

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

In the Matter of

TOWN OF COHASSET

and

COHASSET PERMANENT
FIREFIGHTERS, LOCAL 2804,
I.A.F.F.

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Case No. MUP-12-1495

Date Issued: January 30, 2015

Board Members Participating:

Marjorie F. Wittner, Chair
Elizabeth Neumeier, Board Member

Appearances:

Brian Magner, Esq. - Representing the Town of Cohasset
Nicholas J. Dominello, Esq.

Paul T. Hynes, Esq. - Representing the Cohasset Permanent
Firefighters, Local 2804, I.A.F.F.

DECISION ON APPEAL OF HEARING OFFICER'S DECISION

SUMMARY

1 The issue before the Commonwealth Employment Relations Board (CERB) is
2 whether the Hearing Officer correctly concluded that the Town of Cohasset (Town or
3 Employer) violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Chapter 150E
4 (the Law) by transferring bargaining work outside of the bargaining unit represented by

1 the Cohasset Permanent Firefighters, Local 2804 (IAFF (Union)).¹ In its supplementary
2 statement, the Employer claims that fire prevention duties have historically been shared
3 between fire chiefs and bargaining unit members and, therefore, the Hearing Officer
4 erred when she held that the Town's failure to bargain before transferring certain fire
5 prevention duties outside of the unit was a departure from past practice that triggered
6 the City's duty to bargain. The Employer also contends that enforcement of the Hearing
7 Officer's order would improperly preclude the fire chief from performing duties
8 authorized under M.G.L. c. 148 and related regulations. The Union filed a responsive
9 supplement statement contesting the Town's arguments for both substantive and
10 procedural reasons. For the reasons set forth below, the CERB affirms the Hearing
11 Officer's decision.

12 FACTS

13
14 The CERB will adopt the Hearing Officer's findings of fact and limit its review to
15 questions of law unless a party identifies specific findings of fact claimed to be
16 erroneous. City of Boston, 5 MLC 1796, 1797, MUP-2688 (April 10, 1979). With one
17 exception, discussed below, the facts in this case are undisputed.² For the reasons set

¹ The Hearing Officer held that the Employer violated Section 10(a)(5) of the Law by not timely providing reasonable and relevant information to the Union and by transferring transmittal of run reports, compilation of bills and certain CPR training duties. The Hearing Officer also dismissed the allegation that the Town violated Section 10(a)(5) of the Law by repudiating a December 2009 Memorandum of Agreement. Neither party seeks the CERB's review of those holdings.

² The Town also challenges the Hearing Officer's conclusion that the relevant period for determining whether a there was a binding past practice was Chief Silvia's six-year tenure as chief. Because the Town questions the legal precedent the Hearing Officer relied upon to reach this conclusion, we address this argument in the Opinion section of the decision.

1 forth below, we adopt the Hearing Officer's findings and summarize the salient portions
2 as follows.³

3 Robert Silvia (Silvia) became the Town's fire chief in 2006 and was fire chief in
4 2012, when the events in this case occurred. Silvia's predecessors as the Town's
5 permanent fire chiefs were Roger Lincoln (Lincoln), who served for ten to twelve years,
6 Robert Nadeau (Nadeau), who served for one and one-half years, Daniel Brock (Brock),
7 who served for six years and Martin Dooley (Dooley), who served for three years.

8 The Union's bargaining unit includes firefighters, lieutenants and captains.
9 Captains, who serve as shift commanders, also perform certain specialized duties, such
10 as fire prevention and records. Captain Mark Trask (Trask) oversaw the fire prevention
11 function and has performed fire prevention duties since 1983. He performed many of
12 his fire prevention duties on an overtime basis. As part of those duties, Trask oversaw
13 certain inspections, including license inspections⁴ and inspections for Town permits
14 issued pursuant to M.G.L. c. 148, a.k.a. Section 10A permits.⁵ He assigned these
15 inspections to the captains on various shifts, who then ensured that the firefighters who
16 worked the shifts conducted the inspections. Trask estimated that he performed eighty
17 percent of the fire prevention duties and the other shift captains performed the
18 remaining twenty percent of the fire prevention duties.

³ Further reference may be made to the Hearing Officer's decision, reported at 40 MLC 258 (March 14, 2014) and attached to the slip opinion of this decision.

⁴ The Board of Selectmen require establishments that hold licenses to sell food or liquor or hold special events to undergo annual inspections.

⁵ These permits are issued to entities that sell or store propane, gas or flammable liquids and lumberyards.

1 Captain Paul Bilodeau (Bilodeau) was responsible for the records duty. He
2 typically performed those duties during his workday. Bilodeau also performed certain
3 fire prevention duties. When calls came in that prevented firefighters from performing
4 the fire inspections described above, Bilodeau conducted some of those inspections
5 himself. He shared these fire prevention duties with former fire chiefs Lincoln, Nadeau
6 and Brock. The Hearing Officer found that Lincoln performed approximately twenty-five
7 percent of fire prevention duties, Nadeau did “some” fire prevention duties and Brock
8 performed approximately seventy percent of these duties. She also found that Former
9 Chief Dooley performed no fire prevention duties and that the only fire prevention duty
10 that Silvia performed was getting the license inspections list from the Board of
11 Selectmen and giving it to Trask for assignment.⁶

12 Effective January 2012, the Town appointed Lieutenant John Dockray (Dockray)
13 to the newly-created, non-bargaining unit title of Assistant Fire Chief. After assuming
14 this position, Dockray began performing certain fire prevention duties, including
15 attending Town Planning Board meetings that had fire prevention issues on the agenda,
16 conducting inspections for Section 10A permits and assigning license inspections to the

⁶ The Town challenges this finding on two grounds. First, that it is “self-contradicting;” and, second, that it is contrary to testimony at the hearing showing that Silvia performed fire prevention duties when he was chief and that no party ever testified that fire prevention duties were exclusively performed by the bargaining unit. After reviewing the referenced testimony, we deny the challenge. Although Silvia testified that he performed “some” fire prevention duties, including some related to license oversight, he never testified what those duties were. Moreover, Trask testified that those duties were “minimal.” Thus the referenced testimony does not render the Hearing Officer’s finding that the duties consisted solely of obtaining a list from the Board of Selectmen and providing it to Trask either inconsistent or inaccurate. The Town’s related argument, that this finding does not support the Hearing Officer’s conclusion that fire prevention work was performed exclusively by bargaining unit members, is addressed in our Opinion.

1 shift captains. All of these tasks had previously been performed exclusively by Trask or
2 other bargaining unit members. However, other shift captains continued to perform
3 twenty percent of fire prevention duties.

4 Opinion⁷

5 Shared Work/Past Practice

6 It is well-established that a public employer violates Section 10(a)(5) of the Law
7 when it transfers work performed by bargaining unit members to non-bargaining
8 personnel without first giving the union representing the bargaining unit members notice
9 and an opportunity to bargain to resolution or impasse. City of Cambridge, 23 MLC 28,
10 36, MUP-9171 (June 28, 1996), *aff'd sub nom. Cambridge Police Superior Officers*
11 Association v. Labor Relations Commission, 47 Mass. App. Ct. 1108 (1999). The
12 Town's central argument on appeal is that the Hearing Officer erred when she held that
13 the six-year period in which Silvia performed the single fire prevention duty described
14 above, was sufficient to establish a departure from the prior practice of shared fire
15 prevention duties between fire chiefs and bargaining unit members, so as to establish a
16 new practice of unit members exclusively performing fire prevention duties. The Town
17 argues that fire chiefs and bargaining unit members have had a 26.5 year history of
18 sharing fire prevention duties, and thus, as it did to the Hearing Officer, the Town
19 argues that Dockray's performance of certain fire prevention duties after becoming
20 Assistant Chief did not trigger the Town's duty to bargain.

21 We find no error for several reasons. Preliminarily because there is no dispute
22 that former Chief Dooley performed no fire prevention duties at all, the Town's assertion

⁷ The CERB's jurisdiction is not contested.

1 of a 26.5 year practice of fire prevention duties being shared bargaining unit work is
2 unfounded. Second, in conducting her analysis, the Hearing Officer correctly compared
3 and evaluated the shared work patterns before and after Silvia's tenure. Those patterns
4 reflect that, for roughly 18-20 years before Silvia became Chief, his predecessors
5 performed varying amounts of fire prevention duties, including Brock, who performed up
6 to 70% of those duties. By contrast, during his six years of service, Silvia performed
7 one duty, obtaining a list of establishments from the Board of Selectmen and giving it to
8 Trask to assign. Since that task, is, at best, a preliminary step in the main duty of
9 assigning and actually conducting the investigations, we find substantial evidence to
10 support the Hearing Officer's conclusion that this represented a departure from the prior
11 practice of sharing the duties established by Silvia's predecessors.

12 The Town alternatively claims that the two cases the Hearing Officer relied on to
13 support her finding that six years of bargaining unit members exclusively performing
14 bargaining unit work was sufficient to establish a new practice are inapposite. See City
15 of Boston, 38 MLC 201, MUP-08-5253 (2012) and City of Boston, 28 MLC 369, MUP-
16 2267 (May 31, 2002). The Town contends that in both of those cases there was a
17 triggering event involving some type of structural change (i.e., a split of bargaining units
18 or merger of departments) that led to previously shared work being consistently
19 assigned to and performed by one bargaining unit for a period of time. The Town
20 contends that there was no similar triggering event here and thus the cases the Hearing
21 Officer relied upon are not relevant.

22 We disagree for both legal and factual reasons. First, the pertinent inquiry in
23 cases where past practice is at issue is not whether external circumstances have

1 triggered the onset of a new practice period, but whether the practice has occurred with
2 regularity over a sufficient period of time, so that it is reasonable to expect that the
3 practice will continue. Town of Chatham, 28 MLC 56 58, MUP-9146 (June 29, 2001).
4 As the decisions the Hearing Officer cited demonstrate, the CERB has found a past
5 practice of bargaining unit members exclusively performing work where they have
6 consistently done so over a number of years . City of Boston, 38 MLC at 202 (two and
7 a half year practice); City of Boston, 28 MLC at 372 (seven year practice). See also
8 Commonwealth of Massachusetts, 9 MLC 1355, SUP-2585 (October 22, 1982) (four
9 years of offering a summer hours option to certain employees constituted a practice
10 which could not be unilaterally changed upon expiration of contract); City of Boston, 19
11 MLC 1613, MUP-7322 (December 24, 1992) (nine year history of allowing union
12 members to address new employees during their orientation period constitutes a
13 practice); Ware School Committee, 22 MLC 1502, MUP-7753 (February 13, 1996)
14 (twelve year history of giving preference to teachers over non-teachers when hiring
15 constitutes a practice).

16 Second, the Town's argument rests on a flawed reading of both Boston
17 decisions. In the 2002 Boston case, detectives and patrol officers shared the task of
18 identifying latent prints from crime scenes for over ten years until around 1991, when
19 patrol officers began exclusively performing that work. Contrary to the Town's
20 suggestion, the patrol officers did not begin exclusively performing these tasks when
21 detectives split off from the patrol officers and formed their own unit in 1981, the so-
22 called "triggering event." Rather, patrol officers began exclusively performing that work
23 ten years later and continued to do so for the next seven years, until it was assigned

1 outside of the unit. 28 MLC at 370-371 and n. 22. Consistent with the principles
2 articulated above, it was the length and consistency of this seven-year practice that led
3 the CERB to conclude that the City had established a consistent practice of assigning
4 only patrol officers to identify latent prints recovered at crime scenes. 28 MLC at 372
5 (citing City of Cambridge, 23 MLC at 36).

