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

In the Matter of CITY OF EVERETT and NEW ENGLAND POLICE BENEVOLENT ASSOCIATION	Case No. MUP-13-3006 Date issued: April 29, 2016

Board Members Participating:

Marjorie F. Wittner, Chair
Elizabeth Neumeier, CERB Member
Katherine G. Lev, CERB Member

Appearances:

Albert Mason, Esq. - Representing the City of Everett

Gary G. Nolan, Esq. - Representing NEPBA

CERB DECISION ON APPEAL OF HEARING OFFICER'S DECISION

SUMMARY

1 The City of Everett (City) and the New England Police Benevolent Association
2 (Union) filed cross-appeals to the Commonwealth Employment Relations Board (CERB)
3 from a decision of a Department of Labor Relations (DLR) Hearing Officer holding: 1) that
4 the City did not violate Section 10(a)(5) and derivatively, Section 10(a)(1) of M.G.L. c. 150E
5 (the Law) by reducing the number of police captains employed by the City by attrition
6 without first giving the Union prior notice and an opportunity to bargain to resolution or

impasse; but (2) that the City did violate these sections of the Law when it indefinitely assigned a lieutenant to perform the duties of the unfilled captain's position. We affirm the decision for the reasons set forth below.

Background

The parties stipulated to certain facts and the Hearing Officer made additional findings of fact that we adopt, except where noted, and summarize the salient facts below. Further reference may be made to the Hearing Officer's decision, published at 41 MLC 360, and attached to the slip opinion of this decision.

The Union is the exclusive representative for uniformed personnel in the City's police department (Department) who hold the rank of sergeant, lieutenant and captain. At all relevant times, the City and the Union were parties to a collective bargaining agreement (CBA) that contained the following provision:

> Article 5, Section 6.3
>
> Upon request the city will give the Union an opportunity to state its views with respect to the existence of an alleged vacancy and how it should be filled. Irrespective of whether a vacancy exists above the rank of patrolman, the City will call for a Civil Service promotional examination at least once every two years. The City reserves the sole discretion to determine if a vacancy will be filled.
>
> Article 6
> The differential of at least 15% between pay grades will be maintained between sergeant and lieutenant and captain.

Police Chief Steven A. Mazzie (Mazzie) has headed the Department since 2003. From 1998 until 2011, four captains reported directly to the chief of police. Each of those captains commanded a division. From at least 2003 until 2011, there were four divisions:

1 Operations, Criminal Investigations, Special Services[1] and Administrative. Until their
2 respective retirements from the Department, discussed below, Captain Henry (Henry)
3 commanded the Operations Division and Captain Bontempo (Bontempo) headed the
4 Criminal Investigations Division.[2] The Criminal Investigations Division provides oversight
5 for all the Department's investigative actions in the City, including management and
6 monitoring of all evidence and other related functions assigned by the Chief. As set forth in
7 Annual Reports that were submitted as exhibits in this case, in 2012 and 2013, the Criminal
8 Investigations Division had three units: the Criminal Investigations Unit, the Special
9 Criminal Investigations Unit and the Youth Services/Gang Unit.[3] In 2012, the Criminal
10 Investigations Division was headed by a captain, and staffed by three sergeants and nine
11 detectives. In 2013, it was headed by a lieutenant and staffed by an additional lieutenant,
12 two sergeants and five detectives.

13 In 2011, Henry retired pursuant to an early retirement incentive that prevented the
14 City from filling his position for at least three years. At that time, the City redistributed
15 Henry's duties among the remaining three captains.[4] In October 2012, Bruce T. Howard,

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[1] Prior to 2006, there was a Community of Services division that was subsumed into the Special Services division created that year.

[2] The record does not reflect Henry's or Bontempo's first names.

[3] The Department's Annual Reports from 2009-2013 were admitted as joint exhibits. The CERB has supplemented the Hearing Officer's findings with details from these reports for the sake of completeness.

[4] The 2010 Departmental Organizational chart shows that Henry commanded the Operations Division, Captain McAdam (McAdam) commanded the Administrative Services, Captain Basteri (Basteri) headed Special Services and Bontempo commanded the Criminal Investigation Division. The 2011 organization chart shows only three divisions headed by three captains: Operations (Basteri), Administrative Services (McAdams) and Criminal Investigation (Bontempo). It no longer showed a separate Special Services Division. This

1 Jr., (Howard), the Director of Operations for the Civil Service Unit, sent an email to the
2 City's Human Resources Director Robert Joy (Joy). Howard's email indicated that he and
3 Joy had spoken earlier about whether or not the Everett Police was considering the
4 appointment/promotion of a Police Captain "in the very near future." Howard asked if Joy
5 had an update because the most recent list had been revoked on October 1. Joy
6 responded to Howard by confirming that, after speaking with Mazzie, the Department had
7 no plans promote a captain. Joy further stated that, "in fact [Mazzie] was moving towards a
8 Deputy Chief structure and would use a captain's vacancy to fund the position once
9 negotiated." At some point after this email exchange, the parties agreed at successor
10 negotiations that they would bargain over the new Deputy Chief structure before the City
11 would implement it. As of the hearing, the City had not created a Deputy Chief position or
12 filled the vacancy left by Henry's retirement.

13 In 2013, Bontempo retired. As of the hearing, Mazzie had not filled Bontempo's
14 vacancy with another captain and had not yet decided whether to do so or to move to a
15 Deputy Chief structure. Instead, in 2013, without first bargaining with the Union, he
16 assigned a lieutenant (Lieutenant Gamby or Gamby) to perform the duties that Bontempo
17 had been assigned to prior to his retirement. Previously, from at least 2010-2012, Gamby
18 had served as an Officer-in-Charge (OIC) in one of the two Platoons (Platoon A and
19 Platoon B) that reported directly to Captain Basteri, who commanded the Operations

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three division structure continued in place through the date of the hearing, although, as discussed below, instead of being headed by three captains, they were headed by two captains and one lieutenant.

1 Division.[5] The 2012 organization charts shows one sergeant and nine officers reporting to
2 Gamby. By contrast, the 2013 Department organizational chart places Gamby at the head
3 of the Criminal Investigations Division, on the same organizational level as the two
4 remaining captains. Under Gamby are two sergeants, one lieutenant, eight detectives, one
5 officer and what appear to be two civilians. Gamby occupies the same place on the
6 organizational chart formerly occupied by Bontempo. There is no evidence and no party
7 contends that the duties Gamby performs in this capacity differed from those previously
8 performed by Bontempo. Gamby was not promoted to captain, or paid the 15% contractual
9 differential between lieutenant and captain.

10 Since 2013, there have been only two captains in the Department. Mazzie testified
11 that the "biggest reason" for not filling the vacant captain's positions created by Henry's and
12 Bontempo's retirement was the economics relating to the potential building of a gambling
13 casino in Everett. The City offered no specific public safety rationale for placing a
14 lieutenant in charge of the Criminal Investigations Division. In the period of time since
15 Henry and Bontempo retired, the City added three new lieutenants (increasing the number
16 from seven to ten) and ten new patrol officers (increasing the number from 65 to 75).

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[5] The CERB has supplemented these findings with information from the 2010-2013 organization charts. (Unlike the 2010-2013 organizational charts, the 2009 Department organizational chart does not show specific assignments other than chief, captains and civilian employees.) These charts show that in 2010, Gamby was the Day OIC of Platoon A. In 2011 and 2012, he served as the First Half OIC in Platoon B. In this capacity, he had one patrol sergeant and nine officers reporting to him. In 2013, Lt. O'Malley served as First Half OIC in Platoon B. There is no evidence that Gamby continued to perform any of the duties that he previously performed in the Operations division after he was assigned to command the Criminal Investigations Division. Accordingly, the Hearing Officer's finding that the assignment "effectively increased" Gamby's workload because he was required to perform the duties of the Investigations commander *in addition* to his lieutenant's duties, is not supported by the record.

