DLR charges filed by the Union with the
21 specific authority to agree to any settlement that would not alter the contract or cost the City a
22 "tremendous" amount of money on a permanent basis.

23 As Deputy Director of the LRO, Steven Sutliff (Sutliff) also worked regularly with the
24 Union to settle grievances and DLR charges. Although Sutliff was not always present during
25 Foley's settlement meetings, after those meetings he would draft settlement agreements for
26 Foley to present to the Union, including MUP-07-4942. In June of 2007, Boyle participated in

On April 30, 2012, the Union reintroduced the document into evidence and the City did not

1 an omnibus settlement agreement with the Department and Union that included the Union's
2 promise to withdraw MUP-07-4942.

3 **The Operations Division**

4 The Operations Division (Operations) is located in the Department's Headquarters and
5 is responsible for managing all incoming telephone calls, including 911 calls, internal
6 communications and dispatch. The Department divides Operations into two areas: the main
7 room and the back room. The main room handles dispatch, while the back room handles
8 various calls from the following Operations subdivisions: Missing Persons Unit, Stolen
9 Vehicles Unit, Channel 8 and the Tow Unit.

10 A Commander oversees Operations and reports to the Department's Superintendent-
11 in-Chief (Chief) who, in turn, reports to the City's Police Commissioner. The Commander
12 supervises the Captain, who oversees the Operations' supervisors (Lieutenants and
13 Sergeants). Operations supervisors directly supervise approximately 150-200 civilian
14 employees whom the Department regularly scheduled as call takers and administrative
15 support staff. The civilian call-takers work one of three shifts: day, first-half and last half. The
16 Department assigns approximately 70 civilians to the day shift from 8:00 a.m. to 4:00 p.m.
17 and assigns approximately 50-60 civilians to the first and last-half shifts, from 4:00 p.m. to
18 12:00 a.m. and 12:00 a.m. to 8:00 a.m., respectively. The main room receives approximately
19 700,000 911 calls annually.

20 **Operations Tow Unit**

21 The Tow Unit is located in the back room of Operations. The Department assigns two
22 civilian call-takers to each of the Tow Unit's three shifts to answer incoming calls on the
23 telephone lines that the Department dedicates for vehicle tows (tow lines). The tow lines

1 operate all year, 24-hours daily/seven days weekly. In addition to processing tow clearances,
2 the civilian call-takers also respond to calls from civilians looking for their cars and seeking to
3 file tow-related complaints. The Tow Unit receives approximately 50,000 calls annually on
4 the tow lines. Beginning in 2007, all tows were accomplished by private towing companies
5 that the Department first required to contact the Tow Unit and obtain a clearance number
6 before towing a vehicle.

7 **Operations Supervisors**

8 Pursuant to the parties' May 9, 2005 settlement agreement, the City assigned three
9 unit members to supervise Operations during each of the three shifts (for a total of nine daily
10 supervisors). Two of the nine supervisors (the Duty Supervisor and the 911 Supervisor)
11 oversee the main room and one supervisor oversees the back room. The supervisors' shifts
12 differ slightly from the civilian shifts: the day shift begins at 7:30 a.m. and ends at 4:00 p.m.,
13 while the first-half shift runs from 4:00 p.m. to 11:45 p.m. and the last-half shift lasts from
14 11:45 p.m. until 7:30 a.m.

15 The duties and responsibilities of the supervisors include: ensuring adequate staffing;
16 assigning trained personnel to all necessary positions; notifying appropriate Department units
17 when a high profile incident occurs; monitoring unprofessional transmissions; ensuring that
18 civilian call-takers send and properly log messages; keeping a written record of all calls to the
19 sick line; direct copies of incident reports to appropriate Department units; handling
20 complaints from civilians and calls for Operations Dispatch supervisors, as necessary;
21 keeping the Operations Duty Supervisor updated on all pertinent issues. The supervisors are
22 also responsible for ensuring that civilian call-takers treat callers with respect and enter
23 correct information into the database.

24 **The SSI Tow Unit and the SSI Agreement**

1 In April of 2007, the City launched the "Street Sweeping Initiative" (SSI), which
2 covered City-wide street sweeping on the day shift only, from Monday to Friday, between
3 April 1st and November 30th, annually. To support the SSI, the City established four
4 additional tow lines and assigned four additional civilian call-takers to manage those tow
5 lines. During the SSI season, private tow companies make approximately 35,000 tows each
6 year. In addition to those 35,000 calls for tow clearances, the SSI civilian call-takers also
7 receive corresponding calls from private citizens inquiring about their towed vehicles and
8 filing complaints against the tow companies. Because SSI tows only occur during the day
9 shift, the total number of telephone calls for regular tows and SSI tows significantly increase
10 between the hours of 8:00 a.m. and 4:00 p.m.

11 Sometime after the City's April of 2007 decision to create the SSI but before May 22,
12 2007, Union Vice President Sergeant Mark Parolin (Parolin) met with Foley and Commander
13 of Operations Kenneth Fong (Fong) to discuss the four additional SSI tow lines and four
14 additional SSI civilian employees. At that meeting Parolin raised concerns about the
15 workload impact on the supervisors assigned to the Operations back room during the day
16 shift pursuant to the parties' May of 2005 agreement.