6 The Town also erroneously describes the 2012 City of Boston decision as one in
7 which previously shared work became exclusive bargaining unit work following a
8 structural change (a merger of two departments). In that case, however, the Hearing
9 Officer expressly *rejected* the employer's argument that the work had historically been
10 shared. 38 MLC 85, 88 (September 28, 2011). More importantly, the Hearing Officer's
11 finding that there was a binding practice of bargaining unit members exclusively
12 performing certain warehouse command duties was based on the well-established
13 principles set forth above, i.e., that the work had been "successively and consistently
14 assigned to the same bargaining unit over 2 years." Id. The CERB affirmed the decision
15 in its entirety. 38 MLC at 202. Likewise, because the Hearing Officer's decision in the
16 instant case relied on the same factors, six years of fire prevention work consistently
17 being assigned to the bargaining unit, we affirm.

18

1 Statutory Argument

2 For the first time on review, the Town argues that the Hearing Officer's ruling
3 conflicts with Massachusetts Law, specifically M.G.L. c. 148, "Fire Prevention" and 527
4 CMR, the Massachusetts Comprehensive Fire Safety Code. The Town contends that
5 because this statute and regulations are not listed in Section 7(d) of the Law, the chief's
6 duties are not subject to collective bargaining. The Town further contends that if it were
7 required to comply with the Hearing Officer's ruling, the chief would be precluded from
8 performing the fire prevention duties that he is obligated to oversee, enforce and
9 perform in accordance with Massachusetts law.

10 We will not consider this argument because, as the Union points out, it is
11 improperly raised for the first time on review. See Anderson v. Commonwealth
12 Employment Relations Board, 73 Mass. App. Ct. 908, 909 n. 7 (2009) (citing McCormick
13 v. Labor Relations Commission, 412 Mass. 164, 170 (1992)) (noting Board's policy of
14 not considering argument raised for first time on review and refusing to consider same
15 on appeal). Here, both parties litigated and briefed the issue of whether the Town had
16 unlawfully transferred bargaining unit work outside of the bargaining unit. The Town
17 therefore should have anticipated that the Hearing Officer's remedy would include an
18 order to restore the status quo, i.e., an order to cease and desist from failing to bargain
19 before transferring fire prevention duties outside of the bargaining unit and to restore
20 them to the unit. See Newton School Committee v. Labor Relations Commission, 388
21 Mass. 557, 576 (1983) (in fashioning appropriate remedies, the CERB attempts to

1 “restore the situation as nearly as possible to that which would have existed but for the
2 unfair labor practice”).⁸

3 Conclusion

4 For the foregoing reasons, we affirm the Hearing Officer’s conclusion that the
5 Town violated Section 10(a)(5) of the Law by transferring bargaining unit work outside
6 of the bargaining unit and issue the following order.⁹

ORDER

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

1. Cease and desist from:

- a) Unilaterally transferring bargaining unit work to a non-bargaining unit employee, the assistant fire chief, without first giving the Union notice and an opportunity to bargain to resolution or impasse about the decision and the impacts of that decision.
- b) Failing and refusing to bargain collectively in good faith with the Union by failing to provide in timely manner information that is relevant and reasonably necessary to the Union’s role as exclusive bargaining representative.
- c) In any like manner, interfering with, restraining and coercing its employees in any rights guaranteed under the Law.

⁸ We note that the Town has not identified any specific provision of Chapter 148 that either requires the chief to exclusively perform the duties in question or precludes him from satisfying his bargaining obligation before delegating or making assignments in furtherance of his obligations under that statute. See, e.g., City of Lynn v. Labor Relations Commission, 43 Mass. App. Ct. 172 (1997) (relieving public employer of bargaining obligation only when acting pursuant to a specific, narrow statutory mandate not listed in Section 7(d) of the Law.)

⁹ As noted above, the City did not appeal from the conclusion that the Town failed to provide certain information in a timely matter. Therefore, pursuant to Section 11 (e) of the Law, the Hearing Officer’s order with respect to that aspect of the case is final and binding on the Town. It is reprinted here and in the Notice set forth below for the sake of completeness.

2. Take the following action that will effectuate the purposes of the Law:
- a) Restore to the bargaining unit the duties that were transferred to the assistant fire chief, which includes certain fire prevention duties, CPR training, and the transmission of run reports and the compilation of EMS bills.
 - b) Upon request, bargain to resolution or impasse with the Union over the decision to transfer bargaining unit work to the assistant chief and the impacts of that decision on unit members' terms and condition of employment.¹⁰
 - c) Make unit members whole for economic losses, if any, that they have suffered as a direct result of the Town's decision to transfer bargaining unit work to the assistant fire chief, plus interest on any sums owed at the rate specified in M.G.L.c.231, Section 6I.
 - d) Provide requested information that is relevant and reasonably necessary to the Union's role as exclusive bargaining representative in a timely manner.
 - e) Post immediately in all conspicuous places where members of the Union's bargaining unit usually congregate, or where notices are usually posted, including electronically, if the Town customarily communicates with these unit members via intranet or email and display for a period of thirty (30) days thereafter, signed copies of the attached Notice to Employees.
 - f) Notify the DLR in writing of steps taken to comply with this decision within ten (10) days of receipt of this decision.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD

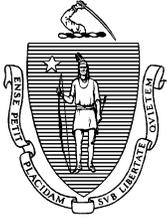
MARJORIE F. WITTNER, CHAIR

ELIZABETH NEUMEIER, BOARD MEMBER

¹⁰ The Hearing Officer's order did not include an affirmative order to bargain but the Notice to Employees that she ordered the Town to post did. We include it for the sake of consistency.

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

NOTICE TO EMPLOYEES

**POSTED BY ORDER OF THE COMMONWEALTH EMPLOYMENT
RELATIONS BOARD**

**THE MASSACHUSETTS DEPARTMENT OF LABOR RELATIONS
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS**

A hearing officer of the Massachusetts Department of Labor Relations has held that the Town of Cohasset (Town) has violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by: a) transferring bargaining unit work to a non-unit employee, the assistant fire chief; and b) failing to timely provide information that the Cohasset Permanent Firefighters, Local 2804, I.A.F.F. (the Union) had requested that was relevant and reasonably necessary to its role as exclusive bargaining representative. The Town appealed from the hearing officer's conclusion regarding the transfer of bargaining unit work and the Commonwealth Employment Relations Board (CERB) affirmed.

Section 2 of M.G.L. Chapter 150E gives public employees the following rights: to engage in self-organization to form, join or assist any union, to bargain collectively through representatives of their own choosing, to act together for the purpose of collective bargaining or other mutual aid or protection; and to refrain from all of the above.

WE WILL NOT fail to bargain in good faith by unilaterally transferring bargaining unit work, which includes fire prevention duties, CPR training, transmission of run reports and compilation of online bills for Emergency Medical Services (EMS) to the assistant fire chief.

WE WILL NOT fail to bargain in good faith by failing to provide in a timely manner requested information that is relevant and reasonably necessary to the Union's role as exclusive bargaining representative.

WE WILL take the following affirmative action to effectuate the purposes of the Law:

1. Restore to the bargaining unit the above-referenced duties that were transferred to the assistant fire chief.
2. Bargain to resolution or impasse with the Union over the decision to transfer bargaining unit work to the assistant chief and the impacts of that decision on unit members' terms and conditions of employment.
3. Make unit members whole for economic losses, if any, that they have suffered as a direct result of the Town's decision to transfer bargaining unit work to the assistant fire chief, plus interest on any sums owed at the rate specified in M.G.L.c. 231, Section 6I.
4. Provide requested information that is relevant and reasonably necessary to the Union's role as exclusive bargaining representative in a timely manner.

Town of Cohasset

Date

HEARING OFFICER DECISION

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS**

In the Matter of

TOWN OF COHASSET

and

COHASSET PERMANENT
FIREFIGHTERS, LOCAL 2804,
I.A.F.F.

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Case No. MUP-12-1495

Date Issued: March 14, 2014

Hearing Officer:

Margaret M. Sullivan, Esq.

Appearances:

Brian Magner, Esq. - Representing the Town of Cohasset

Paul T. Hynes, Esq. - Representing the Cohasset Permanent
Firefighters, Local 2804, I.A.F.F.

HEARING OFFICER'S DECISION

SUMMARY

1 The issue in this case is whether the Town of Cohasset (Town) violated Section
2 10(a)(5) and, derivatively Section 10(a)(1) of Chapter 150E (the Law) by: a) repudiating
3 a December 2, 2009 Memorandum of Agreement (December 2, 2009 MOA); b)
4 unilaterally transferring bargaining unit work to a non-unit employee, the assistant fire
5 chief; and c) failing to timely provide requested information to the Cohasset Permanent
6 Firefighters, Local 2804 (I.A.F.F.) that was relevant and reasonably necessary. I find

1 that the Town unilaterally transferred bargaining unit work and failed to timely provide
2 relevant and reasonably necessary information to the Union. However, I dismiss the
3 allegation that the City repudiated the December 2, 2009 MOA when it created the
4 position of assistant fire chief.

5 STATEMENT OF THE CASE

6 On January 18, 2012, the Cohasset Permanent Firefighters, Local 2804, I.A.F.F.
7 (Union) filed a charge of prohibited practice with the Department of Labor Relations
8 (DLR) in Case No. MUP-12-1495, alleging that the Town had violated Sections 10(a)(5)
9 and (1) of the Law. A DLR hearing officer conducted an investigation on March 16,
10 2012. On May 31, 2012, the investigator issued a three-count complaint alleging
11 violations of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law. The
12 Complaint alleged that the Town: repudiated the December 2, 2009 MOA (Count I);
13 failed to bargain over the impact of the newly-created assistant fire chief position (Count
14 II); and failed to provide information that the Union requested, which was relevant and
15 reasonably necessary to the Union in its role as exclusive bargaining representative
16 (Count III).¹¹ The Town filed an answer to the complaint on July 26, 2012.

17 I conducted a hearing on January 29, 2013, February 5, 2013 and March 11,
18 2013. On January 29, 2013, before any witnesses testified, I allowed the Town's motion
19 to sequester all witnesses prior to giving testimony, except Captain Paul Bilodeau

¹¹ At the hearing, the Union moved to amend the complaint to include the allegation that the Town failed to timely provide the requested information. I hereby allow the Union's motion to amend the complaint.

1 (Bilodeau), a former Union president, and Fire Chief Robert Silvia (Silvia).¹² Both
2 parties had an opportunity to be heard, to examine witnesses and to introduce
3 evidence. The parties submitted their post-hearing briefs postmarked on June 7, 2013.
4 Upon review of the entire record, including my observation of the demeanor of the
5 witnesses, I make the following findings of fact and render the following decision.