1 Opinion[6]

2 A public employer violates Section 10(a)(5) and, derivatively, 10(a)(1) of the Law
3 when it unilaterally changes an existing condition of employment or implements a new
4 condition of employment involving a mandatory subject of bargaining without first giving its
5 employees' exclusive bargaining representative notice and an opportunity to bargain to
6 resolution or impasse. Commonwealth of Massachusetts v. Labor Relations Commission,
7 404 Mass. 124 (1989); School Committee of Newton v. Labor Relations Commission, 388
8 Mass. 557 (1983); Commonwealth of Massachusetts, 30 MLC 63, SUP-4784 (Oct. 9,
9 2003). To establish a violation, a union must show that: (1) the employer changed an
10 existing practice or instituted a new one; (2) the change had an impact on a mandatory
11 subject of bargaining; and (3) the change was implemented without prior notice to the union
12 and an opportunity to bargain to resolution or impasse. Commonwealth of Massachusetts,
13 30 MLC at 64. An employer's decision to reduce its workforce is a level of services
14 decision over which it has no duty to negotiate. School Committee of Newton, 388 Mass.
15 at 563-564. However, the means or methods by which an employer decides to reduce its
16 workforce, by layoff, attrition, or otherwise, is a mandatory subject of bargaining. Id. at 564.

17 **Count I - Reduction in Force by Attrition**

18 The Hearing Officer dismissed Count I of the Complaint, which alleged that the City
19 had unlawfully refused to bargain by reducing the number of captains in its workforce
20 through attrition. She found that nothing in the record showed that the City had changed its
21 practice or established a new one when it did not fill the captain's position. She also found

[6] The CERB's jurisdiction is not contested.

1 that when Bontempo retired, the City had the core managerial right to determine its level of
2 services by appointing or not appointing a new captain to replace him.

3 The Union claims this was error. According to the Union, the City's decision was not
4 a level of services decision because the City continued to perform the services and merely
5 required a different bargaining unit member perform them. This argument is not persuasive
6 because it ignores the plain language of Article 5, Section 6.3 of the CBA, which reserves
7 to the City "the sole discretion to determine if a vacancy will be filled." By agreeing to this
8 provision, the Union unambiguously waived its right to bargain with the City over its
9 decision to leave a captain's position vacant. On these grounds, we affirm the Hearing
10 Officer's conclusion that the City did not have to bargain over its decision not to hire
11 another captain after Bontempo retired. City of Boston v. Labor Relations Commission, 48
12 Mass. App. Ct. 169, 174 (1999) (citing School Committee of Newton, 388 Mass. at 569 and
13 quoting Commonwealth of Massachusetts, 18 MLC 1403, 1405, SUP-3463 (April 30, 1992)
14 (waiver by contract must be shown "clearly, unmistakably and unequivocally")).

15 **Count II –Assignment of Captain's Duties to a Lieutenant**

16 The issue in Count II is whether the Hearing Officer correctly held that the City had a
17 duty to bargain over both the decision and the impacts of its decision to assign lieutenants
18 the duties of the unfilled captain's position. In general, to determine whether a subject
19 properly falls within the scope of bargaining, the CERB balances the public employer's
20 interest in maintaining its managerial prerogative to effectively govern against the impact
21 the subject has on bargaining unit members' terms and conditions of employment. Town of
22 Danvers, 3 MLC 1559, 1577, MUP-2292, 2299 (April 6, 1977). When undertaking this
23 analysis, the CERB considers the degree to which the subject has a direct impact on terms

1 and conditions of employment, and whether the subject involves a core governmental
2 decision that is far removed from employees' terms and conditions of employment. Id. As
3 the Hearing Officer correctly observed, however, the Law allows public employers to
4 exercise core managerial prerogatives concerning the nature and level of its services and,
5 in particular, does not require them to bargain over their law enforcement priorities and
6 public safety decisions. City of Worcester v. Labor Relations Commission, 438 Mass. 177
7 (2002). The ultimate question in such cases is whether the "ingredient of public policy
8 inherent" in a particular action "is so comparatively heavy that collective bargaining . . . is,
9 as a matter of law, to be denied effect." Town of Burlington v. Labor Relations
10 Commission, 390 Mass. 157, 164 (1983) (citing School Committee of Boston v. Boston
11 Teachers Local 66, 378 Mass. 65, 71 (1979)).

12 In concluding that the City was required to bargain over its decision to assign
13 Bontempo's duties as the commander of the Criminal Investigations Division to a
14 lieutenant, the Hearing Officer first rejected the Employer's statutory arguments, discussed
15 below. Then, applying the Danvers balancing test, she rejected the City's argument that its
16 decision was a managerial prerogative over which no bargaining was required.
17 Specifically, the Hearing Officer found that the City's decision directly affected Gamby's
18 workload and duties and that the City made this change without promoting Gamby or
19 granting him the 15% contractual pay differential between captain's and lieutenant's salary.
20 As to the City's asserted interests, she found that the decision to assign captain's work to a
21 lieutenant was neither a level of services decision, because it did not affect the number of
22 people required to do the work, nor a public safety decision.

1 We affirm for the reasons set forth below. The City's main argument throughout its
2 appeal is that its decision was an assignment/deployment decision that is insulated as a
3 matter of statute and policy from collective bargaining. In City of Worcester, the Court held
4 that, as a matter of public policy, the public employer had the right to compel its police
5 officers to perform truancy duties without first bargaining with the union representing those
6 officers over that decision. 438 Mass. at 182-184. Applying this precedent, it is clear that,
7 as a matter of setting its priorities for law enforcement and establishing a level of services,
8 the City had the right to require bargaining unit members to continue to perform the Division
9 command duties that Captain Bontempo performed before he retired. Id. The City, in
10 exercising these rights, decided to have all of those duties performed by one member of the
11 bargaining unit, rather than distributing those duties among the remaining captains as it had
12 done in the past. The question, therefore, is whether the City is required to bargain over its
13 decision to indefinitely assign all of the retired captain's duties to a single lieutenant.[7]
14 We hold that it must. Unlike in City of Worcester, there is no evidence that assigning
15 a lieutenant to fill the captain's slot was a policy decision that changed the scope, nature,
16 quality or quantity of police investigation work in the City of Everett. Compare City of
17 Boston, 32 MLC 4, 11-12, MUP-2749, MUP-01-2892 (June 24, 2005). (City not required to
18 bargain over the decision to assign riot control work to non-unit detectives in a special
19 tactical unit; assignment implicated public safety determination that first responder police
20 officers should continue staffing district police stations). Nor did this decision implicate the

[7] Although the City argues, and we agree, that the evidence does not definitively show that it "permanently" assigned Gamby to command the Investigations Division, there is also no evidence that City placed an end date or timeline on when it would cease making this assignment.

1 City's ability to select particular individuals to fill this position because there is no evidence
2 in the record, and the City does not argue, that Gamby was selected for this position due to
3 any special skills or qualifications that he possessed. Rather, because the City did not
4 want to hire another captain for primarily economic reasons, the City assigned a lieutenant
5 to perform the captain's work. When a public employer continues to have the same work
6 performed, but at a lower cost, this is not a level of services or deployment decision
7 insulated from collective bargaining, but an economically motivated decision that is
8 particularly suitable for collective bargaining. City of Fall River, 27 MLC 47, 51, MUP-1961
9 (November 21, 2000); City of Boston, 26 MLC 144, 146, MUP-1085 (March 10, 2000) *aff'd*
10 *sub nom.* City of Boston, v. Labor Relations Commission, 58 Mass App. Ct. 1102, *fur. rev.*
11 *den.* 440 Mass. 1106 (2003) (CERB properly imposed a bargaining requirement where
12 City's decision to transfer some work of policing housing developments was not a level of
13 services decision, but a decision about which City law enforcement personnel would
14 perform the work for less money).[8]

15 Furthermore, this decision was not "far removed" from the affected employees' terms
16 and conditions of employment. Town of Danvers, 3 MLC at 1577. Before 2013, Gamby
17 was an officer in charge in the Operations Division with one sergeant and nine officers
18 beneath him. After his reassignment, instead of reporting *to* a Department Division
19 commander, he *served* as a Department Division commander in charge of three subunits

[8] This is not to say, however, that merely paying the lieutenant at the captain's rate of pay would have relieved the City of its bargaining obligation. The change in lieutenant's duties caused by the indefinite assignment still would have triggered a bargaining obligation.

