

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

In the Matter of *
*
CITY OF SOMERVILLE * Case No.: MUP-13-2977
*
and * Date Issued: December 30, 2015
*
SOMERVILLE POLICE *
EMPLOYEES ASSOCIATION *

Board Members Participating:

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

Appearances:

Matthew Buckley, Esq. - Representing the Employer
Jason Powalisz, Esq. - Representing the Union

1 DECISION ON APPEAL OF HEARING OFFICER DECISION

2 Summary

3 At issue in this appeal is a Hearing Officer’s decision, issued on July 1, 2015, that
4 the City of Somerville (City or Employer) refused to bargain in good faith by
5 implementing a decision to assign bargaining unit members to perform the duties of the
6 non-unit position of Console Operator without first giving the Somerville Police
7 Employees Association (Union) the opportunity to bargain to impasse over the impacts
8 of that decision.

9 The City argues that although the Hearing Officer, “in essence, completely
10 adopted the City’s position” that the assignment of Station Officers to the front desk or

1 “bubble area” was a managerial prerogative that was subject to impact bargaining only,
2 she ordered restoration of the status quo ante and the posting of a “false” notice.

3 After reviewing the record and the parties’ briefs, the Commonwealth
4 Employment Relations Board (CERB) affirms the Hearing Officer’s conclusion that the
5 City violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of M.G.L. c. 150E (the
6 Law) by implementing its decision prior to giving the Union the opportunity to bargain to
7 impasse over the impacts of that decision. Further, because the impacts on bargaining
8 unit members’ workload and job duties were an inevitable consequence of the City’s
9 core managerial decision, a prospective order to bargain over these impacts is
10 appropriate.

11 Statement of the Case

12 The Union filed a charge on July 15, 2013, alleging that the City had engaged in
13 prohibited practices within the meaning of Sections 10(a)(5) and (1) of the Law. On
14 October 28, 2013, a duly-designated DLR Investigator dismissed the Union’s allegation
15 that the City had repudiated an agreement, and issued a Complaint alleging that the
16 City, in violation of the Law, required bargaining unit members to perform the duties of
17 the non-unit position of Console Operator without giving the Union prior notice and an
18 opportunity to bargain to resolution or impasse over the decision and the impact of that
19 decision on employees’ terms and conditions of employment. On November 16, 2013,
20 the City filed its answer. Following a hearing on November 12, 2014, both parties filed
21 post-hearing briefs on December 19, 2014. The Hearing Officer issued her decision on
22 July 1, 2015. On July 10, 2015, the City filed a Request for Review. On July 21, 2015,

1 the Union filed an Opposition to the City's Request for Review. The City then filed a
2 brief response to the Union's Opposition and the Union filed a sur-reply.

3 Statement of the Facts

4 Except as discussed below, the City did not specifically challenge any of the
5 Hearing Officer's factual findings. We therefore adopt the findings set forth in her
6 decision, except as supplemented, where noted, and summarize the material facts
7 relating to the issues on appeal. See Massachusetts Board of Regents, 13 MLC 1267
8 (1986).

9 The parties stipulated to the following facts:

- 10 1. The City is a public employer with the meaning of Section 1 of the Law.
11
- 12 2. The Union is an employee organization within the meaning of Section 1 of the
13 Law.
- 14 3. The Union is the exclusive bargaining representative for uniformed patrol officers
15 employed by the City in its Police Department.
- 16 3. On July 3, 2013, Chief of Police Thomas Pasquerello [(Pasquerello)] issued
17 Special Order 2013-15.
- 18 4. Special Order 2013-15 requires bargaining unit members to provide coverage for
19 the Console Operator from 2:00 a.m. to 6:00 a.m., Tuesday through Saturday,
20 and from 4:00 p.m. on Sunday to 6:00 a.m., Monday morning.
- 21 5. The parties did not bargain over the Special Order.

22 Since issuing Special Order 2013-15, the Police Department has required one of
23 the two station officers to sit inside the 311 call area located at the front desk and
24 enclosed by glass, known as "the bubble," and perform the console operator's duties in
25 addition to his or her station officer duties during the 2:00 a.m. – 6:00 a.m. time slot on
26 Tuesdays through Saturdays, and during the 4:00 p.m. to 6:00 a.m. time slot beginning
27 Sunday afternoon into Monday morning.

1 By e-mail dated July 3, 2013, Deputy Chief of Police Michael S. Cabral (Cabral)
2 informed all personnel that Special Order 2013-15 pertained to “temporary changes”
3 affecting the 311 console position vacancies. By that e-mail Cabral also stated that:

4 The Executive Staff realizes that these changes have put additional
5 responsibilities on you. In advance we apologize for the inconvenience,
6 but feel that this order is necessary to continue to provide services to the
7 community we serve. Please know that Chief Pasquarello has been in
8 contact with personnel and the Mayor’s officer regarding these concerns.
9 In the meantime, we ask for your understanding and thank you for [your]
10 cooperation.

11 On July 30, 2013, Counsel for the Union wrote to Counsel for the City stating that
12 the Union had filed the instant prohibited practice charge and, without waiving any
13 rights, offering to meet with the City to negotiate over those aspects of the changes that
14 constituted mandatory subjects of bargaining.¹ The letter provided dates on which the
15 Union was available to meet and further stated that if a suitable resolution was reached
16 the Union was prepared to withdraw the prohibited practice charge.

17 The Hearing Officer’s Decision

18 The Hearing Officer found the City changed an established practice that affected
19 a mandatory subject of bargaining when, on July 3, 2013, it assigned a station officer to
20 work in the bubble and perform the duties of the civilian 311 console officer, in addition
21 to his or her own duties as a station officer. The Hearing Officer found that the
22 assignment effectively increased the station officers’ workload, and that the change was
23 more than a slight departure from their regular duties and, hence, not de minimis. The
24 Hearing Officer further found no dispute that the City failed to provide the Union with

¹ The July 30, 2013 letter was entered into the record as Joint Exhibit 4. The CERB has supplemented the Hearing Officer’s findings regarding this letter for the sake of completeness.

1 notice and an opportunity to bargain to resolution or impasse over the decision or its
2 impacts.

3 The Hearing Officer next determined that the decision to make this assignment
4 was a core managerial law enforcement priority because it impacted the City's ability to
5 effectively deliver 311 services to the public. The Union did not appeal this holding.
6 However, because the decision also had a direct impact on the station officers' terms
7 and conditions of employment (i.e., changing the station officers' duties and increasing
8 their workload), the Hearing Officer found that the City was required to first bargain with
9 the Union over the impacts of that decision but failed to do so.