6 Stipulated Facts

- 7
- 8 1. The Town is a public employer within the meaning of Section 1 of the Law.
 - 9
 - 10 2. The Union is an employee organization within the meaning of Section 1 of the
11 Law.
 - 12
 - 13 3. Article 1 of the parties' collective bargaining agreement, entitled Union
14 Recognition, articulates the scope of employees in the Cohasset Fire Department
15 represented by the Union.
 - 16
 - 17 4. On December 2, 2009, the Town and the Union executed an MOA ("2009 MOA")
18 renewing the 2006-2008 collective bargaining agreement for a three year term to
19 expire on June 30, 2011. The 2009 MOA included a provision regarding the Fire
20 Prevention Officer.
 - 21
 - 22 5. The Town posted the Assistant Fire Chief position in November 2011 and filled
23 the position effective January 1, 2012.
 - 24
 - 25 6. By letter dated November 14, 2011, the Union requested information from the
26 Town regarding the Assistant Fire Chief position; the Town subsequently
27 supplied the Union with information in response to its request.
 - 28
 - 29 7. On January 18, 2012, the Union filed a charge of prohibited practice with the
30 DLR alleging that the Town engaged in prohibited practices within the meaning of

¹² On February 5, 2013, the Union requested that I reconsider my sequestration order. As grounds, the Union argued that it originally planned to call the two sequestered witnesses, Lieutenant Robert Protulis (Protulis) and Captain Mark Trask (Trask), on rebuttal, but subsequently decided to call them as witnesses in the Union's case-in-chief. Both Protulis and Trask had not been present in the hearing room for Bilodeau's testimony on January 29, 2013. I agreed to modify the sequestration order to allow Protulis and Trask to be present during Silvia's testimony. However, I ordered Trask to leave the hearing room during Protulis's testimony and Protulis to leave the hearing room during Trask's testimony.

1 Sections 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General
2 Laws, Chapter 150E.

3
4 8. On March 16, 2012, the parties attended an in-person investigation at the DLR.

5 FINDINGS OF FACT¹³

6 The Town has approximately 7800 residents, and its Fire Department provides
7 services twenty-four hours per day, seven days per week. The Union is the exclusive
8 bargaining representative for the positions of firefighter/EMT, firefighter/paramedic,
9 lieutenant and captain who work in the Fire Department. Unit members work shifts that
10 are twenty-four hours in length. They work one twenty-four hour shift, have two days
11 off, work another twenty-four hour shift, and then have four days off. The Town assigns
12 four unit members to each shift, including two firefighter/paramedics or firefighter/EMTs
13 who staff the Fire Department's ambulance.

14 Fire Department Command Structure as of December 2009

15 As of December 2009, the Fire Department's command structure consisted of a
16 fire chief, four captains and four lieutenants.¹⁴ The Town previously had appointed

¹³ The DLR's jurisdiction in this matter is uncontested.

¹⁴ The Town created the position of lieutenant in 2006.

1 Robert Silvia (Silvia) as the fire chief in 2006 pursuant to M.G.L. c.48, §42A.¹⁵ Silvia's
2 predecessors as the Town's permanent fire chiefs were Roger Lincoln (Lincoln) for ten
3 to twelve years, Robert Nadeau (Nadeau) for one and one-half years, Daniel Brock
4 (Brock) for six years and Martin Dooley (Dooley) for three years.

5 Captains were the shift commanders. Each captain also performed certain
6 duties in specialized areas (specialized duties), including records,¹⁶ training,¹⁷ fire
7 prevention¹⁸ and emergency medical services (EMS).¹⁹ They earned \$600 annual
8 stipends for the performance of those duties. Some of the captains performed the
9 specialized duties during their regular shifts, while other captains performed the
10 specialized duties on an overtime basis. Bilodeau typically performed the records
11 functions during his regular work day. Trask, who had performed fire prevention duties

¹⁵ M.G.L. c.48, Section 42A, which is sometimes colloquially referred to as the "weak chief's statute," states:

In towns which accept this section or have accepted corresponding provisions of earlier laws there shall be a fire department established under the direction of the selectmen, who shall appoint a chief of the fire department and such other officers and firemen as they deem necessary, and fix their compensation in an amount not in the aggregate exceeding the annual appropriation therefor. The selectmen may make suitable regulations governing the fire department and the officers and firemen thereof, and in towns which are not subject to chapter thirty-one may remove the chief and other officers and firemen at pleasure. The chief of the fire department shall be in immediate control of all town property used by the department, and of the officers and firemen, who shall obey his orders.

¹⁶ Bilodeau performed the records function.

¹⁷ Captain Rooney (Rooney) oversaw the training function.

¹⁸ Trask oversaw the fire prevention function.

¹⁹ Captain Curry (Curry) oversaw the emergency medical services (EMS function).

1 since 1983. Trask performed many of his fire prevention duties on an overtime basis.²⁰
2 Trask interacted with the Planning Board and the Zoning Board of Appeals (Planning
3 and Zoning Boards), which included attending certain of their meetings, when members
4 considered whether or not to approve permits for commercial or residential construction
5 projects. Trask acted as a consultant to those Boards by providing technical
6 assistance. He reviewed plans for the proposed projects and made conditional
7 recommendations to the Boards as to whether the plans were in compliance with
8 various fire codes and the requisite fire protection systems, including fire alarms, smoke
9 detectors, and fire suppression systems, including sprinklers, as well as to ensure that
10 fire trucks had sufficient space to access the buildings. He also visited construction
11 sites to ensure that builders were adhering to the plans that they previously had
12 submitted to the two Boards.

13 Trask also oversaw various inspections, including statutory inspections,²¹ license
14 inspections²² and inspections for permits that the Town issues pursuant to M.G.L. c.148
15 (so-called 10A permits).²³ He assigned those inspections to the various shifts, and the
16 captains on those shifts would ensure that the firefighters, who worked the shifts,

²⁰ Trask earned \$12,200 in overtime monies for FY'08 and \$15,800 for FY'09 for the performance of fire prevention duties.

²¹ The Commonwealth of Massachusetts mandates annual inspections of nursing homes, inns, assisted living facilities, schools, child care facilities and theaters.

²² The Board of Selectmen requires establishments, which hold licenses to sell food or liquor or hold special events, to undergo annual inspections. Silvia received the list of establishments that needed to be inspected from the Board of Selectmen and gave the list to Trask.

²³ The Town issues 10A permits to entities that sell or store propane, gasoline or flammable liquids as well as lumberyards.

1 carried out the inspections.²⁴ When alarms, medical calls or emergency calls
2 repeatedly prevented fire fighters on the shifts from carrying out the inspections,
3 Bilodeau conducted some of those inspections himself. Bilodeau also shared his fire
4 prevention duties with certain former fire chiefs, including Lincoln, who performed
5 approximately twenty-five percent of the fire prevention duties, Nadeau, who did some
6 fire prevention duties, and Brock, who performed approximately seventy percent of the
7 fire prevention duties.²⁵

8 Although Curry oversaw the EMS function, he was assisted by then Lieutenant
9 John Dockray (Dockray), who also received a stipend as the EMS Coordinator.²⁶ As
10 the EMS Coordinator, Dockray: a) ordered and stocked medical supplies, b)
11 coordinated the inspection and licensing of drugs and equipment, including
12 ambulances, c) attended monthly meetings at South Shore Hospital and acted as the
13 liaison with its EMS Committee, and d) handled Quality Assurance (QA) and Quality
14 Inspection (QI). The Town used an outside vendor to bill and handle collections for
15 EMS services that the Town rendered. However, Dockray, as EMS Coordinator, was
16 responsible for the transmission of run reports to the vendor, which required him to use
17 computer software to create an online package of bills that satisfied the vendor's
18 requirements and prevented bills from being kicked back for having insufficient
19 information. Dockray with the assistance of Firefighter/Paramedic Dan Smith (Smith)

²⁴ Trask estimated that he performed eighty percent of the fire prevention duties and the other shift captains performed the remaining twenty percent of the fire inspection duties.

²⁵ Dooley performed no fire prevention duties.

²⁶ Lieutenants regularly held the position of EMS coordinator and earned a stipend for the position.

1 conducted CPR training, including CPR training for Town employees, several times per
2 year.²⁷

3 December 2, 2009 Memorandum of Agreement (MOA)

4 The Town and the Union were parties to a collective bargaining agreement that,
5 by its terms, was in effect from July 1, 2006 through June 30, 2008 (2006-2008
6 Agreement). In early 2008, the Town and the Union began negotiations for a successor
7 collective bargaining agreement. Former Town Manager William Griffin and Silvia
8 represented the Town, while Bilodeau, Trask, Protulis, Dockray and Smith represented
9 the Union. During negotiations, the Town proposed that the Union agree to the creation
10 of a bargaining unit position, which would be known as the full-time fire prevention
11 officer.²⁸ In response, the Union made a counter-proposal that the Town agree to
12 employ twenty-three or twenty-four²⁹ line fire fighters³⁰ before the Town could choose to
13 fill the position of fire prevention officer. In Fall 2008, the parties negotiated a tentative
14 successor collective bargaining agreement with the assistance of a mediator from the
15 Joint Labor Management Committee (JLMC). However, the tentative agreement
16 subsequently fell apart when the parties disagreed about the time frame that they had

²⁷ Dockray and Smith were the only Fire Department personnel who conducted CPR training.

²⁸ Silvia, in prior conversations with Bilodeau, had expressed a desire to have a fire prevention officer.

²⁹ I need not reconcile discrepancies in the record as to whether the Union proposed twenty-three or twenty-four line firefighters because it is not material to the outcome of the case.

³⁰ Line firefighters are those fire suppression personnel who staff the Fire Department's apparatus and regularly available to respond to fires and emergencies.

1 negotiated for new employees to achieve paramedic certification. On December 2,
2 2009, the JLMC convened a tri-partite arbitration panel to rule on issues that were in
3 dispute during the parties' successor contract negotiations. During a break in the
4 arbitration hearing, the parties agreed to a successor contract, which they reduced to
5 writing (the December 2, 2009 MOA.)³¹ The December 2, 2009 MOA made certain
6 changes to the 2006-2008 Agreement. Paragraph #10 of the 2009 MOA states:

7 10. Insert into the Collective Bargaining Agreement [the 2006-2008 Agreement] a
8 new article entitled "Fire Prevention Officer" to read as follows:
9

10 (a) The Fire Prevention Officer shall be moved from shift assignment to a day
11 position.
12

13 (b) The Fire Prevention Officer shall work five (5) days in a calendar week. In
14 order to maintain the forty two (42) hours work week described in Article
15 18 ("The work week shall not exceed an average of forty-two hours over
16 an eight (8) week cycle") of the current collective bargaining agreement
17 the Fire Prevention Officer shall be required to work a total of forty two
18 (42) hours each week. The schedule for the five days shall be Monday
19 through Thursday 08:00 hours to 17:00 hours and Friday from 08:00 hours
20 to 14:00 hours. These hours may be changed to allow the FPO [fire
21 prevention officer] to attend meeting[s] or conduct inspections at
22 businesses that operate at night. Any changes to the regularly scheduled
23 hours must be approved by the Chief. The duty hours of the Fire
24 Prevention Officer may be changed by the Fire Chief, either temporarily or
25 permanently, provided that such change is necessary or prudent for the
26 protection of the Town.
27

28 (c) The Fire Prevention Officer will be allowed to work additional shift
29 coverage as enjoyed by the other shift officers providing such coverage
30 does not interfere with the normal day position.
31

³¹ The December 2, 2009 MOA, by its terms, was in effect from July 1, 2009 through June 30, 2011. The December 2, 2009 MOA also carried over language from Article 2 of the 2006-2008 which stated, in part,

The terms of this contract ... shall be renewed automatically from year to year thereafter unless either party at least ninety (90) days prior to the expiration date gives notice that it desires to modify, terminate or amend this Agreement.

1 (d) When the Fire Prevention Officer is on vacation of any duration or
2 extended sick/line of duty injury leave the Fire Chief may fill the Fire
3 Prevention Officer's position temporarily to maintain the efficient operation
4 of the Fire Department.