1 that were staffed by lieutenants, sergeants, detectives and officers.[9] This assignment
2 changed Gamby's duties, placed him on the same level in the Department's organization
3 structure as two other captains, but without any change in his compensation or rank.
4 Applying the Danvers balancing test under these circumstances, we agree with the Hearing
5 Officer that the Town's decision to assign Bontempo's duties to a lieutenant and the
6 impacts of that decision was a mandatory subject of bargaining.

7 None of the City's arguments on review persuade us otherwise. As it did to the
8 Hearing Officer, the City argues here that Section 4A of Chapter 1078 of the Acts of 1973,
9 as amended (Section 4A), precludes the CERB from finding a bargaining obligation.
10 Section 4A sets forth the scope of arbitration in police contract disputes over which the
11 Joint Labor Management Committee (JLMC) has asserted jurisdiction and specifically
12 excludes the "right to assign" from the scope of such arbitration proceedings.[10] The
13 Hearing Officer rejected this argument on the grounds that the record contained no
14 evidence that the City or the Union had filed a petition with the JLMC to invoke its
15 jurisdiction. The City argues that this misses the point, because, in its view, Section 4A
16 excludes all matters pertaining to police assignments from the scope of mandatory
17 bargaining under the Law. In making this argument, however, the City ignores

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[9] As noted above, we find no evidence in the record that Gamby performed these duties in addition to his previous lieutenant's duties as the Hearing Officer states in the Opinion section of her decision. We therefore find no evidence in the record that Gamby's workload, i.e., the actual amount (as opposed to type) of work he performed, increased as a result of this assignment. As described above, however, there is evidence to support her finding that Gamby's duties changed. It is well-established that duties are a mandatory subject of bargaining. Town of Danvers, 3 MLC at 1576.

[10] Section 4A (3(a) states, in pertinent part that "the scope of arbitration in police matters shall be limited to wages, hours and conditions of employment and shall not include the following matters of inherent managerial policy: the right to appoint, promote, assign and transfer employees..."

1 longstanding precedent holding that the list of topics excluded from the scope of an
2 arbitration panel's authority under Section 4A is not coextensive with "all the subjects made
3 bargainable by G.L. c. 150E, Section 6." City of Taunton v. Taunton Branch of the
4 Massachusetts Police Association, 10 Mass. App. Ct. 237, 241-243 (1980) (noting that the
5 legislature had not amended Chapter 150E to include a management's rights clause similar
6 to the one appearing in Section 4A). Cf. Town of Stoughton, 19 MLC 1149, 1163 MUP-
7 6457 (August 12, 1992)(Walsh, concurring) (distinguishing JLMC's declaration of impasse
8 for purposes of taking jurisdiction over a public safety contract dispute from CERB's
9 adjudication of whether parties are at impasse for purposes of the Law). We therefore do
10 not find Section 4A to be dispositive of the issue before us.

11 We further agree with the Hearing Officer that City of Boston v. Boston Police
12 Superior Officers Federation (BPSOF), 466 Mass. 210 (2013) is inapposite because it
13 pertains specifically to the statutory authority granted to the Boston Police Commissioner
14 pursuant to St. 1906, c. 291, §10. The City presents no analogous statutory authority here.
15 In any event, in City of Boston v. BPSOF, 52 Mass. App. Ct. 296 (2001), the Court
16 acknowledged that Boston Police Commissioner's managerial prerogative to assign is not
17 unlimited and may still be subject to arbitration in certain situations, such as where there is
18 evidence that the assignment is abusive or punitive; where the decision involved the
19 procedure for making temporary assignments; or when the assignment is a subterfuge to
20 avoid paying captain's wages during the time that captain's work is performed. Id. at 299-
21 300 (citing City of Boston v. BPSOF, 29 Mass. App. Ct. 907, 908-909 (1990) (decision to
22 rotate lieutenants working out of classification every five days in order to avoid paying out
23 of classification pay held to be a proper subject for arbitration that did not encroach on

1 nondelegable managerial prerogatives) and City of Lynn v. Labor Relations Commission,
2 43 Mass. App. Ct. 172, 179 (1997) (procedure for implementing certain assignments is
3 arbitrable)).

4 Nor does our decision here intrude upon any statutory rights conferred on the City by
5 the Civil Service statute. First, contrary to the City's argument, the fact that Chapter 31 is
6 not listed in Section 7(d) of the Law as being superseded by a collective bargaining
7 agreement is not dispositive of this issue. Rather, in cases where it is argued that the Civil
8 Service statute precludes collective bargaining on a particular topic, the CERB first
9 determines whether there is a material conflict between the bargaining obligation under
10 Chapter 150E and the Civil Service Law. See City of Fall River v. AFSCME, Council 93,
11 Local 3177, AFL-CIO, 61 Mass. App. Ct. 404, 410-411 (2004); Leominster v. International
12 Board of Police Officers, Local 338, 33 Mass. App. Ct. 121, 125 (1992). If there is no
13 conflict, an attempt must be made to read the Chapter 31 and Chapter 150E, as well as the
14 agreements that flow from the collective bargaining law as a "harmonious whole." City of
15 Fall River, 61 Mass. App. Ct. at 406 (quoting Dedham v. Labor Relations Commission, 365
16 Mass. 392, 402 (1974)). Accord Adams v. City of Boston, 461 Mass. 602, 608 (2012)
17 (statutes not listed in Section 7(d) of the Law do not preclude collective bargaining unless
18 there is a material conflict between the CBA provision and the statute).

19 Here, the City argues that Chapter 31 establishes a comprehensive plan for the
20 appointment of individuals to Civil Service positions, whether on an initial or a promotional
21 basis and whether permanent or temporary. The City argues, therefore, that the filling of
22 Civil Service vacancies is subject to Civil Service law and may not be altered by bargaining.
23 This argument ignores the fact that the City specifically chose not to promote a lieutenant

1 pursuant to Civil Service procedures, but nevertheless assigned one to perform all of the
2 captain's former duties without promoting him or paying him the captain's contractual rate
3 of pay. Under analogous circumstances, courts have held that arbitration awards
4 upholding grievances alleging that such practices violated the terms of the parties'
5 collective bargaining agreement did not conflict with Civil Service law. See Secretary of
6 Administration v. Massachusetts Organization of State Engineers and Scientists, 408 Mass.
7 837 (1990) (a grievance filed by a union on behalf of demoted state employees alleging
8 that the employees were performing the duties of a higher classification for a lower salary
9 was within the purview of disputes contemplated by the parties as proper subjects for
10 arbitration under the applicable CBA and was not superseded by the Civil Service statute).
11 In this case, the City has not pointed to any specific Civil Service procedure that
12 conflicts with the bargaining obligation found here. Compare Massachusetts Organization
13 of State Engineers and Scientists v. Commissioner of Administration, 29 Mass. App. Ct.
14 916, 917-918 (1990) (arbitration award properly vacated where it enforced a six-year
15 minimum experience qualification set by appointing authority that conflicted with four-year
16 experience qualification set by personnel administrator). Moreover, the City cannot ignore
17 whatever Civil Service procedures may apply in situations where Civil Service employees
18 are performing the work of a higher promotional rank and then argue that it is excused from
19 bargaining due to those same procedures.
20 Contract Waiver
21 As stated above, where an employer raises the affirmative defense of waiver by
22 contract, it bears the burden of demonstrating that the parties consciously considered the
23 situation that has arisen, and that the union knowingly and unmistakably waived its