10 Finally, the Hearing Officer found no contractual waiver because the City failed to
11 present evidence showing that the Union consciously considered the situation and
12 knowingly and unmistakably waived its rights to bargain over the impacts of the new
13 station officer assignment to the bubble.

14 As a remedy, the Hearing Officer ordered the City to cease and desist from
15 unilaterally changing station officers' workload and duties without providing the Union
16 notice and an opportunity to bargain over the impacts of that decision, or in any like
17 manner from interfering with, restraining and coercing its employees in any rights
18 guaranteed under the Law. She further ordered the City to, upon request, bargain in
19 good faith with the Union to resolution or impasse over the impacts of its decision and to
20 post a notice.

21

1 Opinion²

2 The Hearing Officer correctly applied the standard to determine whether an
3 employer violates Section 10(a)(5) and, derivatively, 10(a)(1) when it unilaterally
4 changes an existing condition of employment or implements a new condition of
5 employment involving a mandatory subject of bargaining without first giving its
6 employees' exclusive bargaining representative notice and an opportunity to bargain to
7 resolution or impasse. Commonwealth of Massachusetts v. Labor Relations
8 Commission, 404 Mass. 124 (1989); School Committee of Newton v. Labor Relations
9 Commission, 388 Mass. 557 (1983). She also correctly found that the City was not
10 obligated to bargain over this decision because setting priorities for the deployment of
11 law enforcement resources is a matter of policy over which it has no duty to negotiate.
12 See City of Worcester v. Labor Relations Commission, 438 Mass. 177, 182 (2002).

13 Notwithstanding a public employer's prerogative to make certain types of core
14 managerial decisions without prior bargaining, however, the CERB holds that "if a
15 managerial decision has impact upon or affects a mandatory topic of bargaining, [then]
16 negotiation over the impact is required." Id. at 185 (citing Boston v. Boston Police
17 Patrolmen's Association, 403 Mass. 680, 685 (1989)); See also Newton School
18 Committee, 388 Mass. at 562-564. The Hearing Officer properly found that impact
19 bargaining was required.

20 On review, the City argues that the fact that no bargaining took place does not
21 mean the City refused to bargain over the impacts of its decision and no evidence of
22 such a refusal was put forward at the hearing. Rather, at the outset, the City took the

² The CERB's jurisdiction is not contested.

1 position that it had the duty to impact bargain, but the Union's response was to file a
2 charge rather than take up the City's offer. Therefore, the City argues that the posting
3 notice is false in stating that the City refused to bargain when, in fact, the Union refused.
4 The City also argues that, under Newton Police Association and City of Newton, 35
5 MLC 142, MUP-02-3634 (2008), the remedy in the normal course when management
6 exercises its prerogative to assign, is to order impact bargaining and, perhaps a make-
7 whole remedy, but not restoration of the status quo ante. The City argues that, in this
8 regard, the CERB is guided by Transmarine Navigation Corp., 170 NLRB 389 (1968)
9 which requires that employees be made whole during the period of impact bargaining.

10 The City has pointed to no evidence in the record that it offered to negotiate over
11 the impacts of this unilateral change in working conditions prior to the change being
12 implemented. Its post-hearing brief merely notes that all bargaining has taken place
13 after the filing of the charge and references the Union's letter of July 30, 2013.
14 Implementation of a unilateral change without notice to the union or an opportunity to
15 bargain is a fait accompli. Absent exigent circumstances not present or argued here, an
16 employer's duty to notify the union of a potential change before it is implemented is not
17 satisfied by presenting the change as a fait accompli and then offering to bargain. City
18 of Newton, 35 MLC 296, 298, MUP-04-4265 (May 27, 2009); Town of Hudson, 25 MLC
19 143, 148, MUP-1715 (April 1, 1999) (citing City of Everett, 2 MLC 1471, MUP-2126
20 (May 5, 1976)). Under such circumstances, the Union need not request bargaining even
21 though it did so here.

22 We therefore reject the City's argument that the Hearing Officer's Notice is false
23 in stating that the City assigned "police officers to perform the duties of the civilian 311

1 console operator without first giving the Union prior notice and an opportunity to bargain
2 to resolution or impasse over the impacts of that decision on employees' terms and
3 conditions of employment."

4 Remedy

5 With respect to the City's objection to the Hearing Officer's statement "to
6 effectively restore the status quo ante in this case," we note that the entire sentence in
7 which that statement appears states:

8 Thus, to effectively restore the status quo ante in this case, I order the City
9 to bargain with the Union over the impacts of the July 3, 2013 decision to
10 assign station officers to perform the duties of the civilian 311 console
11 operator, in addition to their own station officer duties.

12
13 Consistent with this statement, Section 2 of the Order directs the City to take certain
14 affirmative action to effectuate the purpose of the Law. Section 2(a) directs the City to,
15 "[u]pon request, bargain in good faith with the Union to resolution or impasse over the
16 impacts of the July 3, 2013 decision to assign station officers to perform the duties of
17 the civilian 311 console operator." Section 2(b) requires the City to sign and post a
18 notice. Section 2 of the Order did not, however, order the City to rescind the
19 assignments or otherwise to restore the status quo ante.

20 Reading the Remedy and Order together, we construe the Order to require
21 impact bargaining only, but not to rescind the assignments. We have therefore modified
22 Section 1(a) of the Order to avoid further confusion in this regard.

23 As clarified, this Order is consistent with the impacts only bargaining obligation
24 found here. As the Hearing Officer correctly stated, in cases where an employer's
25 refusal to negotiate is limited to the impact of a managerial decision, the CERB
26 traditionally orders restoration of the status quo ante only to affected mandatory

1 subjects and not to the decision itself. Commonwealth of Massachusetts, 26 MLC 116,
2 121-122, SUP-4158 (February 15, 2000). Further, in cases where the effects of an
3 employer's managerial decision are certain and impact bargaining cannot substantially
4 change but can only ameliorate the effects, the CERB, guided by the NLRB's decision
5 in Transmarine Navigation Corp., 170 NLRB 389 (1968), does not order restoration of
6 the status quo ante with respect to the inevitable impacts. Rather, it issues a bargaining
7 order, and, if employees have suffered economic losses, orders restoration of the
8 *economic equivalent* of the status quo ante for a period of time sufficient to permit good
9 faith bargaining to take place. Town of Burlington, 10 MLC 1387, 1388-1389
10 (1984)(amending order on remand from SJC to reflect impacts-only bargaining
11 obligation); City of Boston, 31 MLC 25, MUP-1758 (August 2, 2004).