17 On May 22, 2007, the Union filed MUP-07-4942 and, in response to that charge, met
18 with the City to discuss a possible settlement agreement. During that meeting, Foley asked
19 Parolin whether an offer by the City to add another supervisor on overtime to supervise the
20 four SSI civilian call-takers without any back pay would resolve the matter. Parolin
21 responded to Foley that the offer "sounded great" but he would have to first talk to Union
22 representatives Lieutenant Matthew Spillane (Spillane) and Sergeant Tony Cerundolo
23 (Cerundolo) before agreeing to those terms. Sometime after May 22, 2007, but before June
24 1, 2007, Spillane and Cerundolo instructed Parolin to inform Foley that the Union would

1 accept the City's offer to hire an additional SSI supervisor on overtime to supervise the four
2 SSI civilian employees during the Monday-Friday day shift of the April to November SSI
3 season, in exchange for the Union's withdrawal of MUP-07-4942. Parolin immediately
4 notified Foley that the Union would withdraw MUP-07-4942 in exchange for the Department's
5 offer to hire a SSI supervisor on overtime, and Foley agreed to those terms; however, neither
6 party discussed the details of the new SSI supervisor position or whether the assignment
7 would be temporary or permanent.⁵

8 Pursuant to the May of 2007 oral agreement, Fong instructed Captain Ryans to hire an
9 SSI supervisor on overtime to cover the Monday through Friday day shift during the SSI
10 season, beginning June 1, 2007. Upon hiring the new SSI supervisor, Ryans modified the
11 SSI supervisor's day shift hours to match the SSI civilian-employees' day shift hours, with
12 both working from 8:00 a.m. to 4:00 p.m. The SSI supervisor's duties and responsibilities
13 included: managing the four civilian call-takers and ensuring that they properly responded to
14 incoming calls and properly input that information in Operations' log books and computer

⁵ Both Foley and Parolin testified that they did not have an in depth discussion about the duties of the new SSI supervisor position during their negotiations for the May of 2007 settlement agreement. Foley admitted that while he recalled speaking with Parolin about assigning a SSI supervisor on overtime in exchange for the Union's withdrawal of MUP-07-4942, he denied that the assignment was supposed to be on a "permanent" basis. Chief Daniel Linskey (Linskey), Operations Captain Pervis Ryan (Ryan) and Deputy Superintendent John Daley (Daley)—who served as Commander of Operations from July of 2007 to January of 2011—testified that they were also unaware of any "permanent overtime" assignment in the Department. Chief Linskey also testified that in June of 2007 Foley possessed no authority to assign supervisors on overtime shifts without prior approval from the Commissioner and City Hall. However, Chief Linskey conceded that he never served as Chief under Commissioner O'Toole and, thus, was not privy to the 2005-2008 conversations between O'Toole and Foley regarding Foley's broad discretionary authority to settle grievances and DLR charges with the Union. Chief Linskey also conceded that even though the City did not promote him to the rank of Chief until September 9, 2009, he never worked in Operations. Based on the totality of the evidence submitted, I find that the parties did not agree that the SSI supervisor overtime assignment would be permanent.

1 logs; investigating all reports and complaints pertaining to SSI tows; ensuring that all
2 equipment related to the SSI tow lines worked properly. For three consecutive years
3 between 2007 and 2010, the SSI supervisor worked regular overtime day shifts during the
4 SSI season and oversaw the four civilian call-takers who answered the SSI tow lines and
5 input tow line data.

6 On or about June 15, 2007, the City and the Union finalized negotiations for a larger
7 omnibus settlement agreement that included resolution of many other grievances and DLR
8 charges, including MUP-07-4942. Although Parolin and Foley had already settled MUP-07-
9 4942 in May of 2007, Parolin agreed to include that case in the parties' larger omnibus
10 settlement agreement at Foley's request which stated, in part:

11 In full and final resolution of the matters reference below, the [Union, the City
12 and the Department]...hereby agree as follows....

13
14 15. The Union agrees to withdraw the following grievances with
15 prejudice....MUP-07-4942.

16
17 16. This is a comprehensive settlement agreement for consideration thereof
18 and the Union and all employees named agree to waive any and all claims that
19 the Union or employees may have against the Department and the City of
20 Boston arising out of the facts and circumstances of the grievances herein.

21
22 Seven days later, on June 22, 2007, the Union withdrew MUP-07-4942 from the DLR.

23 **The SSI assignments**

24 Between June 1, 2007 and April 30, 2010, the City placed Sergeant Jeanne Carroll
25 (Carroll) in charge of making assignments to Operations, including assigning SSI supervisors
26 to overtime on the Monday-Friday day shift during the SSI season. When one of the three
27 regular Operations supervisors was unable to work their scheduled shift, Carroll would fill that
28 shift-vacancy with supervisors who were currently (and sometimes previously) assigned to
29 Operations. If both a regular Operations supervisor and a SSI supervisor were unable to

1 work, Carroll's first priority was to ensure adequate coverage for the regular Operations
2 supervisors and then fill the SSI supervisor overtime vacancy, if possible.

3 Carroll recorded all Operations' assignments, including SSI supervisor overtime
4 assignments in charts called "BATs." In 2007, the BATs showed that the SSI Tow Unit was
5 operational during the SSI season and employed four civilian call-takers on 110 instances,
6 with SSI supervisors working on overtime for 105 of those 110 instances (or 95%). In 2008,
7 the BATs reflected that the SSI Tow Unit was operational during the SSI season and
8 employed four civilian call-takers on 139 occasions, with SSI overtime supervisors working on
9 103 of the 139 occasions (74%). In 2009, the BATs showed that the SSI Tow Unit was
10 operational during the SSI season and employed four civilian call-takers on 149 instances,
11 with SSI overtime supervisors working on 134 of those occasions (90%). In 2010, between
12 April 1, 2010 and May 1, 2010, the BATs showed that the SSI Tow unit employed four SSI
13 civilian call-takers on 19 occasions and assigned SSI supervisors to overtime on all 19
14 instances (100%).