1 bargaining rights. City of Boston v. Labor Relations Commission, 48 Mass. App. Ct. at 174;
2 Massachusetts Port Authority, 36 MLC 5, 12, UP-04-2669 (June 30, 2009).
3 In both its post-hearing brief and its supplementary statement, the City claimed that
4 Article 5, Section 5.3 of the CBA permitted it to assign Bontempo's duties to Gamby without
5 bargaining. The Hearing Officer rejected this argument, finding that even though the
6 provision reserved to the City's sole discretion the right to determine if a vacancy will be
7 filled, it was silent as to whether that same discretion extended to the City's decision to
8 "permanently increase the workload of lieutenants" without bargaining.
9 The City argues this was erroneous because there was no evidence that the City
10 permanently increased the workload of the lieutenants by making this assignment and,
11 even if it had, that this would involve a question of a permanent appointment to the rank of
12 captain from a lieutenant, which it claims would be covered by Civil Service law. We
13 rejected the City's claims regarding the Civil Service law for the reasons set forth above.
14 Furthermore, although, for reasons noted above, we agree with the City that the evidence
15 does not clearly support a finding that the City "permanently" increased the lieutenants'
16 workload, it does show that the City changed Gamby's duties by having him serve,
17 indefinitely, alongside two other captains, as the commander of a Department division. We
18 agree with the Hearing Officer that the CBA, which only addresses the right of the City not
19 to fill a vacancy, is silent as to the City's right to have Gamby perform captain's duties on an
20 indefinite basis. In any event, because the Hearing Officer found and the City does not
21 dispute that it has yet to decide whether to fill the position left vacant by Bontempo with a
22 lieutenant, the City cannot rely on its contractual right to decide whether to fill a vacancy to
23 excuse its failure to bargain here.

1 Conclusion

2 For the reasons set forth above, we affirm the Hearing Officer's decision that the City
3 did not violate the Law when it reduced the number of captains in the Department, but that
4 it did violate Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law when it
5 indefinitely assigned a lieutenant to perform all of the duties that a captain formerly
6 performed without first giving the Union notice and an opportunity to bargain over this
7 decision and this impacts of the decision to resolution or impasse.

8 Remedy

9 Section 11 of the Law grants the CERB considerable discretion in fashioning
10 appropriate remedies. Town of Brookfield v. Labor Relations Commission, 443 Mass. 315,
11 326 (2005)(citing School Committee of Newton v. Labor Relations Commission, 388 Mass.
12 at 580). The traditional remedy where a public employer has unlawfully refused to bargain
13 over a decision is an order to restore the status quo ante until the employer has fulfilled its
14 bargaining obligation and to make all affected employees whole for monetary losses they
15 may have sustained because an employer has failed to fulfill its bargaining obligation.
16 Newton School Committee, 5 MLC 1016,1027, MUP-2501 (June 2, 1978), *aff'd* 388 Mass.
17 557. The goal of CERB remedies is to place employees in the same position that they
18 would have been in but for the respondent's unlawful conduct. City of Gardner, 26 MC 72,
19 78, MUP-1949, 1966, 1967, 1995 (January 5, 2000).

20 In this case, the Hearing Officer ordered the City to cease and desist from its
21 unlawful assignment and to restore the status quo ante by returning the duties of
22 commanding the investigations division to the captains until the City satisfied both its
23 decision and impact bargaining obligations and, upon request, to bargain with the Union

1 before changing the status quo. She declined to award a monetary remedy, however,
2 based on her finding that the CBA was silent as to whether unit members should be
3 compensated for working out of their pay grade.

4 In its cross-appeal, the Union argues that the Hearing Officer's remedy did not place
5 Gamby in the same position he would have been in but for the unlawful conduct. It
6 contends the facts of this case "demand" an economic make-whole remedy, which it claims
7 is the 15% wage increase required for captains performing the same work as the affected
8 lieutenant here.

9 We disagree. The Union's request that Gamby be made whole turns on its
10 interpretation of Article 6 of the CBA as requiring a lieutenant who perform captain's duties
11 to be paid a 15% pay differential. However, the issue before us is not whether the
12 Employer repudiated Article 6 when it assigned a lieutenant to command the Criminal
13 Investigation Division without paying the Article 6 differential. It is whether the City
14 unlawfully failed to bargain over the decision and the impacts of its decision to assign a
15 lieutenant to perform these duties in the first place. Having found that the City violated the
16 Law in this manner, the appropriate remedy is the return to the status quo ante and
17 bargaining order issued here. The make-whole remedy sought by the Union goes beyond
18 the restoration of the status quo ante and presumes the results of bargaining that has yet to
19 take place.

20 ORDER

21 WHEREFORE, based on the foregoing, it is hereby ordered that the City of Everett
22 shall:

23 Cease and desist from:

a. Unilaterally changing lieutenants' duties without first giving the Union notice and an opportunity to bargain to resolution or impasse over that decision and its impacts; [11]

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

1. Take the following affirmative action that will effectuate the purpose of the Law:

a. Restore the status quo ante by returning the duties of commanding the Investigations Division to the captains until the City satisfies its obligation to bargain with the Union over the decision to assign lieutenants to perform the duties of unfilled captains' positions and the impacts of that decision to resolution or impasse;

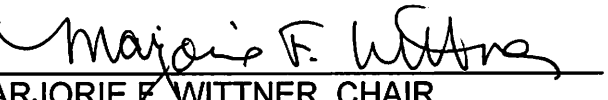
b. Upon request, bargain in good faith with the Union to resolution or impasse over the decision to assign lieutenants to perform the duties of unfilled captains' positions and the impacts of that decision;

c. Sign and post immediately in all conspicuous places where members of the Union's bargaining unit usually congregate and where notices to these employees are usually posted, including electronically, if the City customarily communicates to its employees via intranet or e-mail, and maintain for a period of thirty (30) consecutive days thereafter, signed copies of the attached Notice to Employees; and

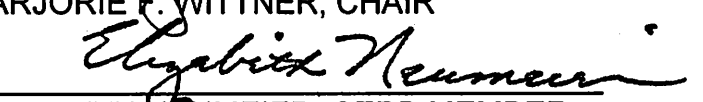
d. Notify the DLR in writing within thirty (30) days of receiving this Decision of the steps taken to comply with the Order.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD



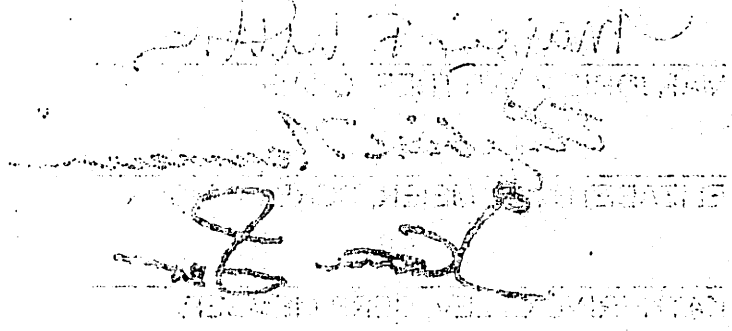
MARJORIE F. WITTNER, CHAIR



ELIZABETH NEUMEIER, CERB MEMBER

KATHERINE G. LEV, CERB MEMBER

[11] We have modified this remedy slightly by deleting the reference to changes to the lieutenant's workload. See footnote 5.



APPEAL RIGHTS

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

THE COMMONWEALTH OF MASSACHUSETTS

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE COMMONWEALTH EMPLOYMENT RELATIONS BOARD

AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

The Commonwealth Employment Relations Board (CERB) has affirmed a decision of a Department of Labor Relations Hearing Officer of the Massachusetts Department of Labor Relations holding that the City of Everett (City) violated Sections 10(a)(5) and, derivatively, 10(a)(1) of General Laws Chapter 150E (the Law) by assigning police lieutenants to perform the duties of unfilled captains' positions without giving the Union prior notice and an opportunity to bargain to resolution or impasse over that decision and its impacts on employees' terms and conditions of employment.