12 The City of Boston decision illustrates this point well. There, the CERB held that
13 the City's unilateral decision to prioritize paid details was a core managerial decision
14 that required impact bargaining only. The CERB therefore did not order the City to
15 cease prioritizing details. 31 MLC at 33. Instead, as to the impacts that inevitably
16 flowed from the managerial decision, it ordered restoration of the economic equivalent
17 of the status quo during the make-whole period only. Id. With respect to the non-
18 inevitable impacts however, the CERB issued a cease and desist order and a full,
19 retroactive make-whole remedy. Id. at 33-34.

20 The remedy ordered here follows these principles. The record contains no
21 evidence that any bargaining unit members lost wages or benefits as a result of the
22 City's decision. The Hearing Officer therefore, appropriately, did not order a make-
23 whole remedy of any type and the Union does not claim this was error. The Union

1 argues, however, that the workload and job duties changes identified here did not
2 inevitably flow from the City's decision and could have been changed by impact
3 bargaining. It thus claims that an order restoring the status quo ante with respect to
4 those impacts is appropriate here.³ The Union posits that such bargaining could have
5 included a number of topics, including whether the Station Officers would do the
6 Console Operators' work at all. However, in determining whether a Transmarine
7 remedy is appropriate, the CERB looks to whether impact bargaining will allow the
8 employee organization to have meaningful input on impact issues, not the managerial
9 decision itself. City of Boston, 31 MLC at 33. In this case, the Employer's decision to
10 assign the Console Operator's duties to the station officers was the very subject that the
11 Hearing Officer deemed to be outside the scope of mandatory bargaining. The Union
12 did not file an appeal from this holding, and, therefore, it cannot now couch this topic as
13 one of impact bargaining.

14 Further, it is self-evident that the City's decision to assign Console Operators'
15 duties to station officers, while requiring station officers to continue performing their
16 regular duties, necessarily impacted the station officers' job duties and workload. Thus,
17 the other potential impact bargaining issues the Union identifies, such as whether
18 technology would "alleviate" the assignment, or whether additional compensation would
19 have been awarded, could clearly only ameliorate, but not change, the impacts of the
20 City's managerial decision. Under these circumstances, and in the absence of any

³ The Union, like the Employer, reads the Hearing Officer's decision as ordering restoration of the status quo ante, and therefore its arguments in this regard are directed against the Employer's claim on review that the Order was inappropriate. As explained above, we do not construe the Hearing Officer's Order in in this manner.

1 economic impacts, the order to engage in impact bargaining and to post a notice is
2 appropriate. Town of Burlington, 10 MLC at 1389.

3 Conclusion

4 For the foregoing reasons, and as modified, the CERB affirms the Hearing
5 Officer's Decision and Order.

6 Order

7 WHEREFORE, based on the foregoing, it is hereby ordered that the City of
8 Somerville shall:

9 Cease and desist from:

- 10 a. Failing to bargain over the impacts of its decision to require station officers to
11 perform the duties of the civilian 311 console operator, in addition to their own
12 duties, during the hours of 2:00 a.m. to 6:00 a.m. on Tuesdays through
13 Saturdays, and between the hours of 4:00 p.m. to 6:00 a.m. on Sunday
14 afternoon through Monday morning, without first giving the Union notice and
15 an opportunity to bargain to resolution or impasse over the impacts of that
16 decision;⁴
17
- 18 b. In any like manner, interfering with, restraining and coercing its employees in
19 any right guaranteed under the Law.
20
- 21 2. Take the following affirmative action that will effectuate the purpose of the Law:
22
- 23 a. Upon request, bargain in good faith with the Union to resolution or impasse
24 over the impacts of the July 3, 2013 decision to assign station officers to
25 perform the duties of the civilian 311 console operator, in addition to their own
26 duties, during the hours of 2:00 a.m. to 6:00 a.m. on Tuesdays through
27 Saturdays, and between the hours of 4:00 p.m. to 6:00 a.m. on Sunday
28 afternoon through Monday morning;
29
- 30 b. Sign and post immediately in all conspicuous places where members of the
31 Union's bargaining unit usually congregate and where notices to these
32 employees are usually posted, including electronically, if the City customarily
33 communicates to its employees via intranet or e-mail, and maintain for a

⁴ As noted above, we have modified Section 1(a) of the Hearing Officer's Order to comport with the Remedy portion of our decision.

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period of thirty (30) consecutive days thereafter, signed copies of the attached Notice to Employees; and

- c. Notify the DLR in writing within thirty (30) days of receiving this Decision of the steps taken to comply with the Order.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS
COMMONWEALTH EMPLOYMENT
RELATIONS BOARD

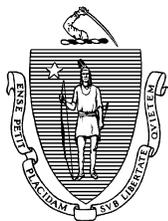
MARJORIE F. WITTNER, CHAIR

ELIZABETH NEUMEIER, CERB MEMBER

HARRIS FREEMAN, CERB MEMBER

APPEAL RIGHTS

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



THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS
NOTICE TO EMPLOYEES
**POSTED BY ORDER OF THE COMMONWEALTH EMPLOYMENT
RELATIONS BOARD**

The Commonwealth Employment Relations Board (CERB) has affirmed a decision of a Department of Labor Relations (DLR) Hearing Officer holding that the City of Somerville (City) violated Sections 10(a)(5) and, derivatively, 10(a)(1) of General Laws Chapter 150E (the Law) by assigning police officers to perform the duties of the civilian 311 console operator without first giving the Union prior notice and an opportunity to bargain to resolution or impasse over the impacts of that decision on employees' terms and conditions of employment. The City posts this Notice to Employees in compliance with the CERB's order.

Section 2 of the Law gives all employees the right to form, join or assist a union; to participate in proceedings at the Department of Labor Relations; to act together with other employees for the purpose of collective bargaining or other mutual aid or protection; and, to choose not to engage in any of these protected activities.

WE WILL not fail to bargain over the impacts of assigning station officers to perform the duties of the civilian 311 console operator, in addition to their own duties, during the hours of 2:00 a.m. to 6:00 a.m. on Tuesdays through Saturdays, and between the hours of 4:00 p.m. to 6:00 a.m. on Sunday afternoon through Monday morning, without first giving the Union notice and an opportunity to bargain to resolution or impasse over the impacts of that decision.

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

WE WILL upon request, bargain in good faith with the Union to resolution or impasse over the impacts of the July 3, 2013 decision to assign station officers to perform the duties of the civilian 311 console operator, in addition to their own duties, during the hours of 2:00 a.m. to 6:00 a.m. on Tuesdays through Saturdays, and between the hours of 4:00 p.m. to 6:00 a.m. on Sunday afternoon through Monday morning.

City of Somerville

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 Labor Relations, Charles F. Hurley Building, 1st Floor, 19 Staniford Street, Boston, MA 02114 (Telephone: (617) 626-7132).

