



Facts<sup>5</sup>

The Union challenged portions of the Hearing Officer's Recommended Findings of Fact. After reviewing those challenges and the record, we adopt the Hearing Officer's Recommended Findings of Fact in their entirety and summarize the relevant portions below.

*1999 Provisional Promotions<sup>6</sup>*

In 1998 and 1999, there were several retirements in the ranks of lieutenant and captain in the Peabody Fire Department. On or about February 25, 1999, Chief Joseph Mendonca (Chief Mendonca) issued a memorandum to firefighters regarding provisional lieutenant appointments.<sup>7</sup> The memorandum read, in part:

The City of Peabody has requested participation in the next lieutenant's examination. Mayor Torigian will be appointing qualified individuals on a provisional basis pending the establishment of a certified list. The lieutenant's examination will be given in November 1999. Any qualified interested firefighter should forward a letter of application to Cynthia King, Director of Personnel by 12:30 p.m. March 5, 1999. You may include in this letter any information that you feel would aid you in being appointed provisionally to a lieutenant's position.

On that same day, Chief Mendonca issued a memorandum to fire lieutenants regarding provisional captain appointments. The memorandum stated, in part:

The City of Peabody has requested participation in the next captain's examination, which is scheduled to be given in November of 1999. In the near future, Mayor Torigian will be appointing qualified individuals on a provisional basis pending the establishment of a certified list to the position of captain. Any qualified, interested fire lieutenant should forward a letter of application to Cynthia King, Director of Personnel by 12:30 p.m. March 5, 1999. You may include in this letter any information that you feel would aid you in being appointed provisionally to a captain's position.

The Union first learned about the provisional promotions when the City posted the memoranda in the fire stations.

After the City posted the memoranda, Union president Joseph P. DiFranco, Jr. (DiFranco) spoke to Chief Mendonca and told him that the Union did not receive advance notice of the February 25, 1999 memoranda as required by the Agreement. Chief Mendonca replied that the matter was out of his hands and DiFranco would have to "go across the street." DiFranco understood Chief Mendonca to mean that DiFranco would have to speak to the Mayor, Attorney Daniel Kulak (Attorney Kulak), counsel for the City, or City Personnel Director Cynthia King (King).

DiFranco consulted with counsel for the Union on or about February 25, 1999. On or about February 26, 1999, Attorney John McMahon (Attorney McMahon), counsel for the Union, sent a letter to Attorney Kulak demanding to bargain over the provisional promotions. On March 4, 1999, Attorney Kulak responded to Attorney McMahon's letter stating: "It is the position of the City that the long standing practice relative to civil service promotions has been and will continue to be that the Mayor, as appointing authority, will continue to exercise his full statutory authority to make promotions consistent with Chapter 31."

On or about February 27, 1999, DiFranco sent a letter to King concerning the provisional appointments. The letter stated, in part:

[W]hile it has been some time since the City last made a provisional appointment, all previous provisional appointments that we are aware of, when there has been no civil service promotional exam list available, have been on the basis of seniority only. That is to say that the senior firefighter, lieutenant, captain or deputy has always been bumped up to fill a vacancy in the next higher rank. This has been the practice for provisional appointments and any change in practice must be bargained.

Approximately 2-3 years ago there were nearly 10 vacancies in the officer ranks and the City never provisionally filled them. In fact, for the past decade or more, the City has, rightly, relied on the W.O.O.G. clause of the contract to fill vacancies of this nature.<sup>8</sup> This is appropriate as that clause is contractual and agreed to by both parties.

5. The Commission's jurisdiction is uncontested.

6. The Hearing Officer took administrative notice of M.G.L. c. 31, § 15 regarding provisional promotions. That statute states in pertinent part:

An appointing authority may . . . make a provisional promotion of a civil service employee in one title to the next higher title in the same departmental unit. Such provisional promotion may be made only if there is no suitable eligible list, or if the list contains the names of less than three persons eligible for and willing to accept competitive examination for an original appointment and the appointing authority requests that the position be filled by a departmental promotional examination or pursuant to section eight. No provisional promotion shall be continued after a certification by the administrator of the names of three persons eligible for and willing to accept promotion to such position.