The City posts this Notice to Employees in compliance with the CERB's order.

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

> WE WILL NOT unilaterally change lieutenants' duties without first giving the Union notice and an opportunity to bargain to resolution or impasse over that decision and its impacts.
>
> WE WILL NOT in any like or similar manner interfere with, restrain, or coerce employees in the exercise of their rights protected under the Law.
>
> WE WILL restore the status quo ante by returning the duties of commanding the Criminal Investigations division to the captains until the City satisfies its obligation to bargain with the Union.
>
> WE WILL upon request, bargain in good faith with the Union to resolution or impasse over the decision to assign lieutenants to perform the duties of unfilled captains' positions and the impacts of that decision.

_____ _____

City of Everett Date

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

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

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of	*	
CITY OF EVERETT	*	Case No. MUP-13-3006
and	*	Date issued:
NEW ENGLAND POLICE BENEVOLENT ASSOCIATION	*	

Hearing Officer:

Kendrah Davis, Esq.

Appearances:

Albert Mason, Esq. - Representing the City of Everett

Gary G. Nolan, Esq. - Representing NEPBA

HEARING OFFICER'S DECISION

SUMMARY

The issues are whether the City of Everett (City or Employer) violated Section 10(a)(5) and derivatively, Section 10(a)(1) of M.G.L. c.150E (the Law) by: (1) reducing the number of police captains employed by the City through attrition without first giving the New England Police Benevolent Association (Union or NEPBA) prior notice and an opportunity to bargain to resolution or impasse about the method to achieve a reduction in force, and the impacts of that decision; and (2) by assigning police lieutenants to perform the duties of the unfilled captain position without giving NEPBA prior notice and an opportunity to

1 bargain to resolution or impasse over that decision and its impacts on employees' terms
2 and conditions of employment.

3 For the reasons explained below, I find that the City did not violate the Law when it
4 reduced the number of police captains employed by the City through attrition, but did
5 violate Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law when it assigned a
6 police lieutenant to perform the duties of an unfilled captain position without first giving
7 NEPBA prior notice and an opportunity to bargain to resolution or impasse over that
8 decision and its impacts on employees' terms and conditions of employment.

9 STATEMENT OF THE CASE

10 On July 26, 2013, the Union filed a Charge of Prohibited Practice (Charge) with the
11 Department of Labor Relations (DLR), alleging that the City had engaged in prohibited
12 practices within the meaning of Section 10(a)(5) of the Law. On October 21, 2013, a duly-
13 designated DLR Investigator issued a two-count Complaint of Prohibited Practice
14 (Complaint) alleging that the City: (1) unlawfully reduced the number of police captains
15 through attrition when, since April 19, 2013, it left unfilled a captain's position, and (2)
16 assigned a police lieutenant to perform the duties from the unfilled captain's position
17 without first giving the Union prior notice and an opportunity to bargain to resolution or
18 impasse over the decision to reduce the number of captains and assign lieutenants to
19 perform the captains' work. On October 29, 2013, the City filed its Answer.

20 On September 17, 2014, I conducted a hearing at which both parties had a full
21 opportunity to be heard, to examine and cross-examine witnesses and to introduce
22 evidence. The City and the Union filed their post-hearing briefs on October 20 and 21,
23 2014, respectively.

STIPULATION OF FACTS

The parties stipulated to the following facts:

1. The Union is an employee organization within the meaning of Section 1 of the Law.

2. The Union is the exclusive bargaining representative for uniformed personnel in the City's police department who hold the rank of sergeant, lieutenant and captain.

3. On April 19, 2013, Captain Robert Bontempo [(Bontempo)] retired from the City's police department (Department).

4. The City has assigned a lieutenant to the duty assignment that Captain Bontempo had been assigned to prior to April 19, 2013.

5. The City took the action involved herein, without giving the Union prior notice and an opportunity to bargain to resolution or impasse over the assignment of a lieutenant to the duty assignment that Captain Bontempo had previously been assigned to prior to April 19, 2013.

6. The City is a public employer with the meaning of Section 1 of the Law.

7. There are currently fewer captains on the Everett police department than there were before the retirement of Captain Bontempo.

FINDINGS OF FACT

The Collective Bargaining Agreement

The Union and the City were parties to a collective bargaining agreement (Agreement) effective from July 1, 2013 – June 30, 2014. Article 5, Section 5.3 of the Agreement pertains to Appointment and Promotion, and states in full:

> Upon request the City will give the Union an opportunity to state its views with respect to the existence of an alleged vacancy and how it should be filled. Irrespective of whether a vacancy exists above the rank of patrolman, the City will call for a Civil Service promotional examination at least once every two years. The City reserves the sole discretion to determine if a vacancy will be filled.

1 Article 6 of the parties' Agreement pertains to salaries and states, in relevant part,
2 "The differential of at least 15% between pay grades will be maintained between...sergeant
3 and lieutenant and captain."

4 **The Department's Organizational Structure**
5
6 **1. The Divisions**

7 Since at least 1998, the department has had a hierarchical command structure that
8 consists of the Chief of Police at the top with four captains underneath who command four
9 divisions (one captain per division): Operations, Investigations, Community Services and
10 Administrative. Beginning in or about 2006, the department subsumed the Community
11 Services division into the newly created Special Services division.

12 The Operations Division comprises functions that are directly concerned with legal
13 violations; enforcement of all laws and ordinances, preservation of peace and public order,
14 prevention and repression of crime, apprehension of all violators of the law, etc.

15 The Investigations Division comprises three subunits (criminal investigations, special
16 investigations and evidence) while providing oversight for all investigative actions
17 undertaken by the department, including management and monitoring of all evidence, and
18 any other related functions assigned by the Chief.

19 The Special Services Division comprises homeland security, intelligence and crime
20 analysis, community services, elder affairs, school resource officer program, marine unit,
21 grants and any other related functions assigned by the Chief.

22 The Administrative Division provides services to the other divisions to assist with
23 execution of their primary missions. It is also responsible for department property, the
24 records section, building/fleet maintenance, holding facility, weapons and firearms section,

1 capital equipment, licensing, scheduling personnel, keeper of the records, armorer, training
2 and development of court officers, and any other related functions assigned by the Chief.

3 **2. The Chief and the Captains**

4 Beginning in early 2003, and at all relevant times, Steven A. Mazzie (Mazzie) has
5 been Chief of the department. Two months prior to Mazzie's promotion, the department
6 returned then-chief Rogers[1] to his former position as captain. In April of 2003, Captain
7 Rogers retired from the department via an early retirement incentive.

8 The department employed Henry as a captain who, in 2009 and 2010, commanded
9 the department's Operations Division. Henry retired from the department in 2011 via an
10 early retirement incentive that prevented the department from filling his position until three
11 years after his departure.

12 Since in or about 1976 through 2013, Bontempo was employed by the department
13 which eventually promoted him to captain.[2] During his tenure as captain, Bontempo
14 commanded the department's Investigations Division until his retirement in April of 2013.[3]

15 Captain Basteri has been employed with the department for 33 years, 20 of which
16 have been as a captain. In 2009 and 2010, Basteri commanded the Special Services
17 Division. In 2011, Chief Mazzie assigned Captain Basteri to perform the duties of
18 commander of the Operations Division. Initially, Basteri shared these duties with Captains

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[1] The parties did not identify Captain Rogers' first name.

[2] The record is unclear about when the Department promoted Bontempo to the position of captain.

[3] Captain Bontempo's retirement was regular and unrestricted, unlike Captains Rogers and Henry.

1 Bontempo and McAdam until the City permanently assigned him to perform those duties
2 exclusively.

3 The department promoted Patrick McAdam (McAdam) to captain in 2006 after
4 Rogers took early retirement.[4] At all relevant times, the department has assigned Captain
5 McAdam as commander of the Administrative Services Division.