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of

CITY OF SOMERVILLE

and

SOMERVILLE POLICE
EMPLOYEES ASSOCIATION

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Case No. MUP-13-2977

Date issued:
July 1, 2015

Hearing Officer:

Kendrah Davis, Esq.

Appearances:

Matthew Buckley, Esq. - Representing the City of Somerville

Jason Powalisz, Esq. - Representing Somerville Police Employees
Association

HEARING OFFICER'S DECISION

SUMMARY

1 The issue is whether the City of Somerville (City or Employer) violated Section
2 10(a)(5) and derivatively, Section 10(a)(1) of M.G.L. c.150E (the Law) when it required
3 bargaining unit members to assume the duties of the non-unit position of Console
4 Operator on July 3, 2013 without first giving the Somerville Police Employees
5 Association (Union) prior notice and an opportunity to bargain to resolution or impasse
6 over the decision and impacts of the decision on employees' terms and conditions of
7 employment.

1 exhibits, and in consideration of the parties' arguments, I make the following findings of
2 fact and render the following opinion.

3 STIPULATION OF FACTS

4 **The parties stipulated to the following facts:**

- 5 1. The City is a public employer with the meaning of Section 1 of the Law.
6
7 2. The Union is an employee organization within the meaning of Section 1 of the
8 Law.
9
10 3. The Union is the exclusive bargaining representative for uniformed patrol officers
11 employed by the City in its Police Department.
12
13 3. On July 3, 2013, Chief of Police Thomas Pasquerello [(Pasquerello)] issued
14 Special Order 2013-15.
15
16 4. Special Order 2013-15 requires bargaining unit members to provide coverage for
17 the Console Operator from 2:00 a.m. to 6:00 a.m., Tuesday through Saturday,
18 and from 4:00 pm. on Sunday to 6:00 a.m., Monday morning.
19
20 5. The parties did not bargain over the Special Order.

21
22 FINDINGS OF FACT

23
24 **The Collective Bargaining Agreement**

25 The Union and the City were parties to a collective bargaining agreement
26 (Agreement) effective from July 1, 2004 – June 30, 2008. They were also parties to
27 three memoranda of agreement (MOA) effective from: July 1, 2008 through June 30,
28 2009; July 1, 2009 through June 30, 2011; and July 1, 2011 through June 30, 2012.

29 Article II, Management Rights states, in pertinent part:

30 Except as provided by the specific provisions of this Agreement and in
31 accordance with applicable law, the City will continue to have, whether
32 exercised or not, all of the right[s], powers and authority heretofore
33 existing, including but not limited to, the following: determine the standards

1 of services to be offered by the Police Department; determine the
2 standards of selection for employment; direct its employees; take
3 disciplinary action; relieve it[s] employees from duty because of lack of
4 work or for other legitimate reasons; issue rules and regulations not
5 inconsistent with this Agreement; maintain the efficiency of governmental
6 operations; determine the methods, means and personnel by which the
7 City's operations are to be conducted; determine the content of job
8 classifications; exercise complete control and discretion over its
9 organization and the technology of performing its work; and fulfill all of its
10 legal responsibilities....

11
12 **The 311 Call Centers**

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14 The City has three call-centers that are dedicated to answering telephone calls
15 from the public which pertain to non-emergency (311) services (e.g., requests for
16 certain City services like repairing potholes and removing downed trees). The City's
17 three 311 call-centers are located at City Hall, in the Police Department and in Beverly,
18 Massachusetts by a third-party answering service. Each call-center is open seven days
19 weekly, 24 hours daily and, since August of 2000, has been headed by Steven Craig
20 (Craig), Director of Constituent Services for the City. Craig is also responsible for the
21 non-unit, civilian 311 console operators, who answer (and sometimes transfer) the
22 incoming 311 calls.

23 At the police station, the 311 call area is located at the front desk inside the
24 "bubble,"⁵ which is near the station officers' designated work area and separated by an
25 eight-foot hallway and two doors (that are typically closed, or only partially opened).
26 The Police Department assigned civilian 311 console operators to work in the station at

⁵ The Police Department colloquially refers to the front desk area as the "bubble" because it is enclosed by glass.

1 the bubble. When one of the civilian 311 console operators needed to take a meal or
2 restroom break, a station officer would occasionally cover the bubble that brief period,
3 due to the close proximity between the bubble and the station officer's designated area.
4 On those occasions, prior to July 3, 2013, the station officer would either sit inside the
5 bubble or monitor the lobby and the front desk areas via the department's video
6 surveillance system.

7 In preparation for the fiscal year (FY) 2014 budget, Craig conducted a study and
8 concluded that during the winter of FY 2013, the lowest call-volume of all incoming, 311
9 calls that the Police Department's console operators received occurred between the
10 hours of 2:00 a.m. and 6:00 a.m.⁶ As a result of his study, the City decided that,
11 through attrition, it would no longer fill any more civilian 311 console operator vacancies.

12 Prior to July 3, 2013, and between the hours of 2:00 a.m. and 6:00 a.m. (i.e.,
13 after hours), the Police Department did not assign civilian 311 console operators to
14 answer calls from inside the station's bubble. Instead, the Police Department directed
15 that those incoming 311 calls be automatically transferred to either the third-party
16 answering service in the city of Beverly or to the 911 operators.

17 **The Civilian 311 Console Operators**

⁶ Craig testified that during this time, the call-centers received between 1 and 1.5 calls per hour, on average. The Union did not dispute this testimony. Neither party offered Craig's complete FY 2014 study. Further, neither party offered evidence of the average number of total 311 calls that occurred after-hours during the spring, summer and autumn months of FY 2014.

1 The civilian 311 console operators' duties include: surveillance of the lobby area,
2 including ensuring the safe transfer of children during parent custody exchanges;
3 monitoring public facilities such as the lavatories; reviewing claim checks for towed
4 motor vehicles and processing vehicle releases from the tow lot; handing out and
5 receiving certain forms for: vehicle crash reports, stolen motor vehicles, incident reports,
6 missing persons, credit card fraud, identity fraud, etc.; answering 311 calls, calls from
7 the "1600" line⁷ and other types of non-emergency calls; assisting the general public
8 with various directions (e.g., about information related to holiday parking bans; etc.).

9 **The Station Officer Position**

10
11 Since at least 1994, the Police Department has assigned two police officers per
12 shift to work at a specific desk area inside the station, which is located near the lobby
13 and 911 areas but is separate from the front desk/bubble area. Specifically, prior to July
14 3, 2013, and between the hours of 2:00 a.m. to 6:00 a.m. on Tuesdays through
15 Saturdays, and 4:00 p.m. to 6:00 a.m. on Sunday afternoon through Monday morning,
16 the Police Department regularly assigned two station officers to work in the station area.
17 During that time, the Police Department never assigned those station officers to
18 specifically cover the "bubble" and perform civilian 311 console operator duties. On
19 occasion, however, the third-party answering service might transfer a 311 call to the
20 police station if that call concerned to a police-related matter (e.g., a noise complaint).