15 **The Elimination of the SSI Supervisor Overtime Position**

16 Between June 1, 2007 and April 31, 2010, the City employed the SSI supervisor on a
17 regularly-scheduled overtime assignments in the SSI Tow unit during the Monday-Friday day
18 shifts in the SSI season. At some point prior to May 1, 2010, Chief Linskey spoke with the
19 civilian employees assigned to the SSI Tow Unit who informed him that the SSI supervisor
20 was "very infrequently available."⁶ During that time, but prior to May 6, 2010, Chief Linskey
21 also reviewed the Department's top fifty wage earners, after receiving a media inquiry about
22 whether the Department should have paid overtime to Operations Supervisor Lieutenant

⁶ Neither party quantified the meaning of "very infrequently available" and the Chief never followed-up with an investigation into the civilian call-takers' concerns.

1 Spillane on July 7, 2009 when he left work early without permission.⁷ Deputy Daley also
2 complained to Chief Linskey about Spillane and recommended that the Department eliminate
3 the SSI supervisor position, citing “lack of quality control, poor data entry (such as inaccurate
4 and illegible tow logs) and the high level of complaints generated.” Daley further complained
5 that the SSI supervisors experienced “plenty of free time” during their shift.

6 On May 1, 2010, Chief Linskey eliminated the SSI supervisor position, while retaining
7 the four civilian call-takers employed to answer the SSI tow lines. He also instructed the
8 regularly-scheduled back room supervisors to assume the SSI supervisor’s job duties and
9 responsibilities. Specifically, in addition to their regular duties of supervising the regular tow
10 lines and back room civilian call takers, Chief Linskey required the back room supervisors to
11 supervise the four SSI Tow Unit civilian employees and the SSI tow lines during the SSI tow
12 season. On or around May 20, 2010, Chief Linskey met with Operations supervisors to
13 explain why he eliminated the SSI supervisor position and stopped assigning unit members to
14 that position on a regularly-scheduled, overtime basis. At that meeting, the Chief invited the
15 Union to discuss ways to restore the position but, instead, the Union filed the instant Charge.

16 OPINION

17 **Count I - Repudiation**

18
19 The statutory obligation to bargain in good faith includes the duty to comply with the
20 terms of a collectively bargained agreement. Commonwealth of Massachusetts, 26 MLC
21 165, 168 (2000). A public employer's deliberate refusal to implement or to abide by the
22 unambiguous terms of an agreement constitutes a repudiation of that agreement in violation
23 of the Law. Town of Plymouth, 33 MLC 23, 25 (2006); Town of Falmouth, 20 MLC 1555

⁷ The Boston Globe printed an article about the Spillane incident on May 6, 2010.

1 (1994), aff'd sub nom., Town of Falmouth v. Labor Relations Commission, 42 Mass. App. Ct.
2 1113 (1997). To establish that an employer repudiated an agreement, a union must show
3 that the employer deliberately refused to abide by the unambiguous terms of the agreement.
4 Worcester County Sheriff's Department, 28 MLC 1, 6 (2001). If the language of the
5 agreement is ambiguous, the CERB looks to the bargaining history that culminated in the
6 provision at issue to determine whether there was an agreement between the parties. City of
7 Waltham, 25 MLC 59, 60 (1998).

8 Where the evidence is insufficient to show an agreement underlying the matter in
9 dispute, or if the parties hold differing good faith interpretations of the terms of the agreement,
10 the CERB will not find repudiation because the parties did not achieve a meeting of the
11 minds. City of Boston/Boston Public Library, 26 MLC 215, 216 (2000); Town of Ipswich, 11
12 MLC 1403, 1410 (1985), aff'd sub nom. Town of Ipswich v. Labor Relations Commission, 21
13 Mass. App. Ct. 1113 (1986). To achieve a meeting of the minds, the parties must manifest
14 an assent to the terms of an agreement. City of Boston/Boston Public Library, 26 MLC at
15 217. Oral agreements between a public employer and a union can be effective and are
16 enforceable under the Law if the agreement is otherwise valid. City of Quincy, 17 MLC 1603,
17 1608 (1991); Massachusetts Board of Regents of Higher Education, 10 MLC 1196 (1983)
18 (citing Service Employees International Union, Local 509 v. Labor Relations Commission,
19 410 Mass. 141, 145 (1991)).

20 Here, it is undisputed that Foley and Parolin entered into an oral settlement agreement
21 in May of 2007 and, pursuant to that agreement, the City assigned a SSI supervisor on
22 overtime in exchange for the Union's withdrawal of MUP-07-4942. However, the City argues
23 that the parties never agreed to make the SSI supervisor assignment permanent and that the

1 May 2007 agreement is invalid because the OLR never granted Foley the authority to enter
2 into that agreement. Conversely, the Union maintains that the City agreed to assign unit
3 members to the SSI supervisor position on a permanent, overtime basis and that the OLR
4 gave Foley authority to enter into that agreement. Because the terms of the parties' May
5 2007 oral agreement are ambiguous, I look to the parties' bargaining history to determine
6 whether there was a sufficient meeting of the minds to reach an agreement.

7 **1. The Parties' Bargaining History**

8 After the City created the SSI in April of 2007 and hired four additional civilians to
9 answer the four SSI tow lines, the Union met with the City to bargain over those additional
10 hires and tow lines. After an unsuccessful meeting, the Union filed MUP-07-4942 on May 22,
11 2007, and, in response to that charge, Foley met with Parolin to negotiate a possible
12 settlement agreement. During those settlement discussions, which occurred between May
13 22 and May 31, 2007, Foley offered to hire an additional SSI supervisor on overtime in
14 exchange for the Union's withdrawal of MUP-07-4942. While the parties did not discuss the
15 duties and responsibilities of the new SSI supervisor position and did not determine whether
16 that position would be permanent or temporary, the parties agreed to create the position on a
17 regularly-scheduled, overtime basis during the Monday-Friday day shifts of the SSI season.