6 **The Captains' Retirements**

7 As previously noted, when Captain Henry took early retirement in 2011, the City was
8 prohibited from filling his vacant position for a period of three years. To compensate for his
9 absence during this period, the department reassigned Captain Henry's duties and
10 responsibilities as commander of the Operations Division among the three remaining
11 captains—Bontempo, McAdam and Basteri—until, later appointing Captain Basteri to that
12 position, permanently.

13 When Captain Bontempo took unrestricted retirement in 2013, the City was not
14 prohibited from filling his vacant position. However, instead of hiring a new captain to
15 replace Bontempo, or reassigning his duties as commander of Investigations to the
16 remaining captains, the City assigned Lieutenant Gamby to perform those duties without
17 promoting him to captain or providing him with a 15% salary increase pursuant to Article 6
18 of the parties' Agreement.

19 **The Prior Practices**

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[4] There is no direct evidence that Captain Rogers' early retirement contained a hiring restriction similar to Captain Henry's three-year early retirement restriction. However, Captain Basteri testified that the City waited until 2006 to promote McAdam and replace Rogers as captain. Because the City did not dispute Basteri's testimony on this point, I find that Captain Rogers' early retirement also contained an early retirement, hiring restriction of three years.

1 Prior to 2013, when a captain retired from the department, the City would either hire
2 a new captain or redistribute the retiring captain's duties to other captains. When the City
3 promotes a lieutenant to the position of captain, that promotion is accompanied by a 15%
4 contractual pay increase pursuant to Article 6 of the Agreement. Based on these practices,
5 the Union believed that after the three years had lapsed on Captain Henry's early
6 retirement and after Captain Bontempo had taken his retirement, the City would either hire
7 new captains to fill their vacancies or redistribute the work to the other captains.

8 Since the retirements of Captains Henry and Bontempo, the department has
9 increased its number of employees by hiring 43% more lieutenants (from 7 to 10) and 15%
10 more patrol officers (from 65 to 75). Since April 19, 2013, the City has employed only two
11 captains: McAdam and Basteri.

12 **The October 2012 E-mails**

13 In or about 2012, the Union became aware that the City neither intended to fill
14 Captain Henry's vacancy nor intended to hire a new captain to replace Captain Bontempo
15 when he retired in 2013. Rather, the City wanted to keep those positions vacant—since
16 Bontempo would not be retiring for another year—and use salaried funds from those
17 positions to implement a new Deputy Chief structure. Specifically, by e-mail dated October
18 11, 2012, the Commonwealth's Civil Service Director of Operations Bruce T. Howard, Jr.
19 (Howard) contacted the City's Human Resource Director Robert Joy (Joy) about whether
20 the City intended to hire a captain "in the near future."[5] Later that day, Joy replied to

[5] The genesis of this e-mail exchange occurred when Union President Lieutenant O'Malley asked Howard in 2012, on behalf of Lieutenant Paul Landry (Landry), whether there would be an upcoming Civil Service exam for Captain Henry's vacant position. Pursuant to Article 5, Section 5.3 of the parties' Agreement, the City is obligated to "call for a Civil Service promotional examination at least once every two years."

1 Howard's e-mail, stating that after speaking with Chief Mazzie, the department had no
2 plans to hire a new captain. Joy also stated that the Chief was "moving towards a [D]eputy
3 [Ch]ief structure"[6] and intended to use the salaries from the vacant captains' positions to
4 fund the new Deputy Chief position.[7]

5 The City stated that its "biggest reason" for not filling the vacancies of Captains
6 Henry and Bontempo "is economics" especially due to the forthcoming casino.[8] As of April
7 19, 2013, the City has yet to make a final decision about whether to fill the vacancies left by
8 the retirements of Captains Henry and Bontempo.

9 DECISION

10 A public employer violates Section 10(a)(5) and, derivatively, 10(a)(1) of the Law
11 when it unilaterally changes an existing condition of employment or implements a new
12 condition of employment involving a mandatory subject of bargaining without first giving its
13 employees' exclusive bargaining representative notice and an opportunity to bargain to
14 resolution or impasse. Commonwealth of Massachusetts v. Labor Relations Commission,
15 404 Mass. 124 (1989); School Committee of Newton v. Labor Relations Commission, 388
16 Mass. 557 (1983); Commonwealth of Massachusetts, 30 MLC 63, SUP-4784 (Oct. 9,

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[6] At some point after this e-mail, the parties agreed during negotiations for a successor agreement that they would first bargain over the new Deputy Chief structure before the City would implement it.

[7] Chief Mazzie later forwarded the entire e-mail exchange to both Lieutenants O'Malley and Landry.

[8] Chief Mazzie testified to this fact and the Union did not rebut it. At the time of the hearing, the November 2014 ballot question on whether to allow casinos in the Commonwealth had not yet passed. On November 4, 2014, the Commonwealth voted to pass the ballot measure.

1 2003). To establish a violation, a union must show that: (1) the employer changed an
2 existing practice or instituted a new one; (2) the change had an impact on a mandatory
3 subject of bargaining; and, (3) the change was implemented without prior notice to the
4 union and an opportunity to bargain to resolution or impasse. Commonwealth of
5 Massachusetts, 30 MLC at 64; Town of Shrewsbury, 28 MLC 44, 45, MUP-1704 (June 29,
6 2001); Commonwealth of Massachusetts, 27 MLC 11, 13, SUP-4378 (Aug. 24, 2000).
7 Section 6 of the Law requires public
8 employers to negotiate before changing the wages, hours, working conditions or standards
9 of productivity and performance of their employees. School Committee of Newton, 388
10 Mass. at 562; see also Commonwealth of Massachusetts, 36 MLC 65, 68, SUP-05-5191
11 (Oct. 23, 2009); Town of Andover, 28 MLC 264, 269-70, MUP-1012 and MUP-1186 (Feb.
12 7, 2002). The City's decision to reduce the overall size of its police force is a level-of-
13 services decision over which it has no duty to negotiate. School Committee of Newton, 388
14 Mass. at 562-63; Melrose School Committee, 9 MLC 1713, 1721, MUP-4507 (Mar. 24,
15 1983). However, its decision to do so by means of reduction in force through attrition is a
16 mandatory subject of bargaining. School Committee of Newton, 388 Mass. at 563; Sec. of
17 Admin. and Finance v. Commonwealth Employment Relations Board, 74 Mass. App. Ct.
18 91, 96 (2009); City of New Bedford, 38 MLC 239, MUP-09-5581 and MUP-09-5599 (Apr. 3,
19 2012) (appeal pending). Workload and job duties are also mandatory subjects of
20 bargaining. Town of Lakeville, 38 MLC 219, MUP-09-5590 (H.O. Mar. 22, 2012), aff'd 38
21 MLC 290 (May 23, 2012) (citing Medford School Committee, 1 MLC 1250, 1252-53, MUP-
22 690 (Jan. 20, 1975)).
23 **Reduction in Force by Attrition**

1 There is no evidence that the City changed or instituted a new practice of reducing
2 the number captains through attrition. Prior to April 19, 2013, the record shows that when
3 Captain Rogers took early retirement in 2003, the City was prevented from appointing
4 Captain McAdam as his replacement for a period of three years. Similarly, when Captain
5 Henry took early retirement in 2011, the City was prohibited from hiring a new captain until
6 2014, pursuant to the terms of the early retirement arrangement. In 2012, one year after
7 Henry's retirement, the Union learned that the City did not intend to fill his vacancy and
8 wanted to implement a new Deputy Chief structure using the funds from his vacant
9 position. The Union demanded to bargain in October of 2012 and, since that time, the City
10 has agreed not to implement that structure until it first bargains with the Union over the
11 impacts of the decision. Although the three-year period on Captain Henry's early
12 retirement restrictions had not yet expired and the City had not yet made a final decision
13 about his vacancy, the City did decide on April 19, 2013 that it would not appoint a new
14 captain to replace Captain Bontempo on his retirement.