7. The Union and the City were parties to a collective bargaining agreement effective from July 1, 1995 through June 30, 1998 (Agreement). Article XXIV of the Agreement related to job posting and bidding. Article XXIV, Section 1 provided:

When the Chief of the Fire Department or other appropriate official of the City of Peabody declares that a position in the Fire Department has become vacant, the vacancy will be posted on the bulletin board in a conspicuous place in a notice containing the grade and a brief description of the duties. The notice shall remain posted for a period of five (5) normal working days, not including the day of the posting. The Union will be notified of the va-

cancy, in writing, prior to the aforesaid posting period[.] Employees who hold the same classification or rank, and qualification, who are employed by the Peabody Fire Department may apply for the vacant position throughout the five (5) day posting period. The Chief . . . will evaluate applicants for the vacant position based on qualification of seniority, background, training, past record, experience, proven ability, scheduling availability, and work force balance. [A] vacancy shall be defined as an opening in a position caused by a promotion, retirement, resignation, or death of the incumbent and it is the intent of the City to fill said position. [S]eniority is defined as continuous payroll service with the Peabody Fire Department.

Article XXIV, Section 2 stated:

Within five (5) normal working days after the last day of the posting period, the Chief will award the position to the most qualified of the applicants who have bid for that position from within the Peabody Fire Department, if any. In the event two or more applicants are deemed to be equally qualified to fill a vacancy, the most senior of those applicants shall be awarded the vacancy.

8. Article X of the Agreement pertained to working out of grade. Article X, Section 1 provided:

When circumstances make it necessary for [employees] to work the tour of duty of a rank higher than [their] own [they] shall be compensated by an amount equal to the difference between the hourly compensation for [their] own rank and the hourly compensation of the rank whose duties [they] as-

DiFranco did not receive a response to his letter.

The Union filed a grievance on February 27, 1999 alleging that the City unilaterally implemented a new application process for provisional promotions and requesting, in part, that the City either provisionally promote employees on the basis of seniority or use the W.O.O.G. clause to fill the vacancies.<sup>9</sup> On or about March 5, 1999, Chief Mendonca wrote to DiFranco informing him that the Union's February 27, 1999 grievance had been referred to Attorney Kulak.

Between February 25, 1999 and March 5, 1999, bargaining unit members represented by the Union had a meeting. Because there was a short amount of time to apply for the provisional promotions, DiFranco and Union secretary/treasurer David Ahern (Ahern) distributed a form letter at the meeting that they had created for applicants to use when applying for provisional promotions. By distributing the form letter at the meeting, DiFranco and Ahern hoped to maximize the number of employees applying for the provisional promotions. The form letter was addressed "to whom it may concern" and had a signature line for the applicant to sign. The body of the form letter read:

I am respectfully submitting my name for consideration for the provisional position of \_\_\_\_\_, with the understanding that the most senior of applicants for this position will be awarded the job as in the past.<sup>10</sup>

This was the first time that the Union had used this type of form letter. Ahern later hand delivered to King's office all of the Union form letters signed by unit members seeking provisional promotions.

Wood initially submitted the Union form letter to the City to apply for a provisional promotion to the rank of lieutenant. Before the March 5, 1999 application deadline, Wood and Chief Mendonca had a conversation about the pending provisional promotions. During the conversation, Chief Mendonca stated that, in his opinion, if he was the appointing authority and had specified the criteria necessary to qualify for a position, he would consider only the candidates who submitted applications detailing their qualifica-

tions. Chief Mendonca suggested to Wood that he submit a resume to the City if he were interested in receiving a provisional promotion. Wood followed Chief Mendonca's suggestion and submitted a resume, his certificate of honorable discharge from the U.S. Army, and his certification in asbestos operations and maintenance.