5
6 (e) The Fire Prevention Officer shall not be considered or counted as part of
7 the normal shift complement when he/she is assigned to his/her normal
8 duties.

9
10 (f) The Fire Prevention Officer's vacation leave shall be calculated on a five
11 day per week basis. One week's vacation shall count as five vacation
12 days. The FPO shall be allowed to take vacation time on a single day
13 basis. Whenever taking vacation on a single day basis, the FPO shall
14 notify the Chief at least two (2) weeks in advance, or if not possible, with
15 as much notice as possible.

16
17 (g) Hiring of a full time Fire Prevention Officer is permitted only if the Town
18 fills out Line personnel to 22 firefighters.

19
20 (h) The Fire Prevention Officer shall receive an annual stipend in the amount
21 of \$5,000. This stipend shall not be paid unless and until the Chief
22 changes the FPO [fire prevention officer] assignment to a day shift.³²

23 2011

24 On or about late August 2011, the Town experienced the impact of Hurricane
25 Irene, which included storm surges, felled trees, downed power lines, and power
26 outages. The Fire Department was busy for a number of days dealing with the storm
27 and its aftermath. On or about Friday, September 9, 2011, then Town Manager Michael
28 Coughlin (Coughlin)³³ met in his office with Silvia and Mark DeLuca (DeLuca) the
29 Town's former Police Chief. Coughlin instructed the fire chief and the police chief to
30 provide him with written goals and objectives, including proposals for non-unionized,

³² Bilodeau, who was chairman of the Union's bargaining team for the December 2, 2009 MOA, acknowledged that the agreement did not compel the Town to fill 22 line personnel positions or to hire a fire prevention officer in the event that the Town filled the 22 line personnel positions.

³³ As of September 9, 2011, Coughlin had been Town Manager for several months.

1 second in command positions for their respective departments, by Tuesday, September
2 13, 2011.³⁴ Subsequently compiled the requested documents and presented them to
3 Coughlin. On September 13, 2011, Coughlin and Silvia presented the proposal for a
4 non-union, second-in-command position in the Fire Department to the Board of
5 Selectmen and to the Town's Capital Budget Committee, which reviews and
6 investigates capital needs of municipal departments and recommends specific capital
7 projects and equipment for consideration by Town Meeting. The organizational chart,
8 which accompanied the proposal, referred to the second-in-command position in the
9 Fire Department as a deputy chief position. On September 14, 2011, Silvia sent email
10 messages to nine local fire chiefs³⁵ stating in pertinent part:

11 The Town of Cohasset is considering reorganizing the Fire Department to
12 include the position of Deputy Fire Chief. I have been tasked with
13 collecting data on job description[s], salary range, work schedule and
14 union status. Any info that you can provide me in this task will be greatly
15 appreciated.³⁶
16

17 On September 22, 2011, Silvia sent Coughlin an email stating in pertinent part:

³⁴ On September 12, 2011, Coughlin also instructed Silvia to provide an organizational chart for the Fire Department, which included the proposed second-in-command position, along with Silvia's goals and objectives.

³⁵ The chiefs were Mark Duff of Hingham, Richard Judge of Scituate, George Rogers of Bridgewater, Kevin Robinson of Marshfield, Kevin Nord of Duxbury, John Nuttal of Abington, Timothy Grenno (Grenno) of Whitman, Scott Duffey of Rockland, and Robert Hollingshead of Hull.

³⁶ The chiefs subsequently sent information showing that the deputy chiefs in Hingham, Bridgewater, Duxbury and Whitman were non-union positions, while the deputy chiefs in Scituate, Abington, Marshfield and Rockland were union positions. The record does not contain information about whether or not the deputy chief in Hull is a union-covered position.

With your blessing I will investigate the cost of an “assessment center”.³⁷ I am also working on a job description. I will forward a draft to you to review ASAP.

1 On that same date, Coughlin sent via email his approval of the use of an assessment
2 center.

3 On September 26, 2011, Silvia sent an inquiry via email to nine local fire chiefs,
4 to whom he previously sent his September 14, 2011 email message. In his September
5 26, 2011 email message, Silvia asked about: a) the civil service status of their deputy
6 chiefs; b) the inclusion or exclusion of the positions from union representation; and c)
7 the status of the positions as salaries or non-salaried, including whether the incumbents
8 in the positions were eligible for overtime. On September 27, 2011, Glenn Pratt (Pratt),
9 the Town’s Director of Emergency Management,³⁸ issued a report regarding the Town’s
10 response to Hurricane Irene, which was entitled “After Action Report Hurricane Irene
11 August 27-31. 2011 (After Action Report).³⁹ In the portion of his “After Action Report”
12 entitled “Areas Identified as Needing Improvements or Additional Planning,” Pratt stated
13 in pertinent part:

³⁷ Some employers use assessment centers, instead of promotional examinations, to select successful candidates for promotion. The assessors present candidates with different scenarios and measure their responses for certain qualities or attributes, including communications or leadership skills.

³⁸ Pratt owned his own business but received a stipend from the Town for his work as director of emergency management.

³⁹ On or about September 22, 2011, Coughlin reviewed a draft of Pratt’s After Action Report and made certain edits to the draft. In a September 22, 2011 email message to Pratt, Coughlin describes one of the edits as:

We need to press the changes in the command structure-Chief Silvia needs a Deputy and Chief DeLuca needs to empower his L.T. to be ability [able] to full function as a second in command.

1 Hurricane Irene demonstrated the need to make immediate modifications
2 in the command structure of the Cohasset Fire Department. Throughout
3 the event, Chief Silvia was working with National Grid away from the
4 command post and there was no administrative support for the
5 Department during the event. Proceed immediately with the appointment
6 of a Deputy Fire Chief.

7 On or about September 27, 2011, Bilodeau, in his role as Union president, and
8 Dockray met with Silvia and requested to bargain about the proposal to create a non-
9 union second-in-command position in the Fire Department.⁴⁰ Silvia replied that the
10 Town wanted a management position, that the position was outside of the bargaining
11 unit, and that the Town had no obligation to bargain with the Union. Bilodeau informed
12 Silvia that the Town had an obligation to bargain, because the Union was going to lose
13 a unit member, if the Town appointed a unit member as second-in-command.⁴¹ Silvia
14 reiterated that the Town had no obligation to bargain. Bilodeau pointed out that the job
15 title of deputy chief, which the Town had used to refer to the proposed second-in-
16 command, also was the title of a bargaining unit position.⁴² Bilodeau asked why the
17 Town simply did not use the Civil Service process to fill the vacant bargaining unit

⁴⁰ Bilodeau asked to bargain after he became aware that Coughlin and Silvia had presented the proposal regarding the second-in-command to the Board of Selectmen and the Capital Budget Committee. The Town had not notified the Union about the proposal.

⁴¹ Bilodeau in his testimony referred to the second-in-command position as the assistant chief position. However, I find that the parties did not refer to the second-in-command position as the "assistant chief" until after September 29, 2011. Silvia's September 29, 2011 email message, which is subsequently reprinted later, shows that Silvia began to use the term "assistant chief" to refer to the second-in-command, non-union position on or about September 29, 2011.

⁴² The Town had not filled the deputy chief's position, which was covered by Civil Service, since the incumbent in the position retired in February 1983. At that time, the Town appointed a fourth captain rather than fill the deputy chief's vacancy. The position also was not funded for FY'2012 in the Town's budget.

1 position of deputy chief. At some point during the conversation, Silvia indicated that he
2 wanted the incumbent in the second-in-command position to fill in for him and to
3 perform fire prevention duties like Deputy Murphy in Scituate. After the meeting ended,
4 Bilodeau decided to submit a written request to bargain over the proposed second-in-
5 command position. In a September 28, 2011 email message to Silvia, Bilodeau stated
6 in pertinent part:

7 The union has taken the stance to address the Deputy position during the
8 bargaining process. I am hand delivering a request to start that process
9 with the Town Manager today. ...⁴³

10 On September 29, 2011, Silvia sent the following email message to Coughlin:

11 What if we create a position that never has existed in the CFD [Cohasset
12 Fire Department]? I just came across this position from the Town of
13 Lexington for a[n] "Assistant Fire Chief". The posting outlines the duties
14 and they are exactly what we are looking for. There has never been an
15 assistant chief of the department.

16 Coughlin in a September 29, 2011 email message replied:

17 Let's go with this. Have Bill Quigley amend the present org chart to Assist
18 Chief for the packet. If the union contests, arguing that the Assistant Chief
19 is really the Deputy Chief in disguise, we will argue changed
20 circumstances. Given 30 years, the union will lose this one. The labeling
21 of Assistant Chief also allows us to avoid Civil Service. Once again-the 30
22 year time frame gives us a strong argument.

23 On October 3, 2011, Silvia submitted a memorandum (October 3, 2011 memorandum)
24 to Coughlin regarding "Restructuring the Command Staff of the Fire Department". The
25 October 3, 2011 memorandum stated in pertinent part:

26

⁴³ Two hours later, Silvia sent Coughlin an email message inquiring whether he should go ahead and post the vacancy for the deputy chief's position a/k/a the second in command position. Shortly thereafter, Coughlin advised him to wait.

1 **Purpose** [Emphasis in original]
2

3 I am writing to propose that Town of Cohasset review the present
4 command structure of the Cohasset Fire Department. Presently the Fire
5 Chief is the only member of the Department assigned to work the dayshift
6 Monday through Friday. The Fire Chief is the sole individual tasked with
7 administration of the Department. Due to the present organizational
8 structure all of the other twenty members of the Department are assigned
9 to the operations division and are assigned to one of four rotating shifts.
10 In the event the Fire Chief is unavailable there is no other member of the
11 Department that has the experience or training to take over the
12 administration of the department.
13

14 **The Current Command Structure**
15

16 The Fire Chief is the only member of the Department that is responsible
17 for the administration of the Department. The other twenty two members
18 are assigned to the Operations Division. This includes four Captains that
19 each serve in the position of Shift Commander, one for each of the day
20 shifts. Each of the Captains is also assigned as the officer in charge of a
21 specific specialty within the operations division....
22

23 The biggest problems with this organizational structure are: 1. there is no
24 one with the training and experience to take over in the absence of the
25 Chief of the Department, 2. the captain that oversees the Fire Prevention
26 Division works as a shift commander and is assigned to the Operations
27 Division. As the shift commander of one of the duty shifts he is committed
28 to supervising his shift first and working as the fire prevention officer
29 second, and therefore is required to work additional overtime shifts in an
30 attempt to stay current with only a minimal number of inspections. The
31 additional inspections as well as fire prevention education efforts are
32 completed as time, and the budget allow. For FY-12 the Town recognized
33 that there is a major problem with the fire prevention division and added a
34 full-time fire prevention officer's position to the Fire Department budget.
35 This position is yet to be filled due to contractual obligations. When this
36 position is filled the organization will be restructured. ... The addition of the
37 Fire Prevention Officer will eliminate the fire prevention problem but does
38 not address the issues involved with not having a second in command to
39 assume the duties of the Fire Chief in his absence.
40

41 **A Solution to Both Problems**
42

43 The solution to both of the problems is to create the position of Assistant
44 Fire Chief. By creating the position and tasking the individual with the
45 duties of overseeing the Prevention Division as well as adding additional

1 administrative duties to the job description both problems will be
2 addressed. ...