15 The Union argues that the decisions to leave Captain Henry's and Captain
16 Bontempo's positions unfilled were unlawful because there were no level of services
17 impacted—just a change in the persons responsible for doing the captains' work. I
18 disagree.

19 It is well-settled that a public employer's decision to determine its level of services is
20 a core managerial decision that is not subject to collective bargaining. Commonwealth of
21 Massachusetts, 33 MLC 39, 40-41 (2006). I find that the City's decision to reduce the
22 number of captains by leaving those positions vacant was a matter within its exclusive

1 prerogative over which it was not obligated to with the Union. Commonwealth of
2 Massachusetts, 18 MLC 1220, 1225 (1991).

3 Nothing in the record shows that the City changed its past practice or established a
4 new one in terms of the method used to reduce the number of captains' positions by
5 attrition or otherwise. First, the evidence shows that of the three captains who retired
6 between 2003 and 2013, two had left service under early retirement. Specifically, the City
7 was precluded from filling the vacancy left by Captain Rogers' early retirement in 2003 until
8 2006. Similarly, when the Union filed its Charge in 2013, the City had not yet exhausted
9 the mandatory three-year waiting period preventing any new appointments to the vacancy
10 left by Captain Henry's early retirement. The record is clear that these reductions in force
11 were not due to attrition but by non-negotiable early retirement restrictions. Second, while
12 the City was not restricted by any hiring freeze related to Captain Bontempo's retirement in
13 April of 2013, it still possessed the core managerial prerogative to determine its level of
14 services by appointing (or not appointing) a new captain to replace him.

15 Consequently, because the Union is unable to show that the City violated the law by
16 failing to appoint new captains to replace Henry and Bontempo, it has failed to satisfy its
17 burden of proving that a change occurred. Therefore, I dismiss this portion of the
18 Complaint. Commonwealth of Massachusetts, 30 MLC at 64.

19 **Increase in Lieutenant Gamby's Workload**

20 Here, the Union has successfully shown that the City changed an established
21 practice that affected a mandatory subject of bargaining when it increased Lieutenant
22 Gamby's workload in April of 2013. Commonwealth of Massachusetts, 30 MLC at 64. On
23 April 19, 2013, the City assigned Lieutenant Gamby to perform the duties of Investigations

1 commander left vacant by Captain Bontempo's retirement. This assignment effectively
2 increased Lieutenant Gamby's workload because prior to the change the City did not
3 require him to perform the following duties in addition to his lieutenant's duties: provide
4 oversight for all investigative actions undertaken by the department; manage and monitor
5 all evidence; perform other related functions assigned by Chief Mazzie. Town of
6 Shrewsbury, 28 MLC at 45; see also Town of Lakeville, 38 MLC at 225 (citing Medford
7 School Committee, 1 MLC at 1252-53. Further, the City made this change without
8 promoting Gamby to captain or granting him the 15% salary increase that differentiates
9 lieutenants from captains under Article 6 of the Agreement.

10 The City does not dispute that it made this change without first providing the Union
11 with notice and an opportunity to bargain to resolution or impasse over the decision to
12 assign Lieutenant Gamby to perform the duties of Investigations commander and the
13 impacts of that decision. However, it argues that the decision to leave Captain Bontempo's
14 position unfilled and assign lieutenant Gamby to perform the duties of that unfilled position
15 neither changed an existing practice nor impacted a mandatory subject of bargaining. In the
16 alternative, the City contends that matters of deployment, assignment, promotions,
17 minimum manning and transfers are non-delegable managerial rights that are not subject to
18 collective bargaining law. It also contends that even if it was required to bargain with the
19 Union over the decisions to keep unfilled the captains' positions and assign a lieutenant to
20 perform the duties of that unfilled position, the City cannot bargain until it makes a final
21 decision about whether to fill the position. Last, the City maintains that pursuant to Article 5
22 of the Agreement, the Union waived its right to bargain over those changes because that
23 provision gives the City exclusive discretion over whether to fill a vacancy.

1 **Affirmative Defenses**

2 1. Core Managerial Prerogative

3 The Law allows public employers to exercise core managerial prerogatives
4 concerning the nature and level of its services without first bargaining over that decision
5 with unions representing its employees. City of Boston, 38 MLC 85, MUP-08-5253 (H.O.
6 Sept. 28, 2011), aff'd 38 MLC 201 (Mar. 9, 2012). The Law also does not require public
7 employers to bargain over law enforcement priorities and public safety decisions. Id.
8 (citing City of Boston, 32 MLC 4, MUP-2749 and MUP-01-2892 (June 24, 2005); City of
9 Worcester v. Labor Relations Commission, 438 Mass. 177 (2000)). Generally, to decide
10 whether a subject properly falls within the scope of bargaining, the Commonwealth
11 Employment Relations Board (Board) balances a public employer's interest in maintaining
12 its managerial prerogative to effectively govern against the impact on employees' terms
13 and conditions of employment. Id. (citing Town of Danvers, 3 MLC 1559, 1577, MUP-2292
14 and MUP-2299 (Apr. 6, 1977)).

15 The City asserts that its assignment of Lieutenant Gamby to perform the duties from
16 Captain Bontempo's unfilled position is a core managerial prerogative that is not subject to
17 bargaining. First, it relies on Section 4A of Chapter 1078 of the Acts of 1973 and cites to
18 City of Boston v. Boston Police Superior Officers Federation, 466 Mass. 210 (2013),
19 arguing that these two authorities, when read together, support the City's power to make
20 core managerial decisions about the department's level of services and public safety needs
21 assigning lieutenants to perform captains' duties.

22 Concerning the City's reliance on Section 4A of Chapter 1078 of the Acts of 1973
23 and City of Boston v. Boston Police Superior Officers Federation, 466 Mass. 210 (2013), I

1 find those authorities inapposite. Section 4A of Chapter 1078 of the Acts of 1973 pertains
2 to dispute resolution procedures for municipal police officers (and fire fighters) who petition
3 the Joint Labor Management Committee (JLMC) for assistance with collective bargaining
4 negotiations. Here, there is no evidence that the City or the Union filed a petition with the
5 JLMC's to invoke its jurisdiction. Further, City of Boston pertains specifically to the Boston
6 Police Commissioner (BPC) (and the corresponding BPC statute St. 1906, c. 291, § 10, as
7 appearing in St. 1962, c. 322, § 1), not to the City of Everett or the Everett Police
8 Department.

9 Next, the City relies on G.L., c. 31 (Chapter 31 or Civil Service), Section 7(d) of G.L.
10 c. 150E and City of Lynn v. Labor Relations Commission, 43 Mass. App. Ct. 172 (1997), to
11 argue that its decision to assign Lieutenant Gamby as commander of Investigations was
12 based on core managerial policies that exempted it from bargaining with the Union. First,
13 Chapter 31 does not apply here because there is no evidence that any aspect of the Civil
14 Service law impacted the City's decision to assign Lieutenant Gamby captain's duties, or to
15 bargain with the Union over that decision. Similarly, I do not find evidence of an authorizing
16 statute listed in Section 7(d) that impacted the decision.

17 City of Lynn is distinguished because in that case the fire chief unilaterally filed a
18 superannuation retirement application for an employee pursuant to his non-delegable
19 authority under G.L. c. 32, s. 16(1)(a) (Chapter 32) without first having to bargain with the
20 Union over the decision or its impacts. Despite the Court's enumeration of non-bargainable
21 categories that exempted the city from bargaining with the union in that case, it still held
22 that a public sector employer must "bargain with the employee representative on questions
23 relating to "wages, hours, standards of productivity and performance, and any other terms

1 and conditions of employment". Id., 43 Mass. App. Ct. at 178-79. Here, there are no
2 authorizing statutes that specifically exempt the City from bargaining with the Union over
3 the decision to increase the lieutenants' workload or duties.