As part of the provisional promotion process, the Mayor appointed a screening committee consisting of Chief Mendonca, King, and Attorney Kulak. The screening committee members reviewed the applications and felt that the employees who had submitted the Union form letters wanted to be provisionally promoted only if they had the most seniority. The members of the screening committee also believed that the applicants who had submitted the Union form letters did not provide the information that the City had requested. The screening committee members and the Mayor concluded that the employees who had submitted only the Union form letter as an application were not sincere and, consequently, those employees did not receive interviews for provisional promotions to the ranks of lieutenant and captain.

Approximately one week after the deadline to submit applications for provisional promotions, Ahern spoke with Chief Mendonca about why he was not selected for an interview. The Chief stated that, in his opinion, submitting the Union form letter was unprofessional, and the City should not fall for a "Union ploy."<sup>11</sup>

Because no one who had submitted only the Union form letter received an interview for a provisional promotion to the rank of lieutenant or captain, the Union filed a grievance on or about April 27, 1999 alleging discrimination on the basis of Union membership and lawful Union activities. Chief Mendonca denied the April 27, 1999 grievance on or about April 28, 1999.

DiFranco attended a grievance hearing concerning the February 27, 1999 grievance in King's office on April 23, 1999. King was the Mayor's designated hearing officer. On or about April 29, 1999, Mayor Torigian wrote to DiFranco notifying him that the City had denied the Union's February 27, 1999 grievance.

sume[.]. Such compensation shall be paid for each hour [they] work[,], and shall apply for that specific tour of duty.

Article X, Section 2 indicated:

A firefighter shall have served a minimum of three (3) years in grade prior to being assigned to work in the grade of a lieutenant. A lieutenant and/or captain shall have served a minimum of one year in grade prior to being assigned to work in the next higher grade.

The Union and the City were parties to a collective bargaining agreement in effect from July 1, 1975 to June 30, 1977 (earlier agreement). Article IX of the earlier agreement did not contain the language found in Article X, Section 2 of the Agreement.

9. Article XVII, Section 1 of the Agreement contained the grievance and arbitration procedure. That procedure provided that, at Step 1, the employee and/or Union representative must submit a written grievance to the Chief within five calendar days of the occurrence of the incident upon which the grievance was based. The Chief must then meet with the aggrieved employee and/or Union representative within seven calendar days and answer the grievance in writing within five calendar days of that meeting. At Step 2, the written grievance is supposed to be submitted to the

Mayor or the Mayor's designee within five calendar days after receipt of the Chief's answer. The Mayor or Mayor's designee is then supposed to meet with the aggrieved employee and/or Union representative within seven calendar days and answer the grievance in writing within five days of the meeting. At Step 3, the Union must submit the grievance to arbitration within fifteen calendar days after receipt of the Mayor's answer. Article XVII, Section 2 of the Agreement provided that a grievance would be deemed waived unless submitted at each step by the aggrieved employee and/or Union representative within the time limits provided, but the time limits could be extended by mutual agreement. Article XVII, Section 2 also stated that the City's failure to respond at any stage or step of the grievance and arbitration procedure within the time limits would be deemed a negative response and the grievance would be taken to the next step. Article XVII, Section 4 provided that both parties agreed to cooperate in expediting grievances requiring rapid resolution.

10. The Union form letter was marked and entered into evidence as Joint Exhibit 5.

11. Although Chief Mendonca did not recall his conversation with Ahern, he testified that he would not have used the phrase "Union ploy." Because Chief Mendonca did not demonstrate a clear memory of the events in question, the Hearing Officer credited Ahern's testimony on this point.

On or about May 25, 1999, Attorney E. David Wanger (Attorney Wanger), counsel for the Union, submitted five separate demands for arbitration to the American Arbitration Association. One demand for arbitration concerned the provisional promotion process for the officer ranks. Another demand for arbitration pertained to discrimination, exclusion, and/or rejection of applicants for provisional promotions to the lieutenant and captain ranks.