18 Sometime after May 22, 2007, but before June 1, 2007, the Union agreed to accept
19 the City's offer to assign an additional SSI supervisor on an overtime basis during the
20 Monday-Friday day shift of the SSI season and, pursuant to that agreement, the City hired an
21 SSI supervisor on overtime. On June 11, 2007, Boyle contacted Sutliff and provided him with
22 draft settlement language for a larger omnibus settlement agreement between the Union, the
23 Department and the City. That parties finalized that omnibus settlement agreement on June

1 15, 2007, which included the Union's promise to withdraw MUP-07-4942 for consideration
2 and which the Union effectuated on June 22, 2007.

3 Although the May of 2007 oral settlement agreement is silent about whether the
4 parties intended to hire the SSI supervisor overtime on a permanent basis, the evidence
5 shows that Foley agreed to hire the SSI supervisor on regularly scheduled overtime day shifts
6 during the SSI season. The City hired a SSI supervisor on June 1, 2007, and assigned unit
7 members to that position on a regularly-scheduled overtime basis for three consecutive
8 years. Based on that bargaining history, I find that the parties achieved a meeting of the
9 minds in reaching their May of 2007 settlement agreement because the parties manifested
10 their assent to the terms of that agreement when the City hired a SSI supervisor on overtime
11 and the Union withdrew MUP-07-4942. City of Boston, 26 MLC at 216; City of Waltham, 25
12 MLC at 60.

13 **2. Foley's Apparent Authority**

14 The authority to act for and speak on behalf of an employer is governed by agency
15 principles. Town of Chelmsford, 8 MLC 1913 (1982). Authority to act on behalf of a principal
16 can be actual, implied, or apparent. Id., at 1473. Apparent authority is created when
17 a principal engages in conduct that causes another person to reasonably believe that the
18 alleged agent has the authority to act on behalf of the principal. Massachusetts State Lottery
19 Commission, 22 MLC 1468, 1473 (1996). A public employer is responsible for the unlawful
20 conduct of a supervisory employee and agent of the employer who acts within the scope of
21 his apparent authority whether or not the employer authorized those acts. Commonwealth of
22 Massachusetts, 11 MLC 1206, 1216-17 (1984). In resolving labor disputes, each party must

1 be able to rely on the other party's authority to resolve matters under discussion.
2 Massachusetts Board of Regents of Higher Education, 10 MLC 1196, 1205 (1983). Thus,
3 unless a party communicates a limitation or restriction on its negotiator's authority to the other
4 party, "an individual in charge of a transaction has been held to have broad apparent
5 authority." Town of Ipswich, 11 MLC at 1410 n. 7 (1985) (citing Costonis v. Medford Housing
6 Authority, 343 Mass. 108, 115 (1961)); see also Commonwealth of Massachusetts, 28 MLC
7 351, 360 (2002).

8 The City argues that it did not repudiate the May of 2007 agreement because the OLR
9 never gave Foley final approval to authorize it. The City also argues that unlike the parties'
10 June of 2007 omnibus settlement agreement, the May of 2007 oral agreement was not
11 "comprehensive" or "substantial in nature" to amount to a valid, enforceable agreement
12 because it was not signed by the OLR. To support its arguments, the City relies on the
13 parties' 1977 collective bargaining agreement, the 2009 MOA and the 1987 settlement
14 agreement to show that only comprehensive agreements signed by the OLR are valid. The
15 City also relies on Chapter V of the Code of Ordinances, part of its fiscal year (FY) 2007
16 Budget and the Department's organizational chart to show that the OLR has always required
17 the Department's Labor Relations office to seek final approval on all "comprehensive"
18 settlement agreements between the Department and the Union. Last, the City points to City
19 of Boston v. Boston Police Superior Officers Federation, 466 Mass. 210 (2013) to assert that
20 the May of 2007 agreement was unenforceable based on Chapter 291, §§ 10 and 11 of the
21 Acts of 1906, as amended by Chapter 322 of the Acts of 1962.

22 In City of Boston, 466 Mass. at 211, the City transferred a police sergeant who also
23 served as a Union representative. The Union sought to enforce a provision of the collective
24 bargaining agreement that prohibited the City's involuntary transfer of certain Union

1 representatives between stations or assignments. An arbitrator awarded the grievant
2 damages and reinstatement to his original position after finding that the City violated the
3 collective bargaining agreement. On appeal, the Court concluded that the City's assignment
4 and transfer of officers within the Department are nondelegable statutory powers of the
5 Commissioner pursuant Chapter 291, §§ 10 and 11 of the Acts of 1906, as amended by
6 Chapter 322 of the Acts of 1962.⁸ Id. at 215. The Court held that while the statutory
7 language does not contain the word "transfer," the statutory provision defining the
8 Commissioner's authority, by its plain language, confers nondelegable authority over the
9 assignment and organization of the officers within the Department. Id.

10 The Union argues that the City of Boston does not apply because it was based on a
11 narrow set of facts that did not involve regularly-scheduled overtime. It also argues that the
12 nothing in the parties' 1977 collective bargaining agreement, the 2009 MOA or the 1987
13 settlement agreement expressly shows the OLR's exclusive authority to secure settlement
14 agreements, and nothing in them clarifies the meaning of "comprehensive" settlement
15 agreements. Instead, the Union correctly contends that in 2005, Foley entered into two
16 separate settlement agreements with the Union without the OLR's signature and those
17 agreements were more comprehensive than the parties' 1987 agreement because the terms
18 and conditions were either comparable or more detailed and substantive than the 1987
19 agreement. The Union also correctly points to evidence showing that Commissioners
20 O'Toole and Davis gave Foley "broad discretionary powers" to settle grievances and DLR

⁸ Section 10 of the statute grants the Commissioner "authority to appoint, establish and organize the [Department]." Section 11 grants the Commissioner "cognizance and control of the government, administration, disposition and discipline of the [D]epartment, and of the police force of the [D]epartment and shall make all needful rules and regulations for the efficiency of said police." St. 1906, c. 291, s. 10 and 11, as appearing in St. 1962, c. 322, s. 1.