3
4 **Costs**

5
6 The FY-12 Fire Department Budget includes one additional staff position
7 that will be added to the Monday through Friday dayshift. This additional
8 position is a captain's level position. The position has yet to be filled due
9 to contractual obligations involving the creation of the fire prevention
10 officer's position within the union. Therefore the entire funded amount is
11 available. The exact salary for the Assistant Fire Chief has yet to be
12 determined, but the funding available for the additional daytime position
13 will more than cover the cost for the Assistant Chief's salary for FY-12. ...
14 The Assistant Chief's position will be handled just like the Chief of
15 Department's position. Both will be salaried positions working under a
16 contract that requires them to work a minimum of forty hours per week.
17 Neither of these positions is entitled to overtime pay when they work more
18 than the required hours. Therefore the additional pay that the Assistant
19 Chief will receive may be offset by a savings in the overtime expenditure.

20 ...
21

22 On October 11, 2011, Coughlin held a meeting in his office with Bilodeau and
23 Protulis, then the Union vice-president.⁴⁴ Bilodeau informed Coughlin that the Town
24 had an obligation to bargain over the proposal to create the second in command
25 position, which the parties now referred to as the assistant chief's position. Conversely,
26 Coughlin denied that the Town had an obligation to bargain over the proposal. On
27 October 13, 2011, Paul Hynes, counsel for the Union, sent the following email message
28 to Coughlin:

29 Let me introduce myself as labor counsel for the Cohasset Firefighter's
30 Union. I don't believe that we have ever met but I certainly look forward to
31 working with you on behalf of my client.
32

33 Paul has filled me in on the Chief's plan to create an Assistant Chief
34 position and I understand that he'd like to get it done sooner rather than
35 later. As you perhaps know, it is the Union's position that this is

⁴⁴ Silvia also was present at the meeting.

1 something that the Town is required to bargain over therefore I am making
2 a formal demand to bargain. I have copied Brian Magner on this email.

3
4 Paul has made it clear that we want to work in a cooperative manner and
5 that I should make this a priority for scheduling purposes therefore I will
6 make myself available in the evening, if necessary.

7
8 Kindly forward available dates or have your attorney contact me to
9 schedule a meeting.

10
11 Thank you in advance for your anticipated cooperation.

12
13 On October 18, 2011, the Board of Selectmen approved the proposal to create
14 the non-bargaining unit position of assistant fire chief.

15 On October 25, 2011, Hynes sent a letter to Coughlin stating:

16 I had previously emailed you on October 13, 2011. However, as of this
17 date, I have not received the courtesy of a reply.

18
19 Apparently, the Chief intends to create an Assistant Chief position outside
20 of the bargaining unit-without complying with his obligations pursuant to
21 G.L.c.150E.

22
23 My prior e-mail requested that the Town meet to bargain over both the
24 decision as well as the impacts of that decision. Your failure to meet with
25 the Union leaves us no choice but to file an unfair labor practice charge for
26 the blatant violation of G.L.c.150E.

27
28 Please let me know who will be representing the Town in this matter.

29 On November 4, 2011, Silvia sent an email message to all Fire Department personnel
30 stating:

31 It is with great pleasure that I announce that the Town of Cohasset is
32 currently accepting applications for the full-time position of Assistant Fire
33 Chief....

34
35 The Assistant Chief works under the general guidance and direction of the
36 Fire Chief and exercises supervision over Fire Department operational
37 personnel directly or through subordinate personnel. The Assistant
38 Chief's duties include a variety of supervisory, technical, and
39 administrative work in the supervision and administration of fire
40 suppression, fire prevention/education, emergency medical service,

1 hazardous materials leak/spill mitigation, specialized rescue, and training
2 activities.

3

4 Send resume and cover letter no later than 12pm November 18, 2011.

5

6 Silvia attached a job description for the assistant fire chief position to his November 4,

7 2011 email. The job description stated in pertinent part:

8 **GENERAL PURPOSE** [Emphasis in the original]

9

10 Performs a variety of command responsibilities including administrative,
11 operational, educational, fire prevention related and investigative duties.

12

13 **SUPERVISION RECEIVED**

14

15 Works under the general guidance and direction of the Fire Chief.

16

17 **SUPERVISION EXERCISED**

18

19 Assists in supervising all department staff directly and indirectly through captains
20 and lieutenants.

21

22 **ESSENTIAL DUTIES AND RESPONSIBILITIES**

23

24 Acts on behalf of the Fire Chief when the Chief is absent or serving as the
25 Deputy Emergency Manager during an Emergency Operations Center incident.

26

27 Advances the direction of the department based on policies and procedures
28 developed in conjunction with the Fire Chief.

29

30 Provides direction and assistance at fires and other emergencies. Responds
31 after hours to fires and other emergencies in Cohasset and serves as chief
32 officer of apparatus responding to surrounding mutual aid communities.

33

34 Assists the Fire Chief in developing the Fire Department budget. In combination
35 with the Fire Chief administers departmental budget and policies on operations
36 and personnel.

37

38 Develops policy and administers Fire Prevention program.

39

40 Responsible for compliance and enforcement of Massachusetts General Law
41 Chapter 148, Fire Prevention and 527 CMR: Board of Fire Prevention
42 Regulations (State Fire Code).

- 1 Responsible for issuing permits and inspection of the same for compliance as
2 required under the general law and fire code.
3
- 4 Reviews architectural plans received from the Building Commissioner for new
5 construction and alterations of buildings for compliance and approval of fire alarm
6 systems, automatic sprinklers, other fire suppression systems, evacuation routes
7 and exits. Perform[s] inspection and acceptance testing of fire protection
8 systems for final approval prior to occupancy permits being issued.
9
- 10 In combination with the Building Commissioner, inspects all premises where
11 alcoholic beverages are served for signoff on certificate of inspection attesting to
12 safety of building or structure.
13
- 14 Develops and administers public relations and education programs, provide[s]
15 the public and regulated community with information regarding fire prevention
16 and fire protection. Develops and presents programs for schools, civic groups,
17 etc.
18
- 19 Supervises company officers performing quarterly inspections of health care
20 facilities, assisted living facilities, schools and day care centers. Follows up as
21 necessary to eliminate violations of the fire code and/or unsafe conditions.
22 Reviews and approves fire protection and prevention plans as required under the
23 fire and building codes. Responds to possible fire code violations reported by
24 other Town inspectors.
25
- 26 Reviews plans received from Planning Board and provides comments on public
27 safety, delivery of emergency services and adequacy of systems being proposed
28 for developments within Town.
29
- 30 As part of Command Staff, assist[s] the Fire Chief with interviewing and
31 recommending candidates to the appointing authority for hire to the Fire
32 Department.

33 On November 8, 2011, Coughlin sent an email message to Silvia stating:

34 I understand the deadline for submitting applications for the position is
35 November 18th. What date are you thinking about holding the assessment
36 center on? Mark [DeLuca] is holding his on Thursday November 10th.

37
38 I would like to do both appointments at the same BOS [Board of
39 Selectmen] meeting. I want to do it on Tuesday December 6th. Please
40 plan accordingly.

41 Two hours later, Silvia replied that:

1 I am still setting up the assessment process. If we have viable candidates
2 from within I will do my best to make the 12/6 deadline. ...

3 On or about November 18, 2011, Trask, Dockray and Bilodeau⁴⁵ applied for the
4 vacancy for assistant chief by submitting cover letters and resumes. Trask and
5 Dockray subsequently participated in the assessment center process on December 2,
6 2011.⁴⁶

7 On December 5, 2011, Coughlin sent an email message to Silvia stating;

8 Please be advised that I would like to interview the finalists as
9 recommended by their respective assessment center[s] on Wednesday
10 morning 9 AM-both finalists should be accompanied by their chief.

11 On December 6, 2011, Coughlin sent an email message to Silvia stating:

12 I need to know the candidate that was recommended by the Assessment
13 Center so we can notify the finalist that he should report with you in my
14 office at 9AM.

15 On December 6, 2011, Silvia notified Dockray via email that:

16 Town Manager Mike Coughlin has requested that you appear in his office
17 tomorrow morning at 09:00 to interview for the position [o]f Assistant Chief
18 of the Fire Department. The dress for the interview is "Duty Uniform."
19 Please let me know if you will be able to appear.

20 In a December 8, 2011 email message to Coughlin, Silvia noted:

21 I have reviewed the results from the Assessment Panel that was
22 completed for the Assistant Fire Chiefs position. I have also conferred
23 with the three fire chiefs that comprised the assessment panel, Fire Chief
24 William Scoble of Westwood, Retired Fire Chief Kenneth Galligan of
25 Brockton, and Fire Chief Timothy Grenno of Whitman. The Chiefs
26 unanimously scored Lieutenant John Dockray as the top candidate. It is
27 my belief that Lieutenant Dockray is well suited to take on the
28 responsibility and challenges of this new position. Therefore, I am happy

⁴⁵ Bilodeau subsequently withdrew his application for the position.

⁴⁶ Westwood Fire Chief William Scoble (Scoble) chaired the assessment panel along with Retired Brockton Fire Chief Kenneth Galligan and Whitman Fire Chief Grenno.

1 to recommend John J. Dockray for promotion to the rank of Assistant Fire
2 Chief of the Cohasset Fire Department.

3 The Town subsequently appointed Dockray to the position of assistant chief effective
4 January 2012.

5 Certain Events After January 2012

6 EMS and CPR

7 On or about the time Dockray became assistant chief, Curry, the captain who
8 oversaw EMS functions, retired. The Town appointed Randy Belanger (Belanger) as an
9 acting captain.⁴⁷ Belanger, who also is a registered nurse, took over the QA and QI
10 duties⁴⁸ that Dockray previously performed as EMS coordinator.⁴⁹ Lieutenant John
11 Hernan (Hernan), current Union president, took over the other duties of the EMS
12 coordinator, which included ordering medical supplies, attending the monthly meetings
13 at South Shore Hospital, acting as liaison to the EMS Committee, and coordinating the
14 inspection and licensing of drugs and equipment.

15 However, Dockray continued to transmit the run reports to the outside vendor
16 that handled the billing for EMS services and continued to use computer software to
17 compile the online package of bills. Dockray also continued to teach CPR classes and
18 even began to teach those classes on a monthly basis under the auspices of the Town's

⁴⁷ Belanger became a permanent captain in May or June of 2012.

⁴⁸ Belanger subsequently took over the training function as well when Rooney retired.

⁴⁹ Although Bilodeau testified that Dockray continued to perform the QA and QI duties after his promotion, I credit Silvia's testimony that Belanger took over the QA and QI duties because it is consistent with Union witness Protulis's testimony on this point.

1 Recreation department. At times, Dockray conducted those classes with certain
2 members of the Union's bargaining unit.⁵⁰

3 Fire Prevention Duties

4 During 2012, Dockray attended certain Planning Board meetings⁵¹ as part of the
5 process of learning his fire prevention duties. However, Trask also attended those
6 meetings and even attended certain meetings⁵² that Dockray did not attend.⁵³ Dockray
7 conducted inspections for Section 10A permits.⁵⁴ Dockray also became responsible for
8 assigning inspections to the various shift captains, which the Board of Selectmen
9 requires of establishments that hold licenses to sell food or liquor or to hold special
10 events.⁵⁵

11 In 2012 and continuing, Trask continued to receive a stipend for the performance
12 of fire prevention duties. In FY'2012, Trask earned \$17,436.12 in overtime, although
13 the record does not reveal what portion of those monies represents overtime for the
14 performance of fire prevention duties. For the period from July 1, 2012 through mid-

⁵⁰ Smith, who previously taught classes with Dockray, left the Town's employment on or about May 2012.