On or about June 25, 1999, the Union filed a grievance pertaining to the provisional promotions and requested that the City immediately submit the grievance to arbitration. On or about June 30, 1999, Chief Paul Goglia (Chief Goglia)<sup>12</sup> wrote a memorandum to DiFranco. In that memorandum, Chief Goglia acknowledged receipt of the June 25, 1999 grievance, informed DiFranco that the grievance could not be answered at his level, and indicated that the City was not willing to send the grievance immediately to arbitration.

On or about June 27, 1999, the City provisionally promoted Firefighters Wood, John Dowling (Dowling), and Robert Caruso (Caruso) to the rank of lieutenant. Firefighter Richard Curris had an earlier seniority date, June 21, 1970, than Wood, September 27, 1970; Caruso, January 11, 1981; and Dowling, July 9, 1996.<sup>13</sup> The following firefighters had earlier seniority dates than Dowling and Caruso: 1) Frank D'Amico, October 14, 1973; 2) Kevin Lynch, February 3, 1975; and 3) Bernard Wilson, July 20, 1980. The following firefighters had earlier seniority dates than Dowling: 1) Robert Desmond, June 30, 1987; 2) Thomas Desmond, January 28, 1991; 3) Michael Dewan, February 4, 1995; 4) DiFranco, June 30, 1987; 5) Robert Gill, March 16, 1982; 6) James Kimber, July 25, 1989; 7) James Lendall, February 3, 1986; 8) Russell Lewis, June 30, 1987; 9) Neil Magesky, June 30, 1987; 10) Jeff Maguire, August 1, 1994; 11) John Manning, June 7, 1993; 12) Mark Manning, August 1, 1994; 13) David Osgood, April 19, 1993; 14) Mark Quinn, August 3, 1986; 15) Stephen Rizzotti, April 9, 1984; 16) Robert Smith, June 30, 1987; 17) Steve Smyrnios, January 21, 1991; 18) Armando Teixeira, June 30, 1987; and 19) Thomas Wynne, August 9, 1982.

On or about June 27, 1999, the City provisionally promoted Lieutenants Richard Nelson (R. Nelson), Henry Hogan (Hogan), and Eric Harrison (Harrison) to the rank of captain. Trembly had an earlier seniority date, August 21, 1988, than R. Nelson, August 1, 1994; Harrison, July 3, 1989; and Hogan, July 22, 1990. Lieutenant David Sampson had an earlier seniority date, July 25, 1989, than Hogan and R. Nelson. Lieutenant Paul Couris had an earlier seniority date, July 22, 1990, than R. Nelson.

DiFranco, Union Vice President Michael Dewan (Dewan), King, and Chief Goglia attended a grievance hearing on or about July 15, 1999 regarding the June 25, 1999 grievance. On or about July 26,

1999, the Mayor wrote to DiFranco and stated that the City stood by its "answer for the same grievance that was sent to [DiFranco] on April 29, 1999." The City never bargained with the Union over provisional promotions.

#### *Prior Provisional Promotions<sup>14</sup>*

The City provisionally promoted Firefighter Frank D'Amico (D'Amico) to the rank of lieutenant on or about May 23, 1983. D'Amico's seniority date was October 14, 1973. The following firefighters had earlier seniority dates than D'Amico:

1. Joel Actor (Actor), August 29, 1971;
2. Edward Blanchard (Blanchard), September 27, 1970;
3. Roger Brennan (Brennan), November 5, 1967;
4. Raymond Brown (Brown), January 1, 1956;
5. Gerald Burgess (Burgess), October 16, 1966;
6. William Burke (Burke), March 15, 1970;
7. Kenneth Burkinshaw (Burkinshaw), April 17, 1966;
8. George Cheney (Cheney), December 22, 1963;
9. Gerard Colarusso (Colarusso), July 27, 1969;
10. John Compiano (Compiano), December 24, 1961;
11. John Connors (Connors), April 17, 1966;
12. John Croughwell (Croughwell), January 1, 1956;
13. Richard Curris (Curris), June 21, 1970;
14. Thomas Davis (Davis), July 27, 1969;
15. John DeAngelo (DeAngelo), June 27, 1971;
16. Robert Deurloo (Deurloo), February 11, 1970;
17. Donald Dillaway (Dillaway), December 24, 1967;
18. James Driscoll (Driscoll), September 22, 1963;
19. Claude Eppinger (Eppinger), August 2, 1964;
20. John Gahagan (Gahagan), April 17, 1966;
21. Richard Jacavano (Jacavano), December 24, 1967;
22. John Kerwin (Kerwin), November 5, 1967;
23. Stephen Kucker (Kucker), April 15, 1973;
24. Albert Larrabee (Larrabee), April 17, 1966;
25. Bartholomew Madruga (Madruga), October 1, 1962;
26. William Mahoney (Mahoney), June 30, 1968;
27. Leonard Marshall (Marshall), December 20, 1959;
28. David McDonald (McDonald), October 1, 1962;

12. Chief Goglia succeeded Chief Mendonca who retired on May 30, 1999.

13. The record does not reflect Firefighter Jim McDonnell's seniority date.

14. The record does not reflect whether the individuals with earlier seniority dates were employed at the time the City made the provisional promotions indicated with the exception of Lieutenant James Kerwin (Kerwin). He was employed when Lieutenant Sidney Durkee (Durkee) received a provisional promotion to the rank of captain. The record also does not demonstrate if the City asked the employees with earlier seniority dates if they were interested in receiving provisional promotions before promoting the applicant with the later seniority date.

29. Carl Melville (Melville), June 30, 1968;
30. Raymond Meserve (Meserve), December 29, 1957;
31. Thomas Moran (Moran), June 21, 1970;
32. George Nelson (Nelson), May 7, 1972;
33. James Nickola (Nickola), December 9, 1964;
34. John O'Connor (O'Connor), April 17, 1966;
35. Robert Parsons (Parsons), March 3, 1963;
36. Maurice Pearson (Pearson), June 30, 1968;
37. Joseph Pechinsky (Pechinsky), January 1, 1956;
38. Ned Peluso (Peluso), June 21, 1970;
39. Philip Pierce (Pierce), October 16, 1966;
40. Ralph Putnam (Putnam), October 1, 1962;
41. William Reynolds (Reynolds), November 5, 1967;
42. Louis Rochon (Rochon), April 27, 1958;
43. Joseph Silva (Silva), June 30, 1968;
44. Raymond Smith (R. Smith), December 12, 1965;
45. Stanley Smith (S. Smith), September 27, 1970;
46. Thomas Smith (T. Smith), March 15, 1970;
47. Daniel Strabone (Strabone), April 17, 1966;
48. Daniel Sweeney (Sweeney), September 28, 1958;
49. Roy Thibodeau (Thibodeau), December 29, 195<sub>1</sub>; <sup>15</sup>
50. Theodore Thrasivoulos (Thrasivoulos), June 30, 1968;
51. Philip Tighe (Tighe), April 4, 1971;
52. Charles Tracchia (Tracchia), June 30, 1968;
53. Wood (Wood), April 3, 1968; and
54. Michael Zuppio (Zuppio), September 27, 1970.

The City provisionally promoted Actor to the rank of lieutenant on or about March 4, 1984. The following firefighters had earlier seniority dates than Actor: Blanchard, Brennan, Brown, Burgess, Burke, Burkinshaw, Cheney, Colarusso, Compiano, Connors, Croughwell, Curris, Davis, DeAngelo, Deurloo, Dillaway, Driscoll, Eppinger, Gahagan, Jacavano, Kerwin, Larrabee, Madruga, Mahoney, Marshall, McDonald, Melville, Meserve, Moran, Nickola, O'Connor, Parsons, Pearson, Pechinsky, Peluso, Pierce, Putnam, Reynolds, Rochon, Silva, R. Smith, S. Smith, T.