⁷ The parties did not elaborate about the nature of these calls.

1 In those instances, one of the assigned station officers would usually respond to the
2 call.

3 **The Station Officers**

4 In July of 2011, the Police Department hired Mark Nevin⁸ as a patrol officer.
5 Beginning in or about September of 2012 through February of 2014, the Police
6 Department assigned Nevin to work as a station officer. After July 3, 2013, the
7 Department assigned Nevin to work in the bubble and perform the duties of the civilian
8 311 console operator, in addition to his duties as a station officer.⁹

9 In November of 2012, the Police Department hired Oscar Joseph Rivera
10 (Rivera), assigning him to the station officer position from February of 2013 to present.
11 Between February of 2013 and February of 2014, the Police Department scheduled
12 Rivera to work the “last-half” shift (11:45 p.m. to 7:45 a.m.) on a four-two schedule (i.e.,
13 working four consecutive shift days with two consecutive days off). At some point
14 between July of 2013 and February of 2014, the Police Department assigned Rivera to
15 work in the bubble and perform the duties of the civilian 311 console operator, in

⁸ In its post-hearing brief, the Union contends that station officer “Dan Nevin” testified at the hearing, however the record only reflects the testimony of the following five witnesses: Oscar Joseph Rivera, Mark Nevin, Steven Craig, David Fallon and Michael McGrath. The record also shows that the only station officers employed by the City were Joseph Rivera, Michael McGrath and Mark Nevin. Further, on or about November 12, 2014, the Association requested, and I authorized, a subpoena for a person identified as Mark Nevin. Thus, for purposes of my decision, I am treating all references to Dan Nevin as a reference to Mark Nevin.

⁹ The record is unclear about the specific time period during which Nevin performed the station officer duties.

1 addition to his duties as a station officer during his last-half shift schedule. At some
2 point after February 2014, the Police Department scheduled Rivera to work a four-two
3 “switch” or “split” shift (i.e., working two consecutive days on the first shift (3:45 p.m. to
4 11:45 p.m.) and two consecutive days on the last shift (7:45 a.m. to 3:45 p.m.), with two
5 consecutive days off.

6 In 1994, the Police Department hired Michael McGrath (McGrath) and, since that
7 time he has served in the following positions: dispatcher, station officer, clerk, officer in
8 the narcotics unit, officer in the domestic violence unit, officer in the general detective
9 unit, and patrol officer (his most current position). Since in or about 2011, McGrath has
10 also served as Union President.¹⁰

11 **The Station Officers’ Duties**

12 The station officers’ duties include: monitoring arrestees; booking arrestees;
13 transporting arrestees from the arrest site, from the hospital and/or to a “wet shelter” for
14 intoxicated arrestees; administering breathalyzer tests; managing the detail list and
15 contacting/assigning patrol officers to available detail assignments; inputting various
16 document information, including stolen vehicle information, stolen license plates,
17 missing persons, other stolen or missing “high-value” property; processing license plate
18 information requests from fellow officers; inputting certain data for Homeland Security

¹⁰ The record is unclear about the specific time period during which McGrath performed the station officer duties. Also, there is no record evidence showing that the Police Department ever assigned McGrath to work in the bubble and perform the duties of the civilian 311 console operator position on or after July 3, 2013.

1 and reporting if the input system has crashed; responding to law enforcement-related
2 issues in the lobby area; answering certain questions by telephone; sitting with juveniles
3 in a designated area and waiting to either release them to a parent or guardian or
4 transport them to a separate juvenile holding facility; and monitoring SIGIS, a national
5 database communications software application system that allows computerized
6 communication between different law enforcement agencies.

7 **1. The Booking Process**

8 The Police Department usually assigns two officers per shift to the station. Prior
9 to July 3, 2013, when a patrol officer would make an arrest, one of the station officers
10 would drive the police transport vehicle to the arrest location, arrest the suspect, pat
11 them down for contraband, remove any personal property from their person, and
12 transport them to the station. Once arriving at the station, the second station officer
13 would assist the first one by placing the arrestee in the holding area until the
14 commanding officer (or commander) was ready to “book” the arrestee (i.e., process
15 certain documentation and authorize certain procedures to finalize the arrestee’s
16 confinement). On the commander’s instruction, both station officers would bring the
17 arrestee to the front desk area where they would: log all of the arrestee’s personal
18 property; remove any personal clothing articles that may harm the arrestee; fingerprint
19 the arrestee; grant him or her a telephone call if requested; and place them in a jail cell.
20 During this time, the entire booking process could take anywhere between 20 to 30
21 minutes depending on whether the arrestee was cooperative.

1 Prior to July 3, 2013, the arresting patrol officer did not enter the station with the
2 station officer to conduct the arrestee's booking during the after-hours period of 2:00
3 a.m. to 6:00 a.m. on Tuesday through Saturday, and 4:00 p.m. to 6:00 a.m. on Sunday
4 afternoon through Monday morning. However, after July 3, 2013, the Police
5 Department instructed the arresting patrol officer to accompany the first station officer
6 into the station to book the arrestee, while the second station officer remained in the
7 bubble. After this change, the booking process could average about one-hour
8 depending on the arresting officer's experience with the process.

9 Additionally, after July 3, 2013, there were occasions when the station officer
10 assigned to the bubble would have to leave the front-desk area to either assist in the
11 booking process or attend to members of the public who entered the lobby.

12 **2. The Detail Assignments**

13 On the last-half shift between the hours of 7:45 a.m. and 3:45 p.m. on Sunday,
14 station officers assigned to that shift would be responsible for coordinating the detail
15 assignments for the upcoming day shift on Monday. Coordination of those detail
16 assignments include contacting approximately 30 patrol officers by telephone to fill
17 between 15 to 25 detail job assignments. Specifically, the assigned station officer
18 would telephone each patrol officer, inquire about whether they had an assignment
19 preference from the detail list, and mark that preference, if any. If a patrol officer did not
20 answer his or her telephone on the first call, the station officer would leave a voice
21 message and give them 10 minutes to call back. Failure to return the station officer's

1 call would result in the station officer bypassing that patrol officer and contacting the
2 next person on the list.

3 After July 3, 2013, the Police Department expected station officers to carry out
4 the detail assignment responsibility, in addition to any other tasks required of them while
5 assigned to the bubble throughout the last-half shift.