⁵¹ Dockray attended Planning Board meetings, which had fire prevention issues on the agenda.

⁵² The record does not reveal whether Dockray and/or Trask attended Zoning Board of Appeals meetings from 2012 and continuing.

⁵³ Although Bilodeau testified that the Town declined to send Trask to certain Planning Board meetings and instead sent Dockray, Trask testified that he went to the same meetings as Dockray and even went to certain meetings that Dockray did not attend. I credit Trask's testimony on this point because it is more likely that Trask would know what meetings he attended than Bilodeau would know.

⁵⁵ Trask estimated that the other shift captains still continued to perform twenty percent of the fire prevention duties.

1 January 2013, Trask earned \$4200 in overtime monies, although the record does not
2 reveal what portion of those monies represents overtime for the performance of fire
3 prevention duties. For the period from the first week of November 2012 until the
4 second week of December 2012, the Fire Department imposed a freeze on overtime
5 expenditures, because the overtime budget had been depleted. In December 2012,
6 Town Meeting approved additional funding for the Fire Department, and Silvia lifted the
7 overtime freeze.

8 Academy Training

9 In 2012, Silvia and Dockray attended Fire Prevention Officer Level One (FPO-
10 Level One) training at the Academy. Trask also applied to attend this training, but the
11 Academy placed him on a waiting list. In late January, early February 2013, the
12 Academy notified Trask that he had been accepted into a subsequent session of FPO-
13 Level One training, and Silvia approved Trask's request to attend this training.

14 Line Officers

15 For the period from December 2009 until the dates of the hearing, the Town
16 never filled out its line personnel to 22 firefighters.⁵⁶

17

⁵⁶ The record before me shows that the Town only makes conditional offers of employment to firefighter recruits and does not actually hire them until two weeks before their enrollment dates at the Massachusetts Firefighting Academy (Academy). The Union claims that this practice has prevented the Town from reaching 22 line personnel, the condition precedent that is contained in the December 2, 2009 MOA, for the Town to exercise its right to hire a full-time fire prevention officer. However, I make no findings about the effects of the hiring practice on the parties' compliance with the December 2, 2009 MOA, because the practice was already in place when they executed the agreement. The practice existed prior to 2006 when Silvia became fire chief and, thus the Town did not develop the practice to avoid complying with the December 2, 2009 MOA.

1 Union's Information Request2 November 2011

3 On November 14, 2011, Hynes sent a letter to Coughlin that states in pertinent
4 part:

5 As you know, this firm represents the Cohasset Firefighters union, IAFF
6 Local 2804. Apparently, you have refused the Union's two requests to
7 meet to discuss this issue.

8
9 The Union is quite concerned that the Town's unilateral creation of an
10 Assistant Fire Chief position outside the bargaining unit is a blatant
11 violation of M.G.L.ch.150E. Particularly troubling is the fact that the
12 Town's conduct is a repudiation of the Memorandum of Agreement "MOA"
13 which was entered into on December 2, 2009. In fact, in agreeing to the
14 Fire Prevention Officer language in paragraph 10 of the MOA the Union
15 took a discounted wage increase for fiscal year 2011 (1%). In order that
16 the Union can evaluate this matter and determine its rights, both under the
17 law and the collective bargaining agreement, it hereby requests the
18 following information pursuant to M.G.L.c.150E, §10(a)(5). Pending
19 receipt and analysis of such information, Local 2084 reserves all
20 contractual and statutory rights regarding the Town's unilateral conduct
21 and the impact of such upon entitlements on the unit. Failure to provide
22 this information promptly would require the Union to exercise its rights to
23 file a separate Unfair Labor Practice Charge under M.G.L.c.150E. The
24 information requested is as follows:

- 25
- 26 1. Please provide copies of any and all documents, correspondence,
27 emails, etc., in any way related to the creation of the Assistant Fire
28 Chief position.
 - 29
 - 30 2. Please inform me whether the Town still intends to fill the Fire
31 Prevention Officer position and, if so, when.
 - 32
 - 33 3. Please provide the source of the funding for the Assistant Fire Chief
34 position.
 - 35
 - 36 4. Please provide in comprehensive detail, what, if any, discussions
37 you had with the Union prior to creating this position.
 - 38
 - 39 5. Please provide in comprehensive detail, the [identity] of any and all
40 town employees, agents, or attorneys, who were in any way
41 involved in the decision to create this position.

1 Without waiving either contractual or statutory rights, Local 2084 now
2 request[s] that the Town maintain the status quo and not fill the Assistant
3 Fire Chief position until such time as all collective bargaining obligations
4 have been satisfied.

5
6 Your prompt attention to these questions and to the disposition of the
7 status quo maintenance request would be greatly appreciated. If you
8 ignore the status quo request we shall file the charge on Monday,
9 November 21st and I suggest that you inform prospective candidates that
10 their appointment could be voided by a subsequent decision.

11 In a November 22, 2011 email message, Town labor counsel Peter Berry (Berry) replied
12 that:

13 This will respond to your letter of November 14 regarding the Assistant
14 Fire Chief Position in Cohasset. Your statement that the Town refused the
15 Union's two requests to meet to discuss this issue is not accurate. In fact,
16 the Town did meet with the Fire Fighters Union to discuss this issue on
17 one occasion. On the second occasion, it was the Fire Union who refused
18 to meet with the Town further.

19
20 The Town does not intend to return to the status quo and reserves all
21 rights. The Town categorically rejects your assertions that the Town is
22 engaging in any Unfair Labor Practice.

23
24 The Town is in the process of putting together a response to your
25 information request and will provide that response as soon as it is
26 completed. In the interim, please feel free to call me if you have any
27 questions regarding this matter.

28 2012

29 On January 18, 2012, the Union filed its charge of prohibited practice in Case No.
30 MUP-12-1495. In February 2012, the Town ceased to employ Coughlin. As of March
31 21, 2012, the Town had not provided the Union with any of the information that Hynes
32 had requested in his November 14, 2011 letter. On March 22, 2012, Berry sent the
33 following email message to Hynes:

34 Attached is information from Cohasset responsive to the Union's request
35 relative to the Assistant Chief's position.

1 However, unbeknownst to Berry, Hynes never received the attached information. On
2 March 27, 2011, Berry forwarded an email message to Hynes that Silvia had drafted⁵⁷
3 in response to Hynes' November 14, 2011 letter.

4 The following information will hopefully address the request for information
5 from Attorney Hynes dated November 14, 2011. I have addressed each
6 of the five items mentioned to the best of my knowledge.

7
8 *"Please provide copies of any and all documents, correspondence, emails,*
9 *etc., in any way related to the creation of the Assistant Fire Chiefs*
10 *position."* [Emphasis in original].

11
12 All information has been provided.

13
14 *"Please inform whether the Town still intends to fill the Fire Prevention*
15 *Officer position and, if so, when."*

16
17 The Town cannot fill the Fire Prevention Officers this position at this time
18 due to contractual obligations. Article 31 (Fire Prevention Officer), section
19 (g) states "Hiring of a full time Fire Prevention Officer is permitted only if
20 the Town fills out Line personnel to 22 firefighters.". Presently, the
21 Department has only 20 Line firefighters. It is doubtful that the
22 Department will be able to fill the additional 2 positions during Fiscal Year
23 2012. The Fiscal Year 2013 Budget does not include funding for the Fire
24 Prevention Officer's position at this time. Funding of the Fire Prevention
25 Officer's position during Fiscal Year 2014 or later has not been
26 determined.

27
28 *"Please provide the source of the funding for the Assistant Fire Chief*
29 *position."*

30
31 The salary for the Assistant Fire Chief's position came from the FY-2012
32 Fire Department funding that was approved by the Annual Town Meeting
33 in the spring of 2011. The salaries funding information has been provided.

34
35 *"Please provide in comprehensive detail, what if any, discussion you had*
36 *with the Union prior to creating this position."*

37
38 The week of October 10th the Union requested to meet with Town
39 Manager Coughlin regarding the creation of the Assistant Deputy Chief
40 position. Union President Paul Bilodeau and Vice-President Robert

⁵⁷ Silvia addressed the email message to Acting Town Manager Michael Milanoski, who provided it to Berry.

1 Protulis met with the Town Manager and me on October 11, 2011 at
2 3:30pm in the Town Manager's Office per their request. The purpose of
3 this meeting was to discuss the creation of the Assistant Fire Chief's
4 position.

5
6 My recollection of the meeting is:

7
8 The Union requested that the Town Manager bargain with the Union
9 regarding the creation/appointment of the Assistant Chief.

10
11 The Town Manager stated that he would address the Assistant Chief's
12 position during the upcoming contract negotiations.

13
14 I do not believe that a date for further bargaining was discussed during the
15 meeting.

16
17 I did not, nor to my knowledge did anyone else, keep minutes for this
18 meeting.

19
20 The Town Manager did not meet again with the Union until the Town
21 Manager met with the Union Bargaining Team in January of this year.

22
23 *"Please provide in comprehensive detail, the identity of any and all town*
24 *employees, agents, or attorneys, who were in any way involved in the*
25 *decision to create this position."*

26
27 It is my recollection that the people involved in the creation of this position
28 include:

29
30 Town Manager Michael Coughlin
31 Fire Chief Robert Silvia
32 Attorney Peter Berry
33 The Town of Cohasset Board of Selectmen
34 The Town of Cohasset Advisory Committee
35 Numerous Plymouth County Fire Chiefs who provided information for
36 comparison studies only.

37 Hynes in a March 28, 2012 email message to Berry responded:

38 Again this does not fully respond to the Information Request. I certainly
39 understand the difficulty of assembling the information with Coughlin gone
40 but this appears to be dismissive-although I know that was not your intent-
41 and will only exacerbate the matter. Let me briefly address my concerns.

42
43 You have provided only 3 documents-none of which are emails or
44 correspondence-and given the number of people involved (based upon

1 information in #5) it is not plausible that there wasn't any correspondence
2 between them.

3
4 The CBA is not an impediment-please explain why the Chief failed to fill
5 the 2 positions when he had funding for them.

6
7 This does not identify what the money was appropriated for. In the Spring
8 of 2011 the Town Meeting could not have appropriate funds for a position
9 that had not even been discussed.

10
11 I assume that your recollection is accurate.

12
13 Your response merely indicates who was involved without addressing our
14 request that you do so in "comprehensive detail", how, when, etc.
15 Moreover, this goes back to #1 because you didn't provide any of the
16 information received from the "numerous" Plymouth County Fire Chiefs,
17 any correspondence (and emails) between Coughlin and the Chief, the
18 Chief and his fellow Chiefs, Coughlin and the Advisory Committee, etc.

19 Also, in a March 28, 2012 email, Berry replied:

20 What do you mean by 3 documents? On March 22nd, I sent an email with
21 7 attachments, including: 1.) a complete description of Chief Silvia's
22 proposal to create the Assistant Chief's position; 2.) a detailed
23 explanation of the funding source for the position (Town Meeting only
24 appropriates bottom line figures for each Department, which allows the
25 Town to utilize the funds appropriated as it deems necessary); 3.) all of
26 the correspondence between Chief Silvia and the other Chiefs; 4.) a
27 description of the assessment center process; 5.) and 6.) two thick stacks
28 of emails about the Assistant Chief position.

29
30 Here is a detailed response to your points below:

31
32 See above.