4 Applying the Board's balancing test to decide whether an employer's decision falls
5 properly within the scope of bargaining, the Board considers factors such as the degree to
6 which the subject has a direct impact on terms and conditions of employment, and whether
7 the subject involves a core governmental decision or is far removed from employees' terms
8 and conditions of employment. City of Boston, 32 MLC at 11 (citing Town of Danvers, 3
9 MLC at 1577).

10 Here, assigning Lieutenant Gamby to perform the duties of Captain Bontempo's
11 unfilled position via commanding the Investigations Division had a direct impact on
12 Gamby's terms and conditions of employment because the assignment changed his duties
13 and increased his workload while simultaneously freezing his salary by failing to provide
14 him with the 15% contractual pay increase under Article 6 of the Agreement. Because the
15 City assigned Lieutenant Gamby to perform the traditional captain's duties of commanding
16 the Investigations division, it had essentially instructed him to work as a captain in all
17 aspects but job title and pay grade. See Town of Lakeville, 38 MLC at 225 (citing Medford
18 School Committee, 1 MLC at 1252-53; Town of Danvers, 3 MLC at 1576).

19 The City's decision to assign Gamby to Investigations commander was not a level of
20 services decision because it does not impact the number of persons required to perform
21 the work, nor does it affect a public safety decision. Board of Higher Education, SUP-08-
22 5396 (Feb. 6, 2015). Rather, as discussed above, Gamby's assignment impacted the

1 mandatory subjects of workload and job duties, over which the City is required to bargain.
2 Town of Lakeville, 38 MLC at 225. Therefore, this affirmative defense must fail.
3 2. Economic Exigency
4 Next, the City asserts that it assigned Lieutenant Gamby as commander of
5 Investigations without promoting him to captain based on economic and operational needs
6 of the department.
7 An employer relying on an economic exigency defense has the burden of
8 establishing that: 1) circumstances beyond its control require the imposition of a deadline
9 for negotiations; 2) the bargaining representative was notified of those circumstances and
10 the deadline; and 3) the deadline imposed was reasonable and necessary. Cambridge
11 Public Health Commission, d/b/a/ Cambridge Health Alliance, 37 MLC 39, 46, MUP-10-
12 5888 (Aug. 18, 2010). Here, I find no evidence of exigent circumstances existing beyond
13 the City's control in this case. Further, the City failed to provide the Union with prior notice
14 and an opportunity to bargain over the change; thus, it could not have imposed a
15 "reasonable and necessary" deadline for negotiations as required under Cambridge Health
16 Alliance. Consequently, the City's economic exigency assertion must fail.
17 3. Contractual Waiver
18 Last, the City argues that the Union waived its right to bargain over the decision
19 assign lieutenants to perform captains' duties pursuant to Article 5, Section 5.3 of the
20 Agreement.
21 Where an employer raises the affirmative defense of waiver by contract, it bears the
22 burden of demonstrating that the parties consciously considered the situation that has
23 arisen, and that the union knowingly and unmistakably waived its bargaining rights. City of

1 Boston v. Labor Relations Commission, 48 Mass. App. Ct. 169, 174 (1999); City of New
2 Bedford, 38 MLC at 248; Massachusetts Board of Regents, 15 MLC 1265, 1269, SUP-2959
3 (Nov. 18, 1988); Town of Marblehead, 12 MLC 1667, 1670, MUP-5370 (Mar. 28, 1986). A
4 waiver by contract will not be lightly inferred. There must be clear and unmistakable
5 showing that such waiver occurred through the bargaining process or the specific language
6 of the agreement. City of New Bedford 38 MLC at 248 (citing City of Taunton, 11 MLC
7 1334, 1336, MUP-5198 (Jan. 17, 1985)).

8 The City argues that because Article 5, Section 5.3 of the Agreement gives it the
9 exclusive right to make decisions about whether to fill a captain's vacancy, it is excused
10 from bargaining with the Union over the issue of assigning Lieutenant Gamby to perform
11 duties from an unfilled captain's position. The Union argues that it did not waive its rights to
12 bargain because the Agreement is silent about that issues. I agree.

13 Although the language of Article 5.3 states clearly that the "City reserves the sole
14 discretion to determine if a vacancy will be filled," it is silent about whether that same
15 exclusive discretion extends to the City's managerial decision to permanently increase the
16 workload of lieutenants without bargaining. Accordingly, I find no contractual waiver in this
17 instance because the City failed to present evidence showing that the Union consciously
18 considered the situation and knowingly and unmistakably waived its rights to bargaining
19 over Lieutenant Gamby's assignment as commander of the Investigation division. City of
20 Boston, 48 Mass. App. Ct. at 174; City of New Bedford, 38 MLC at 248.

21 REMEDY

22 Once the Board determines that a prohibited practice under c. 150E, Section 10, has
23 been committed, it is authorized to issue a cease and desist order to the offending party

1 "and shall take such further affirmative action as will comply with the provisions of this
2 section . . . ." G. L. c. 150E, Section 11; Labor Relations Commission v. Everett, 7 Mass.
3 App. Ct. 826 (1979). Section 11 of the Law grants the Board broad authority to fashion
4 appropriate orders to remedy unlawful conduct, including the authority to fashion "make
5 whole" remedies to compensate employees who suffer an economic loss due to the
6 respondent's unlawful action. City of Gardner, 26 MLC 72, 78 (2000); School Committee of
7 Newton, 388 Mass. at. When fashioning appropriate remedies, the Board attempts to place
8 employees in the position they would have been in but for the unlawful conduct. City of
9 Gardner, 26 MLC at 78 (citing Amesbury School Committee, 11 MLC 1049, 1058 (1984)).
10 Moreover, the Board attempts to fashion remedies that will prevent a respondent from
11 benefitting from its unlawful practice. Amesbury School Committee (Amesbury II), 13 MLC
12 1196, 1197 (1986).

13 To remedy this unilateral change violation, I issue the standard order requiring the
14 City to cease and desist its unlawful activity, restore the status quo ante and negotiate with
15 the Union before changing that status quo. However, I do not order a monetary make-
16 whole remedy. Although the Board has the authority to monetarily compensate employees
17 for performing more work than they would have performed but for the unlawful conduct (see
18 Amesbury II), I refrain from doing so here because the parties' collective bargaining
19 agreement is silent on the matter of whether unit members should be compensated for
20 working out of their pay grade.

21 CONCLUSION

22 For the reasons stated above, I conclude that the City did not violate the Law by
23 reducing the number of police captains by attrition and leaving their positions unfilled, but

did violate Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law when it assigned Lieutenant Gamby to perform the duties of an unfilled captain's position without first giving the Union prior notice and an opportunity to bargain to resolution or impasse over that decision and its impacts on employees' terms and conditions of employment.

ORDER

WHEREFORE, based on the foregoing, it is hereby ordered that the City of Everett shall:

Cease and desist from:

e. Unilaterally changing lieutenants' workload and duties without first giving the Union notice and an opportunity to bargain to resolution or impasse over that decision and its impacts;

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

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

a. Restore the status quo ante by returning the duties of commanding the Investigations division to the captains until the City satisfies its obligation to bargain with the Union over the decision to assign lieutenants to perform the duties of unfilled captains' positions and the impacts of that decision;

b. Upon request, bargain in good faith with the Union to resolution or impasse over the decision to assign lieutenants to perform the duties of unfilled captains' positions and the impacts of that decision;

c. Sign and post immediately in all conspicuous places where members of the Union's bargaining unit usually congregate and where notices to these employees are usually posted, including electronically, if the City customarily communicates to its employees via intranet or e-mail, and maintain for a period of thirty (30) consecutive days thereafter, signed copies of the attached Notice to Employees; and

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

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

/s/
KENDRAH DAVIS, ESQ.
HEARING OFFICER

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. Chapter 150E, Section 11 and 456 CMR 13.15, to request a review of this decision by the Commonwealth Employment Relations Board by filing a Request for Review with the Executive Secretary of the Department of Labor Relations within ten days after receiving notice of this decision. If a Request for Review is not filed within ten days, this decision shall become final and binding on the parties.