6 **The 2003 Grievance**

7 From 1994 until 2003, the Police Department had employed civilians to staff the
8 bubble as operators. At some point in 2003, the Police Department decided to lay-off
9 the civilian operators who worked in the bubble during the after-hours period on the last-
10 half shift. Specifically, by Memo 2003-30, issued on July 11, 2003, the Department
11 stated, in full:¹¹

12 At 2400 hours on July 13, 2003 the lay-offs of the Console Operators will
13 take effect.

14
15 Effective at 0001 hours on July 14, 2003, shift #1, one of the two Station
16 Officers will assume the work station in the Glassed-In Lobby area to
17 assist walk-in citizens.
18

¹¹ The Memo 2003-30 is silent about 311 calls, and the parties did not clarify whether these “console operators” were the same civilian 311 console operators at issue here. David Fallon (Fallon), whom the department promoted to Chief in October of 2014, testified that since at least 2005, the City has employed civilians as “operators” inside the bubble. On rebuttal, Union President McGrath testified that while he was unsure about when the City first began using the term “311 console operators,” he was sure that it had employed civilians in those positions to perform their duties inside of the bubble since, at least, 1994. Because the City did not dispute this point, I credit McGrath’s testimony.

1 The Lobby Station Officer will have access to the CAD¹² and Telephone
2 systems.

3
4 The duties of the Lobby Station Officer's position will continue to be the
5 same as the inside station officer as outlined in all previous orders,
6 memos and job descriptions.

7
8 **Lobby Station Officer Duties:**

9 Tow Card Release

10 Assisting with Lobby Customers

11 Answering Emergency Phone Lines

12 Answering General Business Phone Lines

13 Adding in CAD Items (incidents) for Dispatch

14 And any other duties or responsibilities given to them by the Division
15 Commander, Commander of Field Operations, or the Chief of Police.

16
17 (Emphasis in original.)

18
19 The Union filed a grievance protesting the changes outlined in Memo 2003-30,
20 and the City ultimately settled the matter in or about May of 2004 by restoring the
21 console operators to their positions.

22 **Special Order 2013-15**

23
24 By Special Order 2013-15 dated July 3, 2013, former Chief Pasquarello notified
25 all personnel that the Police Department was changing the way it handled temporary
26 coverage when the console operator's position was vacant. That Order stated, in full:

27 On July 1, 2013, the Console Operators' hours have been changed
28 leading to no coverage from 2:00 a.m. to 6:00 a.m. each morning Tuesday
29 through Saturday and Sunday from 4:00 p.m. through 6:00 a.m. Monday
30 morning. This affects business line calls to the Police Department,
31 Customer Service to citizens at the lobby window and the overall security
32 of the Public Safety building.
33

¹² The parties did not identify this term.

1 As we work toward a permanent solution to these issues, the following
2 steps will be taken in the interim:

- 3
- 4 1. When the console operator's position is vacant, the operator will
5 forward all police related calls to station personnel and/or 911 call
6 takers;
 - 7
 - 8 2. One of the station officers will perform their duties while stationed at
9 the front desk-lobby area, to assist the public with police related
10 issues, monitor all civilian activity and maintain the security of the
11 public safety building. The other station officer will remain in the
12 station officer's area to continue with current duties as described in the
13 Station Officer's job description (Prisoner Transport, Monitoring
14 prisoners, BOP, etc...);
 - 15
 - 16 3. When an officer places a person in custody (arrest, 111B, etc.) the
17 arresting officer will follow the prisoner transport vehicle to the station;
18 and will remain with the person in custody, assuming all booking duties
19 and responsibilities, until the prisoner is placed in the cell. The
20 arresting officer will then utilize the station officer's computer to file
21 reports, while also being in a position to monitor prisoners. This will be
22 necessary, especially if the station officer needs to leave the station to
23 pick up an arrestee with the wagon.
 - 24

25 Since issuing Special Order 2013-15, the Police Department has required one of
26 the two station officers to sit inside the bubble and perform the console operator's duties
27 in addition to his or her station officer duties during the 2:00 a.m. – 6:00 a.m. time slot
28 on Tuesdays through Saturdays, and during the 4:00 p.m. to 6:00 a.m. time slot
29 beginning Sunday afternoon into Monday morning.

30 By e-mail dated July 3, 2013, Deputy Chief of Police Michael S. Cabral (Cabral)
31 informed all personnel that Special Order 2013-15 pertained to "temporary changes"
32 affecting the 311 console position vacancies. By that e-mail Cabral also stated that:

33 The Executive Staff realizes that these changes have put additional
34 responsibilities on you. In advance we apologize for the inconvenience,

1 but feel that this order is necessary to continue to provide services to the
2 community we serve. Please know that Chief Pasquarello has been in
3 contact with personnel and the Mayor's officer regarding these concerns.
4 In the meantime, we ask for your understanding and thank you for [your]
5 cooperation.
6

7 After filing its Charge, the Union made a written demand to bargain with the City
8 on July 30, 2013.¹³

9 DECISION

10 A public employer violates Section 10(a)(5) and, derivatively, 10(a)(1) of the Law
11 when it unilaterally changes an existing condition of employment or implements a new
12 condition of employment involving a mandatory subject of bargaining without first giving
13 its employees' exclusive bargaining representative notice and an opportunity to bargain
14 to resolution or impasse. Commonwealth of Massachusetts v. Labor Relations
15 Commission, 404 Mass. 124 (1989); School Committee of Newton v. Labor Relations
16 Commission, 388 Mass. 557 (1983); Commonwealth of Massachusetts, 30 MLC 63,
17 SUP-4784 (Oct. 9, 2003). To establish a violation, a union must show that: (1) the
18 employer changed an existing practice or instituted a new one; (2) the change had an
19 impact on a mandatory subject of bargaining; and, (3) the change was implemented
20 without prior notice to the union and an opportunity to bargain to resolution or impasse.
21 Commonwealth of Massachusetts, 30 MLC at 64; Town of Shrewsbury, 28 MLC 44, 45,
22 MUP-1704 (June 29, 2001); Commonwealth of Massachusetts, 27 MLC 11, 13, SUP-
23 4378 (Aug. 24, 2000). Issues concerning workload and job duties are mandatory

¹³ There is no evidence in the record that the parties ever met to bargain over this issue.

1 subjects of bargaining. Peabody School Committee, 13 MLC 1313 (1986) (workload);
2 Town of Lakeville, 38 MLC 219, MUP-09-5590 (H.O. Mar. 22, 2012), aff'd 38 MLC 290
3 (May 23, 2012) and Town of Danvers, 3 MLC 1559, 1576, MUP-2292 and MUP-2299
4 (April 6, 1977) (job duties).