33
34 Of course the CBA is an impediment to filling the FPO position. The
35 Union insisted on language prohibiting hiring an FPO until the Town fills
36 out Line personnel to 22 FF's, which has not happened. See Chief Silvia's
37 response below. The CBA language **allows** the Town to fill the FPO
38 position. It does not, nor could it legally, **require** the Town to fill the
39 position. [Emphasis in original].

40
41 See the financial information I sent previously on March 22. See response
42 #2 above.

43
44 The recollection is Chief Silvia's, not mine. He was there.

1 All the information you cite was provided on March 22.

2

3 It appears that your response is the one that is being dismissive. I will re-
4 forward the March 22 information. Please advise.

5 2013

6 The parties exchanged no other correspondence regarding Hynes' November 14,
7 2011 request for information until March 10, 2013. On or about that date, the Town
8 provided the Union with seven email messages between Silva and Coughlin regarding
9 the assistant chief's position. Silvia discovered the email messages on his personal
10 computer when he conducted a further review of all his email messages during the
11 approximately one month period between the second day of hearing on February 5,
12 2013 and when he turned over the materials to the Town's labor counsel during the
13 week of March 4, 2013. The parties introduced those seven email messages into the
14 record as Joint Exhibit 12B at the third day of hearing on March 11, 2013.

15 Opinion

16 Count I-Repudiation

17 Section 6 of the Law requires public employers and unions that represent their
18 employees to meet at reasonable times in good faith regarding wages, hours, standards
19 of productivity and performance, and any other terms and conditions of employment.
20 The statutory obligation to bargain in good faith includes the duty to comply with the
21 terms of a collectively bargained agreement. Commonwealth of Massachusetts, 26 MLC
22 165, 168 (2000) (citing City of Quincy, 17 MLC 1603 (1991); Massachusetts Board of
23 Regents of Higher Education, 10 MLC 1196 (1983)). A public employer's deliberate
24 refusal to abide by an unambiguous, collectively bargained agreement constitutes a
25 repudiation of that agreement in violation of the Law. Town of Falmouth, 20 MLC 1555

1 (1994, aff'd sub nom., Town of Falmouth v. Labor Relations Commission, 42 Mass.
2 App. Ct. 1113 (1997). If the evidence is insufficient to find an agreement or if the parties
3 hold differing good faith interpretations of the language at issue, the Commonwealth
4 Employment Relations Board (CERB) will conclude that no repudiation has occurred.
5 Commonwealth of Massachusetts, 18 MLC 1161, 1163 (1986). If the language is
6 ambiguous, the CERB examines applicable bargaining history to determine whether the
7 parties reached an agreement. Id.; Commonwealth of Massachusetts, 16 MLC 1143,
8 1159 (1989). There is no repudiation of an agreement if the language of the agreement
9 is ambiguous, and there is no evidence of bargaining history to resolve the ambiguity.
10 Commonwealth of Massachusetts, 28 MLC 8, 11 (2001) (citing Town of Belchertown, 27
11 MLC 73 (2000)).

12 The issue in Count I is whether the Town repudiated Paragraph #10 of the
13 December 2, 2009 MOA by creating and filling the assistant chief position. I turn first to
14 consider the plain language of the provision. Both sides assert that the language of
15 Paragraph #10 is clear and unambiguous. The CERB gives effect to the clear meaning
16 of the bargained-for language and does not inquire into the parties' intent where the
17 words of the agreement are unambiguous. A review of Paragraph #10, in its entirety,
18 reveals that the paragraph makes no reference to the assistant chief's position. Rather,
19 the provision discusses the position of full-time fire prevention officer.

20 Turning to Section (g) of Paragraph #10, that section states that: "Hiring of a full
21 time Fire Prevention Officer is permitted only if the Town fills out Line personnel to 22
22 firefighters." Reading the language of Section (g) carefully, giving the words their plain
23 and normal meaning, the provision does not compel the Town to hire twenty-two line

1 personnel. Further, although the language in Section (g) allows the Town to hire a full-
2 time prevention officer when Fire Department staffing reaches twenty-two line
3 personnel, the provision does not require the Town to do so. Here, it is undisputed that
4 the Town never filled out its line personnel to twenty-two firefighters. The Union argues
5 that because the Town hired an assistant chief, even though it had not filled out its line
6 personnel to twenty-two firefighters, the Town failed to abide by the terms of Section (g).
7 The Union reasons that the assistant fire chief position and the full-time fire prevention
8 officer position are the same positions but with different names.

9 I turn now to examine the assistant fire chief position. On November 4, 2011,
10 when the Town posted an opening for an assistant fire chief, it attached the job
11 description for the position. The Union contends that the job description supports its
12 claim that the assistant chief's position and the full-time prevention officer position are
13 the same. The Union argues that nine of the thirteen activities, which are listed under
14 the heading "Essential Job Duties and Responsibilities," involve fire prevention
15 functions. The Union also points to Silvia's October 3, 2011 memorandum regarding
16 "Restructuring the Command Staff of the Fire Department." The Union points to the
17 portion of Silvia's memorandum where he noted that there was a major problem with the
18 fire prevention division, and that there was no one to take over in the absence of the
19 Fire Chief. Silvia then stated:

20 The solution to both of the problems is to create the position of Assistant
21 Fire Chief. By creating the posting and tasking the individual with the
22 duties of overseeing the Prevention Division as well as adding additional
23 administrative duties to the job description both problems will be
24 addressed ...

1 Conversely, the Town argues that the full-time fire prevention officer position was
2 dedicated exclusively to fire prevention, while many of the duties that the assistant fire
3 chief performs are administrative and have nothing to do with fire prevention. The Town
4 also points out that Trask continues to receive a stipend and overtime for performing fire
5 prevention functions, even though the Town has hired Dockray as the assistant chief.

6 Upon review of the job description of the assistant fire chief, there are qualitative
7 differences between the assistant fire chief position and the full-time fire prevention
8 officer. Although the assistant fire chief performs certain fire prevention duties, which
9 will be discussed below in the portion of the decision addressing
10 Count II of the Complaint, he performs other functions as well, which includes acting as
11 the second-in-command in the Fire Department. The assistant chief fills in for the fire
12 chief, when the fire chief is absent or otherwise unavailable. The assistant fire chief
13 also responds after hours to fires and other emergencies in Town, serves as chief
14 officer of apparatus responding to surrounding mutual aid communities, and assists the
15 Fire Chief in developing the budget, and in administering certain departmental policies.
16 Because the assistant fire chief position is not the same position as the full-time fire
17 prevention officer, the requirement in Section (g) that the Town fill out its line personnel
18 to 22 firefighters before it is permitted to hire a full-time fire prevention officer does not
19 apply to the hiring of the assistant fire chief position. Thus, because I conclude that the
20 Town did not repudiate Article 10 of the December 2, 2009 MOA, I dismiss Count I of
21 the Complaint.

Count II-Failure to Bargain Over the Impacts of the Creation of the Assistant Fire Chief Position

1 It is well established that a public employer may exercise its managerial
2 prerogative to determine the nature and level of its services without first bargaining over
3 this decision with the employees' exclusive collective bargaining representative. School
4 Committee of Newton v. Labor Relations Commission, 338 Mass. 557, 563 (1983).
5 Here, the Town's decision to reorganize the supervisory structure of its Fire
6 Department, including the decision to create the position of assistant fire chief, is a core
7 managerial decision that is not subject to the statutory obligation to bargain. See City of
8 Boston, 21 MLC 1350, 1360 (1994) (reorganizing the supervisory structure of the
9 library's circulation and shelving department is a core managerial decision).
10 Nevertheless, the Town must negotiate to resolution or impasse over the impacts of its
11 decision to reorganize on mandatory subjects of bargaining. See School Committee of
12 Newton, 338 Mass at 564. Here, the Town asserts that its reorganization decision had
13 no impacts on the terms and conditions of employment of unit members. However, the
14 Union argues that the creation of the assistant chief's position resulted in the transfer of
15 bargaining unit work to a non-bargaining unit employee, the assistant chief. The
16 assignment of bargaining unit work outside the bargaining unit is a mandatory subject of
17 bargaining. Melrose School Committee, 9 MLC 1713, 1722 (1983)

18 A public employer violates Section 10(a)(5) of the when it transfers work
19 performed by bargaining unit members to non-bargaining unit personnel without first
20 giving its bargaining unit members' exclusive representative prior notice and an
21 opportunity to bargain to resolution or impasse. City of Cambridge, 23 MLC 28, 36
22 (1996), aff'd sub nom., Cambridge Police Superior Officers Association v. Labor

1 Relations Commission, 47 Mass. App. Ct. 1108 (1999). To establish that a public
2 employer has violated the Law, an employee organization must demonstrate that: 1) the
3 employer transferred bargaining unit work to non-unit personnel; 2) the transfer of unit
4 work had an adverse impact on individual employees or the bargaining unit itself; and 3)
5 the employer failed to give the employee organization prior notice and an opportunity to
6 bargain to resolution or impasse over the decision to transfer the work. Lowell School
7 Committee, 28 MLC 29, 31 (2001); City of Gardner, 10 MLC 1218, 1219 (1983). The
8 job duties at issue here are: a) fire prevention duties, b) transmittal of run reports to the
9 private vendor who handles the billing for EMS services and the compilation of bills for
10 EMS services, and c) CPR training.

11 Alleged Transfers of Unit Work

12 To determine whether the Town transferred bargaining unit work, I must first
13 determine as of January 2012 whether the disputed job duties were exclusive
14 bargaining unit work or whether unit members shared the work with non-bargaining unit
15 employees. When bargaining unit members and non-unit employees share work, the
16 CERB previously has determined that the work will not be recognized as belonging
17 exclusively to the bargaining unit. Higher Education Coordinating Council, 23 MLC 90,
18 92 (1996); City of Boston, 6 MLC 1117, 1125 (1979).

19 Fire Prevention Duties

20 The Town urges me to find that the fire prevention duties are shared work
21 because Silvia's four predecessors as full-time fire chief performed varying amounts of
22 fire prevention duties, including Brock who performed 80% of the fire prevention duties.
23 Conversely, the Union urges me to consider the manner in which fire prevention duties

1 were performed in the six years since 2006 when Silvia became fire chief. During that
2 six-year period, Silvia performed no fire prevention duties except for oversight of the
3 licensing inspections, which involved him obtaining the list of license-holders that
4 needed to be inspected from the Board of Selectmen and giving the list to Trask in order
5 that Trask could assign the inspections to the shift captains. Upon review, the six year
6 period is sufficient to establish a departure from the prior pattern of unit members and
7 the various fire chiefs sharing fire prevention duties and to establish a new practice of
8 unit members exclusively performing fire prevention duties. See City of Boston, 38 MLC
9 201, 202 (2012) (rejecting the employer's claim that two and one-half years of assigning
10 police captains to command a particular division was not sufficient to establish a binding
11 practice); City of Boston, 28 MLC 369, 372 (2002) (finding seven years sufficient to
12 establish a practice of assigning patrol officers exclusively to identify latent prints at
13 crime scenes).

14 The facts before me show that since January 2012, Dockray as the assistant
15 chief has conducted inspections for 10A permits. Additionally, Dockray has attended
16 planning board meetings where he, along with Trask, provided technical assistance to
17 planning board members. Previously, only unit members performed those duties for the
18 six-year period from 2006 through 2012. Also, Dockray, rather than Trask, assigns
19 inspections of license-holders to the shift captains. Thus, the Town has transferred
20 exclusive bargaining unit work to a non-bargaining unit employee.