1 charges, and that O'Toole specifically authorized Foley to agree to any settlement that would
2 not alter the contract or cost the City a tremendous amount of money on a permanent basis.
3 There was no evidence that the OLR required Foley to first obtain its approval prior to
4 entering into the May of 2007 settlement agreement, and even if Foley's failure to obtain OLR
5 approval prior to settling those disputes restricted his "broad discretionary powers," the OLR
6 was still obligated to notify the Union about those restrictions, which it failed to do.
7 Commonwealth of Massachusetts, 28 MLC at 360; Town of Ipswich, 11 MLC at 1410 n.7.

8 Thus, the record shows that Foley possessed the apparent authority to enter into the
9 parties' May of 2007 settlement agreement.

10 However, I disagree with the Union's opposition to City of Boston and find that case
11 applies here. Specifically, I find that the terms of the May of 2007 oral settlement agreement
12 were unenforceable because it infringed on the City's managerial prerogative to make
13 assignments in the Operations SSI Tow Unit. City of Boston states that the City's right to
14 make assignments is non-delegable. Even with the Commissioner's prior approval that
15 granted Foley broad discretionary authority to settle agreements, Chapter 291, §§ 10 and 11
16 of the Acts of 1906, as amended by Chapter 322 of the Acts of 1962 explicitly prohibits Foley
17 from delegating away the right to assign the SSI supervisor. Consequently, I cannot
18 conclude that the City unlawfully repudiated the May of 2007 oral settlement agreement and
19 dismiss this portion of the Complaint.

20 **Counts II and III - Elimination of the SSI Supervisor Position and Discontinuation of**
21 **Regularly-Scheduled Overtime.**

22 A public employer violates Section 10(a)(5) and, derivatively, 10(a)(1) of the Law when
23 it unilaterally changes an existing condition of employment or implements a new condition of

1 employment involving a mandatory subject of bargaining without first giving its employees'
2 exclusive bargaining representative notice and an opportunity to bargain to resolution or
3 impasse. Commonwealth of Massachusetts v. Labor Relations Commission, 404 Mass. 124
4 (1989); School Committee of Newton v. Labor Relations Commission, 388 Mass. 557 (1983);
5 Commonwealth of Massachusetts, 30 MLC 63 (2003), aff'd Secretary of Administration and
6 Finance v. Commonwealth Employment Relations Board, 74 Mass. App. Ct. 91 (2009). The
7 employer's obligation to bargain before changing conditions of employment extends to
8 working conditions established through past practice, as well as those specified in a collective
9 bargaining agreement. Town of Wilmington, 9 MLC 1694, 1699 (1983).

10 To establish a violation, the union must show that: (1) the employer changed an
11 existing practice or instituted a new one; (2) the change had an impact on a mandatory
12 subject of bargaining; and, (3) the change was implemented without prior notice to the union
13 or an opportunity to bargain to resolution or impasse. Commonwealth of Massachusetts, 30
14 MLC at 64; Town of Shrewsbury, 28 MLC 44, 45 (2001); Commonwealth of Massachusetts,
15 27 MLC 11, 13 (2000). To determine whether a binding past practice exists, the CERB
16 "analyzes the combination of facts upon which the alleged practice is predicated, including
17 whether the practice has occurred with regularity over a sufficient period of time so that it is
18 reasonable to expect that the practice will continue." Commonwealth of Massachusetts, 30
19 MLC at 64.

20 The Union satisfied its first prima facie element because the City began assigning SSI
21 supervisors to regularly-scheduled overtime during the SSI season on the Monday through
22 Friday day shifts on June 1, 2007 and made those assignments for three consecutive years.
23 The City changed that practice on May 1, 2010, when it eliminated the SSI supervisor
24 position and discontinued assigning unit members to that position on a regularly-scheduled

1 overtime basis. Commonwealth of Massachusetts, 30 MLC at 64; see also New Bedford
2 School Committee, 2 MLC 1180, 1183 (1975) (a period of three years is sufficient to establish
3 a past practice); Town of Dedham School Committee, 5 MLC 1836, 1839 (1978) (a past
4 practice is unequivocal and if it "has existed substantially unvaried for a reasonable period of
5 time and is known and is accepted by both parties"). Despite the sporadic nature of the SSI
6 season (i.e. from April to November only), the City's practice of annually assigning a SSI
7 supervisor on overtime to the SSI Tow Unit from 2007 to 2010 constitutes a valid past
8 practice. See City of Newton 29 MLC 186 (2003) (a consistent practice that applies to rare
9 circumstances and is followed each time the circumstances precipitating the practice recur,
10 constitutes a condition of employment despite sporadic or infrequent activity).

11 The Union also proved the second and third elements of its prima facie case. First,
12 the CERB holds that work assignments and regularly-scheduled overtime, including
13 assigning the SSI supervisor on overtime, affect terms and conditions of employment and are
14 mandatory subjects of bargaining. City of Boston, (citing, 5 MLC 1738, 1742 (1979) (work
15 assignments is a mandatory subject of bargaining); City of Peabody, 9 MLC 1447, 1450-51
16 (1982) (regularly-scheduled overtime is a mandatory subject of bargaining). Second, the City
17 eliminated the SSI supervisor position and discontinued assigning unit members to that
18 position on a regularly-scheduled overtime basis without first giving the Union prior notice and
19 an opportunity to bargain to resolution or impasse because it implemented those changes on
20 May 1, 2010 but waited 20 additional days to bargain with the Union on May 20, 2010.
21 Commonwealth of Massachusetts, 27 MLC at 13.