5 Here, the Union argues that the City changed the established practice of
6 assigning two station officers to the station area, when on July 3, 2013, it began
7 assigning one of the two officers to work in the bubble and perform the duties of the
8 civilian 311 console officer, in addition to his or her own duties as a station officer,
9 between the hours of 2:00 a.m. to 6:00 a.m. during the last-half shift on Tuesdays
10 through Saturdays, and the hours of 4:00 p.m. to 6:00 a.m. on Sunday afternoon
11 through Monday morning. The Union contends that the change affected a mandatory
12 subject of bargaining because it: increased the station officer's workload and duties by
13 requiring that s/he respond to the incoming 311 calls (along with performing other
14 civilian 311 console operator duties, such as responding to lobby events); increased the
15 amount of time it takes to conduct the booking process during the after-hours shift by
16 requiring the station officer to stay in the bubble while the arresting officer enters the
17 station to assist with booking; increased interference with the station officers' duties;
18 and an increased safety risk for patrol officers who remained on patrol while the
19 arresting officer left his or her post to come inside the station and assist with the
20 booking process.

1 I agree. The Union presented evidence showing that the City changed an
2 established practice that affected a mandatory subject of bargaining when, on July 3,
3 2013, it assigned a station officer to work in the bubble and perform the duties of the
4 civilian 311 console officer, in addition to his or her own duties as a station officer,
5 during the 2:00 a.m. to 6:00 a.m. shift on Tuesdays through Saturdays, and the 4:00
6 p.m. to 6:00 a.m. shift on Sunday afternoon through Monday morning. See
7 Commonwealth of Massachusetts, 30 MLC at 64. The evidence also shows that the
8 assignment effectively increased the station officers' workload because, prior to the
9 change, the City did not require them to perform the civilian 311 console officer's duties
10 in addition to their own station officer duties. See Peabody School Committee, 13 MLC
11 at 1319; Town of Lakeville, 38 MLC at 225, aff'd 38 MLC at 290; see also, Chief Justice
12 of Administration and Management of the Trial Court (CJAM), 35 MLC 230, 235, SUP-
13 04-5126 (April 14, 2009) (employer unilaterally changed unit members' workload when it
14 temporarily assigned them to staff the front desk for one half day per week, in addition
15 to performing their regular job duties). There is no dispute that the City failed to provide
16 the Union with notice and an opportunity to bargain to resolution or impasse over the
17 decision or its impacts.

18 While the City does not dispute that job duties are a mandatory subject of
19 bargaining, it City argues that there has been no substantial change in the station
20 officers' job duties; or, alternatively, if there was a change, it was de minimis because
21 the total number of 311 calls received by station officers during the winter of FY 2014

1 averaged between one and two calls between the hours of 2:00 a.m. and 6:00 a.m. on
2 Tuesdays through Saturdays, and between 4:00 p.m. and 6:00 a.m. on Sunday
3 afternoon through Monday morning.

4 **Complained of Action was not De Minimis**

5 Generally, the Commonwealth Employment Relations Board (CERB) will not find
6 an unlawful change to employees' terms and conditions of employment where the
7 action complained of is only a slight departure from what is normally required. See
8 Town of Danvers, 3 MLC 1559, 1576-77, MUP-2292 and MUP-2299 (Apr. 6, 1977)
9 (where employer required firefighters to include more specified data on their time slips,
10 that the change was "too insignificant" to be subjected to mandatory collective
11 bargaining). However, where the change is more than a slight departure and, where it
12 amounts to a material increase in workload and job duties, the CERB will not find the
13 complained of action to be de minimis. See CJAM, 35 MLC at 235 (employer's
14 assignment of probation officers and assistant chief probation officers to staff the front
15 desk for one half day per week for an eight-week period, in addition to their regular
16 duties, constituted a significant workload increase and, therefore, was not de minimis).

17 Here, the City's action of assigning station officers to the bubble in July of 2013
18 was a significant material change because, in addition to answering 311 calls, the
19 Police Department also required them to perform all of the other duties of the civilian
20 311 console operator during the hours of 2:00 a.m. and 6:00 a.m. on Tuesdays through
21 Saturdays, and between 4:00 p.m. and 6:00 a.m. on Sunday afternoon through Monday

1 morning, including: monitoring the lobby area and the public lavatories; assisting with
2 various forms and directions; and managing towed vehicle incidents. CJAM, 35 MLC at
3 235. Because the assigned station officers performed those bubble duties on top of
4 their regular station officer duties, I find that the change was more than a slight
5 departure from their regular duties; and, thus not de minimis. Id.

6 **Affirmative Defenses**

7 As affirmative defenses, the City argues that it has the core managerial
8 prerogative and contractual management right under Article II of the parties' Agreement
9 to assign station officers to the bubble to perform civilian 311 console operator duties, in
10 addition to their own station officer duties.

11 **1. Core Managerial Prerogative**

12 Section 6 of the Law requires public employers to negotiate before changing the
13 wages, hours, working conditions or standards of productivity and performance of their
14 employees. School Committee of Newton, 388 Mass. at 562; see also Commonwealth
15 of Massachusetts, 36 MLC 65, 68, SUP-05-5191 (Oct. 23, 2009); Town of Andover, 28
16 MLC 264, 269-70, MUP-1012 and MUP-1186 (Feb. 7, 2002). The City's decision to set
17 priorities for the deployment of law enforcement resources is a matter of policy over
18 which it has no duty to negotiate. See City of Worcester v. Labor Relations
19 Commission, 438 Mass. 177, 182 (2002). However, notwithstanding a public
20 employer's prerogative to make certain types of core managerial decisions without prior
21 bargaining, the CERB holds that "if a managerial decision has impact upon or affects a

1 mandatory topic of bargaining, [then] negotiation over the impact is required." Id. at 185
2 (citing Boston v. Boston Police Patrolmen's Association, 403 Mass. 680, 685 (1989));
3 see also Newton School Committee, 388 Mass. at 564.

4 To decide whether a subject properly falls within the scope of bargaining, the
5 CERB balances a public employer's interest in maintaining its managerial prerogative to
6 effectively govern against the impact on employees' terms and conditions of
7 employment. City of Boston, 32 MLC 4, 11-12, MUP-01-2892 (June 24, 2005) (citing
8 Town of Danvers, 3 MLC at 1577). Applying this balancing test, the CERB considers
9 factors such as the degree to which the subject has a direct impact on terms and
10 conditions of employment, and whether the subject involves a core governmental
11 decision or is far removed from employees' terms and conditions of employment. City
12 of Boston, 32 MLC at 11 (citing Town of Danvers, 3 MLC at 1577).