21 Transmittal of Run Reports and Compilation of Bills

22 The record concerning the transmittal of run reports and the compiling of EMS
23 bills starts with then Lieutenant Dockray. As EMS coordinator, he transmitted run

1 reports to the outside vendor who handed the billing and collections for the EMS
2 services that the Town rendered. He also used computer software to create an online
3 package of bills that satisfied the vendor's requirements and prevented bills from being
4 kicked back for insufficient information. After the Town promoted Dockray to assistant
5 chief, he continued to transmit the run reports and compile the online package of bills.
6 Therefore, the Town has transferred exclusive bargaining unit work to a non-bargaining
7 unit employee.

8 CPR Training

9 Prior to 2012, unit members Dockray and Smith conducted CPR training for
10 Town employees. After Dockray's promotion, he continued to conduct CPR training
11 with the assistance of certain unit members. Thus, the Town has changed its practice
12 of having unit members exclusively perform CPR training and has transferred
13 bargaining unit work to a non-unit employee.

14 Alleged Adverse Impacts

15 An employer must bargain about a transfer of unit work, if the transfer results in
16 adverse impacts on individual employees or the bargaining unit as a whole. City of New
17 Bedford, 15 MLC 1732, 1737 (1989).

18 Fire Prevention Duties

19 Turning first to the fire prevention duties, the Town contends that the bargaining
20 unit suffered no detriment as a result of the transfer of those duties because Trask
21 continues to perform fire prevention duties, which includes receiving a stipend and
22 earning significant overtime for the performance of those duties. However, while the
23 Town is correct that Trask still performs fire prevention duties and earns overtime for

1 those duties, the Town's assignment of some of those duties to Dockray limits Trask's
2 possible future overtime earnings. See Town of Norwell, 13 MLC 1200, 1202 (1986)
3 (losing opportunities to perform unit work on overtime is a detriment to individual unit
4 members). In fact, Silvia in his October 3, 2011 memorandum notes that the additional
5 pay that the assistant chief will receive may be offset by savings in the overtime
6 expenditure. Also, a review of the November 4, 2011 job description for the assistant
7 chief's position shows that nine out of thirteen of the essential duties and responsibilities
8 for the position concern fire prevention duties. Consistent with the job description, the
9 Town in 2012 sent Dockray to FPO-Level One training at the Academy.

10 Also, because Dockray has taken over the performance of certain fire prevention
11 duties, it is unlikely that the Town will have the same interest in hiring a full-time fire
12 prevention officer as it did previously. The monies that would have funded the full-time
13 prevention officer have instead been subsumed, in part, into paying for the salary of the
14 assistant fire chief. The hiring of a full-time fire prevention officer would have resulted in
15 an additional shift officer⁵⁸ and the likely promotion of a bargaining unit member into that
16 slot. Therefore, the bargaining unit as a whole suffered the adverse impact of a
17 reduced opportunity for promotion See City of Cambridge, 23 MLC at 36, 50 (reducing
18 promotional opportunities for unit members by transferring command functions to newly
19 created deputy superintendent position) and a reduced opportunity to perform a
20 specialized position. See Town of Saugus, 29 MLC 208, 210 (2003) (transferring unit
21 work of specialized position of police officer/mechanic, which is referenced in the
22 collective bargaining agreement, constitutes a detriment to the bargaining unit).

⁵⁸ The December 2, 2009 MOA characterizes the fire prevention officer as a shift officer.

1 Transmittal of Run Reports and Compilation of On-Line Bills

2 Next, the Town argues the duties of transmitting the run reports and compiling
3 the online duties was, at best, a minor duty and that no unit member experienced a
4 detriment as a result of the transfer of this work. Instead, the Town insists that Dockray
5 only performed this duty to help out unit members, who had no experience in performing
6 the work. However, the Town's claim that Dockray's experience is a necessity to
7 perform the functions belies the arguments that the duties are minor. Further, whether
8 the duties are minor or not, it was still bargaining unit work and unit members have lost
9 the opportunity to become skilled in those specialized functions because Dockray has
10 continued to perform the duties even after he was promoted out of the unit. See Id.

11 CPR Training

12 Finally, the Town contends that the transfer of CPR duties to Dockray had no
13 adverse impact on unit members but instead had a positive impact because Dockray
14 expanded the training's scope to include classes at the Recreation Department. Thus,
15 the Town reasons that unit members have more opportunities to assist Dockray in the
16 teaching of CPR. However, the transfer of duties to Dockray has reduced the role of
17 unit members in CPR classes from handling all aspects of those classes to merely
18 being Dockray's assistants, when he believes that they are needed. Thus, the
19 bargaining unit's role in teaching CPR classes has been diminished and future
20 opportunities to run CPR classes have been lost. See City of Boston, 28 MLC at 373
21 (losing opportunities to perform unit work in the future constitutes a detriment to the
22 bargaining unit).

1 Accordingly, I find that the City's transfer of fire prevention duties, transmittal of
2 run reports and compilation of EMS bills, and CPR training constituted a sufficient
3 detriment to the bargaining unit and /or individual bargaining unit members to trigger the
4 Town's statutory obligation to bargain with the Union.

5 Failure to Bargain

6 Here, the Union made several requests to bargain with the Town about the
7 creation of the assistant fire chief's position in September and October 2011. It is
8 undisputed that the Town refused to bargain to bargain with the Union. Consequently,
9 the City has transferred bargaining unit work without bargaining to resolution or impasse
10 with the Union over the decision and the impacts to transfer the work in violation of
11 Section 10(a)(5) of the Law.

12 Count III- Failure to Provide Information in a Timely Manner

13 If a public employer possesses information that is relevant and reasonably
14 necessary to an employee organization in the performance of its duties as the exclusive
15 collective bargaining representative, the employer is generally obligated to provide the
16 information upon the employee organization's request. Higher Education Coordinating
17 Council. 23 MLC 266, 268 (1997). The employee organization's right to receive
18 relevant and reasonably necessary information is derived from the statutory obligation
19 to engage in good faith collective bargaining, including both grievance processing and
20 contract administration. Boston School Committee, 10 MLC 1501, 1513 (1984). The
21 CERB's standard in determining whether the information requested by an employee
22 organization is relevant is a liberal one, similar to the standard for determining relevancy
23 in civil litigation proceedings. Board of Higher Education, 26 MLC 91, 92 (2000); Board

1 of Trustees, University of Massachusetts (Amherst), 8 MLC 1139, 1141 (1981). The
2 Town does not dispute, and I find, that the requested information is relevant and
3 reasonably necessary for the Union to determine whether the assistant chief was
4 performing bargaining unit work.

5 The facts before me establish the following time line. On November 14, 2011,
6 the Union requested information about the assistant chief's position. On November 22,
7 2011, the Town informed the Union that it was in the process of compiling the
8 information. The Union filed its prohibited practice charge on January 18, 2012. On
9 March 22, 27 and 28, 2012, the Town responded, in part, to the Union's November 14,
10 2011 request for information. The DLR issued its complaint of prohibited practice on
11 May 31, 2012. The Town subsequently provided additional information on the third day
12 of hearing on March 11, 2013. The issue before me is whether the City failed to timely
13 provide the Union with the requested information in violation of the Law.

14 An employer may not unreasonably delay furnishing requested information that is
15 relevant and reasonably necessary. Boston School Committee, 24 MLC 8, 11 (1997).
16 In determining whether a delay in the production of information is unreasonable, the
17 CERB considers a variety of factors including: 1) whether the delay diminishes the
18 employee organization's ability to fulfill its role as the exclusive representative; Id.; 2)
19 the extensive nature of the request, UMass Medical Center, 26 MLC 149, 158 (2000); 3)
20 the difficulty of gathering the information, Id.; 4) the period of time between the request
21 and the receipt of information, Higher Education Coordinating Council, 23 MLC at 269;
22 and 5) whether the employee organization was forced to file a prohibited practice
23 charge to retrieve the information. Board of Higher Education, 26 MLC at 93.

1 Here, the Town did not provide the Union with any information until almost two
2 months after the Union filed its prohibited practice charge. See Boston School
3 Committee, 24 MLC at 11 (compelling an exclusive bargaining representative to file
4 charges to obtain relevant requested information does not effectuate the purposes of
5 the law or enhance the spirit of labor relations). Further, the Town placed no
6 information on the record showing that the delay was reasonable because of time and
7 personnel needed to compile the information. See UMass Medical Center, 26 MLC at
8 158 (finding delay in providing information reasonable because of the extensive nature
9 of the request and the difficulty in calculating the information). Instead, the Town
10 argued that the delay was the result of Coughlin leaving the Town's employ in February
11 2012. However, the Union had made its information request almost three months
12 before and filed its charge almost one month before Coughlin left. Furthermore, the
13 Town informed the Union in November 2012 that it was in the process of compiling the
14 information. The facts before me do not explain the almost four-month gap.

15 Additionally, the Town did not provide certain other information until shortly
16 before the third day of hearing, which was nearly a year after it first provided information
17 to the Union. The Town points out that some of the seven email messages that it
18 provided were duplicate copies of messages, which the Union already had. Also, the
19 Town contends that the delay in providing the other messages did not diminish the
20 Union's ability to fulfill its role as exclusive bargaining representative. In particular, the
21 Town notes that it previously had turned over a large number of documents to the Union
22 for use at hearing. However, the legal standard does not require a showing of actual
23 prejudice. City of Boston, 33 MLC 1, 10 (2006). Rather, the appropriate inquiry is

1 whether the Union's role as the firefighters' exclusive representative was diminished by
2 the Town's delay in furnishing the requested information. Board of Higher Education, 26
3 MLC at 93; Massachusetts State Lottery Commission, 22 MLC at 1472. The Union had
4 the right to review the information and make its own assessment here whether or not
5 the information would be useful in its role as bargaining representative See City of
6 Boston, 35 MLC 95, 102 (2008) (raising the possibility that a union and an employer
7 could review the same information and draw different conclusions as to the usefulness
8 of the information). Accordingly, concerning Count III of the Complaint, I find that the
9 Town violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by failing
10 to timely provide the Union with relevant and reasonably necessary information that the
11 Union had requested.⁵⁹

12 Conclusion

13 Based on the record and for the reasons stated above, I conclude that the Town
14 violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law in the manner
15 alleged in Count II and Count III of the amended complaint. I dismiss Count I of the
16 complaint alleging that the City violated Section 10(a)(5) of the Law by repudiating the
17 December 2, 2009 MOA.

⁵⁹ The Union asks me to draw an adverse inference that the Town had not provided all relevant and reasonably necessary information that the Union had requested, because the Town failed to call Coughlin as a witness. Specifically, the Union seeks to have me infer that Coughlin drafted other correspondence in addition to the correspondence from him, which the Town already had provided to the Union. Adverse inferences are appropriate when a witness is accessible to a party and could be expected to testify on the party's behalf. See Quincy School Committee, 27 MLC 83, 91 (2000). The record before me does not show that Coughlin was accessible to the Town, even as a subpoenaed witness. Rather, he involuntarily left the Town's employ in March 2012, approximately ten months before the hearing commenced. Thus, I decline to draw an adverse inference that there is relevant information, which Coughlin drafted and which the Town has not provided to the Union.

- 1 k) Notify the DLR in writing of steps taken to comply with this decision within
2 ten (10) days of receipt of this decision.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

_____/s/_____
MARGARET M. SULLIVAN
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 ten days, the decision shall become final and binding on the parties.