22 **City's Arguments**

23 In response to the unilateral change allegations, the City raises three affirmative
24 defenses. First, it argues that there was no unlawful change because the power to make

1 assignments is a nondelegable duty under Chapter 291, §§ 10 and 11 of the Acts of 1906, as
2 amended by Chapter 322 of the Acts of 1962, and the City was not obligated to provide the
3 Union with notice or an opportunity to bargain over the decision to eliminate the SSI
4 supervisor on overtime position because that decision is a core managerial prerogative.
5 Second, if there was an unlawful change, the City argues that it provided the Union with
6 notice and an opportunity to bargain on May 20, 2010, but because the Union refused to
7 bargain with the City on that date, it waived its right to bargain. Third, the City contends that
8 the Union waived its right to bargain by contract.

9 **1. Core Managerial Prerogatives**

10 Pursuant to Section 6 of the Law, public employers must "negotiate in good faith with
11 respect to wages, hours, standards or productivity and performance, and any other terms and
12 conditions of employment." City of Worcester v. Labor Relations Comm'n, 438 Mass. 177,
13 180 (2002). The CERB exempts from collective bargaining certain types of managerial
14 decisions that must, as a matter of policy, be reserved to the public employer's discretion.
15 See Local 346, Int'l Bhd. of Police Officers v. Labor Relations Comm'n, 391 Mass. 429, 437
16 (1984) (in instances where a negotiation requirement would unduly impinge on a public
17 employer's freedom to perform its public functions, Section 6 of the Law does not mandate
18 bargaining over a decision directly affecting the employment relationship). A public employer
19 may exercise its core managerial prerogative concerning the nature of its level of services
20 without first bargaining with its employees' exclusive collective bargaining representative over
21 that decision. City of Boston, 31 MLC 25, 31 (2004) (citing City of Worcester, 438 Mass. at
22 182) (setting the priorities for the deployment of law enforcement resources is purely a matter
23 of policy that is exempt from the scope of bargaining defined in Section 6 of the Law); see
24 also Town of Dennis, 12 MLC 1027, 1029 (1985) (decision to discontinue providing certain

1 private police details is a level of services decision that lies within management's exclusive
2 prerogative); see generally Boston v. Boston Police Patrolmen's Ass'n, 403 Mass. 680, 684
3 (1989).

4 To determine whether a matter properly falls within the scope of bargaining, the CERB
5 balances a public employer's legitimate interests in maintaining its managerial prerogative to
6 effectively govern against the impact on employees' terms and conditions of employment.
7 City of Boston, 31 MLC at 31 (citing Town of Danvers, 3 MLC 1559, 1571 (1977)). The
8 CERB applies the balancing test on a case-by-case basis, considering such factors as: the
9 degree to which the topic has a direct impact on terms and conditions of employment;
10 whether the issue concerns a core governmental decision; or whether it is far removed from
11 terms and conditions of employment. City of Boston, 31 MLC at 31 (citing Town of Danvers,
12 3 MLC at 1577).

13 It is undisputed that the City assigned the SSI supervisor to work overtime on the
14 Monday-Friday day shifts during the April-November SSI season. However, the City disputes
15 that those assignments constituted regularly-scheduled, "permanent" overtime because those
16 overtime shift assignments sometimes went unfilled during the SSI season and never
17 occurred between December 1 and March 31. Although the City did not schedule all SSI
18 supervisors to overtime 100 % of the time, the record shows that it scheduled SSI
19 supervisors to overtime 95% of the time during the 2007 SSI season; 74% of the time during
20 the 2008 SSI season; 90% of the time during the 2009 SSI season; and 100% of the time
21 during the limited 2010 SSI season. However, applying the CERB's balancing test, I find that
22 despite eliminating the SSI position and the regularly-scheduled overtime assignments and
23 despite the impact on wages, the City's decisions to eliminate the position of SSI supervisor
24 and discontinue the overtime are not mandatory subjects of bargaining because those

1 decisions constitute the kind of level of services decision that lies within the exclusive
2 prerogative of management. City of Boston, 31 MLC at 31.

3 **Impact Bargaining Obligation**

4 A public employer's ability to act unilaterally regarding certain subjects or decisions
5 does not relieve that employer of all attendant bargaining obligations. City of Boston, 31 MLC
6 at 31. "Notwithstanding a public employer's prerogative to make certain types of core
7 managerial decisions without prior bargaining...such decisions may also have impacts or
8 effects that would themselves be the subject of mandatory bargaining." City of Worcester,
9 438 Mass. at 185; see also Town of Dennis, 12 MLC at 1031-32; see generally Boston v.
10 Boston Police Patrolmen's Ass'n, 403 Mass. at 685.

11 The City contends that Chief Linskey's need to review the Department's top earners in
12 response to a 2010 media inquiry about Lieutenant Spillane, coupled with his concerns that
13 the SSI supervisor was "very infrequently available," lacked quality control, permitted poor
14 data entry and a high level of citizen complaints, justified the Chief's ultimate decision to
15 eliminate the SSI supervisor position on May 1, 2010. The City also contends that when
16 Chief Linskey learned that SSI Supervisors were "infrequently" present in the back room
17 during their SSI supervisory overtime shifts, he determined that there was no need to
18 maintain the SSI supervisor position, especially since the Department had already committed
19 to assigning three regular supervisors to Operations during the day shift, year round. Relying
20 primarily on City of Boston, 466 Mass. at 211, above, the City maintains that the
21 Commissioner's right to assign and deploy personnel is an unfettered, non-delegable duty
22 under Chapter 291, §§ 10 and 11 of the Acts of 1906, as amended by Chapter 322 of the
23 Acts of 1962 that exempts the City from any Chapter 150E bargaining obligation, including
24 impact bargaining.