13 Here, the decision to assign one station officer to the bubble during the hours of
14 2:00 a.m. to 6:00 a.m. on Tuesdays through Saturdays, and 4:00 p.m. to 6:00 a.m. on
15 Sunday afternoon through Monday morning was a core managerial law enforcement
16 priority because it impacted the City's ability to effectively deliver 311 services to the
17 public. See City of Worcester, 438 Mass. at 182-84 (where to deploy public services fall
18 within the penumbra of managerial rights and, thus, are not subject to mandatory
19 bargaining); see also Boston School Committee, 13 MLC 1444, aff'd 14 MLC 1365
20 (1987) (the number of employees assigned to each building is a managerial decision).
21 However, because the decision also had a direct impact on the station officers' terms

1 and conditions of employment (i.e., changing the station officers' duties and increasing
2 their workload), I find that the City was required to first bargain with the Union over the
3 impacts of that decision but failed to do so. Town of Lakeville, 38 MLC at 22; see also
4 See Burlington v. Labor Relations Comm'n, 390 Mass. 157, 164-67 (1983) (although
5 town had prerogative to reassign duties, it was still required to bargain over the impacts
6 of that reassignment).

7 **2. Contractual Waiver**

8 The City also argues that the Union waived its right to bargain over the decision
9 and impacts of assigning station officers to perform the civilian 311 console operator
10 duties during the last-half shift in July of 2013, pursuant to Article II of the Agreement.
11 Because I have found that the City was not obligated to bargain over the decision to
12 require station officers to perform the console operators' duties, I only consider whether
13 the Union waived its rights to impact bargain.

14 Where an employer raises the affirmative defense of waiver by contract, it bears
15 the burden of demonstrating that the parties consciously considered the situation that
16 has arisen, and that the union knowingly and unmistakably waived its bargaining rights.
17 City of Boston v. Labor Relations Commission, 48 Mass. App. Ct. 169, 174 (1999); City
18 of New Bedford, 38 MLC 239, 248, MUP-09-5581 and MUP-09-5599 (April 3, 2012);
19 Massachusetts Board of Regents, 15 MLC 1265, 1269, SUP-2959 (Nov. 18, 1988);
20 Town of Marblehead, 12 MLC 1667, 1670, MUP-5370 (Mar. 28, 1986). A waiver by
21 contract will not be lightly inferred. There must be clear and unmistakable showing that

1 such waiver occurred through the bargaining process or the specific language of the
2 agreement. City of New Bedford 38 MLC at 248 (citing City of Taunton, 11 MLC 1334,
3 1336, MUP-5198 (Jan. 17, 1985)).

4 Although the language of Article II states clearly that the City reserves the sole
5 discretion “to determine the standards of services to be offered by the Police
6 Department;...issue rules and regulations not inconsistent with this Agreement;...[and]
7 determine the methods, means and personnel by which the City’s operations are to be
8 conducted” the contract is silent about whether that same exclusive discretion extends
9 to the City’s managerial decision to permanently increase the workload of station
10 officers by assigning them to perform the duties of the civilian 311 console operator in
11 addition to performing their own duties as station officers. Accordingly, I find no
12 contractual waiver in this instance because the City failed to present evidence showing
13 that the Union consciously considered the situation and knowingly and unmistakably
14 waived its rights to bargaining over the impacts of the new station officer assignment to
15 the bubble during the after-hours portion of the last-half shift. City of Boston, 48 Mass.
16 App. Ct. at 174; City of New Bedford, 38 MLC at 248.

17 REMEDY

18 Section 11 of the Law grants the CERB broad authority to fashion appropriate
19 orders to remedy a public employer's unlawful conduct. Labor Relations Commission
20 v. Everett, 7 Mass. App. Ct. 826 (1979). When an employer refuses to bargain, the
21 usual remedy includes an order to bargain, and to return the parties to the positions

1 they would have been in if the violation had not occurred. Town of Dennis, 12 MLC
2 1027, 1033, MUP-5247 (June 21, 1985). However, if the bargaining obligation involves
3 only the impacts of a decision to alter a mandatory subject of bargaining, but not the
4 decision itself, the appropriate remedy must strike a balance between the right of
5 management to carry out its lawful decision and the right of an employee organization to
6 have meaningful input on impact issues while some aspects of the status quo are
7 maintained. Town of Burlington, 10 MLC 1387, 1388-89, MUP-3519 (Feb. 1, 1984).

8 The usual remedy for a failure to bargain over the impacts of a decision involving
9 a managerial prerogative is a prospective order to bargain to resolution or impasse over
10 the impacts of the decision on mandatory subjects of bargaining. Town of Burlington,
11 10 MLC at 1389 (ordering the employer to offer to bargain over the impact of its
12 decision to reassign prosecutorial duties). In cases where an employer's refusal to
13 negotiate is limited to the impact of a managerial decision, the CERB traditionally orders
14 restoration of the status quo ante applicable to those affected mandatory subjects rather
15 than to the decision itself. Commonwealth of Massachusetts, 26 MLC 116, 121-22,
16 SUP-4158 (Feb. 15, 2000). In this respect, the CERB seeks to restore the parties to
17 their bargaining and economic positions that existed prior to the unlawful conduct. City
18 of Malden, 20 MLC 1400, 1406-07, MUP-7998 (Feb. 23, 1994).

19 Here, the City failed to bargain to resolution or impasse over the impacts of the
20 changes in station officers' workload and job duties between the hours of 2:00 a.m. and
21 6:00 a.m. on Tuesdays through Saturdays, and between the hours of 4:00 p.m. and

1 6:00 a.m. on Sunday afternoon through Monday morning. Thus, to effectively restore
2 the status quo ante in this case, I order the City to bargain with the Union over the
3 impacts of the July 3, 2013 decision to assign station officers to perform the duties of
4 the civilian 311 console operator, in addition to their own station officer duties.
5 Commonwealth of Massachusetts, 26 MLC at 121-22; Town of Burlington, 10 MLC at
6 1389.

7 CONCLUSION

8 For the reasons stated above, I conclude that the City did not violate the Law
9 when it failed to provide the Union with notice and an opportunity to bargain to
10 resolution or impasse over the July 3, 2013 decision to assign station officers to perform
11 the duties of the civilian 311 console operator between the hours of 2:00 a.m. and 6:00
12 a.m. during the last-half shift on Tuesdays through Saturdays, or between the hours of
13 4:00 p.m. to 6:00 a.m. on Sunday afternoon through Monday morning. However, I
14 conclude that the City did violate Section 10(a)(5) and, derivatively, Section 10(a)(1) of
15 the Law by failing to bargain with the Union over the impacts of that July 3, 2013
16 decision on employees' terms and conditions of employment.

17 ORDER

18 WHEREFORE, based on the foregoing, it is hereby ordered that the City of
19 Somerville shall:

20 Cease and desist from:

- 21 d. Unilaterally changing station officers' workload and duties by assigning them
22 to perform the duties of the civilian 311 console operator, in addition to their