1 I disagree. Even though the City possesses a non-delegable right to make
2 assignments, the Board has long held that the City also has a statutory obligation to bargain
3 with the Union over the impacts of the decisions to eliminate the SSI supervisor position and
4 discontinue SSI supervisor overtime but failed to do so. Id. (citing City of Worcester, 438
5 Mass. at 185). The evidence shows that the City instructed regular back room supervisors to
6 assume the additional duties of supervising the four civilian call-takers in the SSI Tow Unit
7 and managing the four additional SSI tow lines while continuing to perform their regular back
8 room duties on day shifts during the SSI season. The evidence also shows that the
9 additional work averaged to at least 35,000 telephone calls from private towing companies
10 during the SSI season, along with an equal amount of telephone calls from private citizens
11 about those tows. Because the City failed to fulfill its obligation to bargain with the Union
12 over the impacts of the decisions to eliminate the SSI supervisor position and discontinue the
13 practice of assigning unit members to that position on a regularly-scheduled overtime basis,
14 that failure amounts to violations of Section 10(a)(5) of the Law. See Boston v. Boston Police
15 Patrolmen's Ass'n, 403 Mass. at 685 (if a managerial decision has impact upon or affects a
16 mandatory topic of bargaining, negotiation over the impact is required).

17 **2. Waiver by Inaction**

18 The City argues that the Union waived its right to bargain over the impacts of the
19 decisions to eliminate the SSI supervisor position and discontinue the practice of assigning
20 unit members to that position on a regularly-scheduled overtime basis because the Union
21 refused to bargain with the City on May 20, 2010. The affirmative defense of waiver by
22 inaction must be supported by evidence of actual knowledge of the proposed change, a
23 reasonable opportunity to negotiate over the change, and an unreasonable or unexplained
24 failure of the union to bargain or to request bargaining. City of New Bedford, 38 MLC 239,

1 250 (2012) (citing City of Boston, 31 MLC at 33) (appeal pending). Waiver by inaction will not
2 be found where a union is presented with a fait accompli. City of New Bedford, 38 MLC at
3 250 (citing Town of Hudson, 25 MLC 143, 148 (1999)).

4 Here, the City notified the Union of its decision to eliminate the position of SSI
5 supervisor on overtime on the same day that it implemented the change (May 1, 2010). The
6 evidence also shows that the City waited an additional 20 days before meeting with the Union
7 to bargain over those changes. Because the City announced its May 1, 2010 decisions
8 without prior notice to the Union and without bargaining over the impacts of those decisions, I
9 find that the City presented the Union with a fait accompli, leaving the Union without
10 bargaining options. See Town of Andover, 4 MLC 1085, 1089 (1977) (where an employer
11 presents the union with a unilateral change in the form of a fait accompli, it is reasonable for
12 the union to conclude that bargaining would be futile); see also City of Everett, 2 MLC 1471
13 (1976). For these reasons, the City's waiver by inaction defense must fail. City of New
14 Bedford at 35 (citing Boston School Committee, 35 MLC at n.23).

15 **3. Contractual Waiver**

16 The City also argues that the Union contractually waived its right to bargain over the
17 decision to eliminate the SSI supervisor position on overtime pursuant to Article Iv of the
18 Agreement. The CERB has long held that an employer asserting contractual waiver as an
19 affirmative defense must show that the parties consciously considered the situation that has
20 arisen, and that the union knowingly waived its bargaining rights. Central Berkshire Regional
21 School Committee, 31 MLC 191, 202 (2005); Commonwealth of Massachusetts, 26 MLC
22 228, 231 (2000); Springfield School Committee, 18 MLC 1357, 1362 (1992) (citing Town of
23 Marblehead, 12 MLC 1667, 1670 (1986)). The waiver needs to be clear and unmistakable.
24 School Committee of Newton, 388 Mass. at 569; City of Boston v. Labor Relations

1 Commission, 48 Mass. App. Ct. 169, 175 (1999). If the language in the contract is
2 ambiguous, the CERB will review the parties' bargaining history to determine their intent.
3 Massachusetts Board of Regents, 15 MLC 1265, 1269 (1988). In particular, the CERB must
4 analyze whether the contract language expressly, or by necessary implication, confers upon
5 the employer the right to make a change in a mandatory subject of bargaining without first
6 giving the union notice and an opportunity to bargain. Id.

7 Article IV Agreement states in full, "The Municipal Employer shall not be deemed to be
8 limited in any way by this Agreement in the performance of the regular and customary
9 functions of municipal management, and reserves and retains all powers, authority and
10 prerogatives including, without limitation, the exclusive right of the Police Commissioner to
11 issue reasonable rules and regulations governing the conduct of the Police Department,
12 provided that such rules and regulations are not inconsistent with the express provisions of
13 this Agreement."

14 However, the City failed to present any evidence of the parties' bargaining history
15 except for the Agreement and its relevant provisions. Further, there is no evidence that the
16 parties ever specifically discussed the SSI supervisor position during their negotiations for the
17 contract. The City failed to present "clear and unmistakable" evidence that the Union
18 knowingly waived its contractual right to bargain over the impacts of the decisions to
19 eliminate the SSI supervisor position and discontinue the practice of assigning unit members
20 to that position on a regularly-scheduled overtime basis. Central Berkshire Regional School
21 Committee, 31 MLC at 202; School Committee of Newton, 388 Mass. at 569. Because
22 Article IV is broadly framed and too vague to show whether the Union clearly and
23 unmistakably waived its bargaining rights, the City's contractual waiver argument must also

1 fail. See Newton School Committee, 5 MLC 1016, 1024 (1978), aff'd sub nom., School
2 Committee of Newton v. Labor Relations Commission, 388 Mass. 557 (1983).

3 CONCLUSION

4 Based on the record and for the reasons explained above, I conclude that the City
5 violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law when it failed to
6 bargain with the Union to resolution or impasse over the impacts of the decisions to eliminate
7 the SSI supervisor position and discontinue the practice of assigning bargaining unit
8 members to that position on a regularly-scheduled overtime basis during the Monday-Friday
9 day shift of the April-November SSI season. However, I conclude that the City did not
10 repudiate the May of 2007 settlement agreement because the terms of that agreement were
11 unenforceable and did not violate the law when it failed to bargain with the Union over the
12 decisions to eliminate the SSI supervisor position and discontinue the practice of assigning
13 bargaining unit members to that position on overtime.

14 REMEDY

15 The CERB has discretion to fashion the most satisfactory remedy possible under the
16 facts of each case, Town of Dedham, 21 MLC 1014, 1024 (1994), including awarding
17 interest. Ashburnham-Westminster Regional School District, 29 MLC 191, 195 (2003).
18 Generally, the CERB fashions remedies for violations of the Law by attempting to place a
19 charging party in the position it would have been in but for the unfair labor practice. Natick
20 School Committee, 11 MLC 1387, 1400 (1985).

21 To remedy an employer's unlawful unilateral change in a mandatory subject of
22 bargaining, the CERB usually orders the restoration of the status quo ante until the employer
23 fulfills its bargaining obligation, and directs the employer to make whole the affected
24 employees for any economic losses they may have suffered as a result of the employer's

1 unlawful conduct. Town of Weymouth, 23 MLC 70, 72 (1996). Where an employer's refusal
2 to bargain is limited to the impact of a managerial decision, the appropriate remedy must
3 strike a balance between the right of management to carry out its lawful decision and the right
4 of an employee organization to have meaningful input on impact issues while some aspects
5 of the status quo are maintained. Town of Burlington, 10 MLC 1387, 1388 (1984). Where
6 the effects of an employer's decision are certain and the union's efforts to impact bargain
7 cannot substantially change, but only ameliorate those effects, the CERB is guided by
8 Transmarine Navigation Corp., 170 NLRB 389 (1968), and only requires employers to make
9 affected employees whole during the period of impact bargaining. Town of Dedham, 21 MLC
10 at 1024. However, the CERB distinguishes cases where the effects of the decision were not
11 inevitable and could have been changed by the union's efforts to impact bargain. Id. In
12 those cases, employers must make affected employees whole retroactively. City of Boston,
13 31 MLC at 33 (CERB ordered both prospective and retroactive remedy, distinguishing
14 between impacts that did not inevitably result from managerial decision).

15 The City was not required to bargain over the decision to eliminate the SSI supervisor
16 position on overtime. It was only required to bargain with the Union over the impacts of that
17 decision, the effects of which inevitably resulted in some bargaining unit members losing the
18 opportunity to work regularly-scheduled overtime on the Monday-Friday day shift during the
19 SSI season, with other unit members assuming an additional workload from the defunct SSI
20 supervisor position beginning May 1, 2010. Although the Chief never followed up on civilian
21 employee concerns about the "infrequent" availability of SSI supervisors and admitted that he
22 decided to eliminate the SSI supervisor position based partially on media inquiries about
23 Lieutenant Spillane as a top-fifty earner, the evidence shows that impact bargaining in this
24 instance could only have ameliorated—not substantially changed—the effect of the City's

1 decision to eliminate the SSI supervisor on overtime. Transmarine Navigation Corp., 170
2 NLRB at 389. Consequently, the affected unit members are not entitled to a retroactive
3 make-whole remedy. Instead, the City is required to restore the economic equivalent of the
4 status quo ante prospectively, during impact bargaining. City of Malden, 20 MLC 1400, 1406
5 (1994).

6 ORDER

7 WHEREFORE, based upon the foregoing, IT IS HEREBY ORDERED that the City of Boston
8 shall:

9
10 1. Cease and desist from:

- 11
12 a) Failing to bargain with the Union over the impacts of the decisions to
13 eliminate the SSI supervisor position and discontinue the practice of
14 assigning unit members to that position on a regularly-scheduled
15 overtime basis.
16
17 b) In any like manner, interfering with, restraining and coercing its
18 employees in any right guaranteed under the Law.
19

20 2. Take the following action that will effectuate the purposes of the Law.
21

- 22 a) Upon request, bargain in good faith with the Union to resolution or impasse
23 concerning the impacts of the May 1, 2010 decisions to eliminate the position of
24 SSI supervisor and discontinue the practicing of assigning unit members to that
25 position on a regularly-scheduled overtime basis.
26
27 b) Restore the economic equivalent of the status quo ante by compensating
28 bargaining unit members who are unable to receive regularly-scheduled
29 overtime payments as the SSI supervisor on Monday-Friday day shifts in the
30 SSI season between April 1 and November 30, during the period beginning on
31 the date of receipt of this decision and continuing until the earliest of the
32 following events:
33
34 i. The City and the Union reach mutual agreement regarding
35 the impact of the decisions to eliminate the SSI supervisor
36 position and discontinue the practice of assigning unit
37 members to that position on a regularly-scheduled overtime
38 basis;
39
40 ii. The City and the Union reach impasse after bargaining in
41 good faith;

- 1 posted, including but not limited to the City's internal e-mail system, and
- 2 maintain for a period of 30 consecutive days thereafter, signed copies of
- 3 the attached Notice to Employees; and,
- 4
- 5 d) Notify the DLR in writing of the steps taken to comply with this
- 6 decision within ten (10) days of receipt of this decision.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS



KENDRAH DAVIS, ESQ.
HEARING OFFICER

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. c. 150E, Section 11, 456 CMR 13.02(1)(j), and 456 CMR 13.15, to request a review of this decision by the Commonwealth Employment Relations Board by filing a Notice of Appeal with the Executive Secretary of the Department of Labor Relations not later than ten days after receiving notice of this decision. If a Notice of Appeal is not filed within the ten days, this decision shall become final and binding on the parties.