Smith, Strabone, Sweeney, Thibodeau, Thrasivoulos, Tighe, Tracchia, Wood, and Zuppio.

The City provisionally promoted Durkee to the rank of captain on or about June 18, 1986. Durkee's seniority date was October 1, 1962. The following lieutenants had earlier seniority dates than Durkee: Kerwin, December 29, 195<sub>1</sub>; <sup>16</sup> and Ernest Rheume (Rheume), January 6, 1952. The City provisionally promoted Captain Donald McCauley (McCauley) to the rank of deputy chief on or about June 18, 1986. <sup>17</sup> The City provisionally promoted Firefighter Paul Goglia (Goglia) to the rank of lieutenant on or about June 18, 1986. Goglia's seniority date was November 18, 1973. The following firefighters had an earlier seniority date than Goglia: Blanchard, Brennan, Brown, Burgess, Burke, Burkinshaw, Cheney, Colarusso, Compiano, Connors, Croughwell, Curris, Davis, DeAngelo, Deurloo, Dillaway, Driscoll, Eppinger, Gahagan, Jacavano, Kerwin, Kucker, Larrabee, Madruga, Mahoney, Marshall, McDonald, Melville, Meserve, Moran, Nelson, Nickola, O'Connor, Parsons, Pearson, Pechinsky, Peluso, Pierce, Putnam, Reynolds, Rochon, Silva, R. Smith, S. Smith, T. Smith, Strabone, Sweeney, Thibodeau, Thrasivoulos, Tighe, Tracchia, Wood, and Zuppio.

The City provisionally promoted Brown to the rank of lieutenant on or about July 27, 1986. <sup>18</sup> The City provisionally promoted Compiano to the rank of lieutenant on or about October 4, 1987. The following firefighters had an earlier seniority date than Compiano: Croughwell, Marshall, Meserve, Pechinsky, Rochon, Sweeney, and Thibodeau.

The City provisionally promoted Signal Maintainer Michael Eliuk (Eliuk) to the rank of superintendent of fire alarm on or about August 18, 1991. Eliuk's seniority date was June 27, 1976. Signal Maintainer Roger Fecteau (Fecteau) had an earlier seniority date, April 10, 1967.

The City provisionally promoted Captain Paul Hinchion (Hinchion) to the rank of deputy chief on or about September 5, 1993. His seniority date was February 3, 1986. The following captains had earlier seniority dates than Hinchion: Actor, Davis, Stephen Markarian (Markarian), January 11, 1981; Greg Koulas (Koulas), February 16, 1982; and Jim Coughlin (Coughlin), May 12, 1975. <sup>19</sup> The City did not make any other provisional promotions until June 1999. <sup>20</sup>

15. The record does not indicate the last number of the year.

16. The record does not show the last number of the year. Further, we were unable to determine if Henry Velez (Velez) was senior to Durkee because the record did not contain the last number of the year in Velez's seniority date.

17. Because the record did not show the last number in the year of McCauley's seniority date, we were unable to determine if McCauley had an earlier seniority date than any other captain.

18. We were unable to determine if Thibodeau was senior to Brown because the record did not indicate the last number of the year in his seniority date.

19. The record does not reflect Captain John Leary's seniority date.

20. Although Chief Mendonca testified that the Mayor provisionally promoted D'Amico to the position of fire prevention officer sometime between November 1995 and February 1999 for approximately six weeks, the record evidence does not support his testimony. For example, D'Amico's application for a provisional promotion to the rank of lieutenant indicates that Torigian provisionally promoted D'Amico to the rank of lieutenant in charge of the Fire Prevention Bureau in 1983. Also, the list of provisional promotions contained in Joint Exhibit 21 shows that D'Amico was provisionally promoted to the rank of lieutenant on or about May 23, 1983. Because neither document showed that D'Amico had been promoted to the position of fire prevention officer, the Hearing Officer did not credit Chief Mendonca's testimony.

*W.O.O.G. Assignments*

Employees of the Peabody Fire Department work out of grade on a rotating basis. There is a list of employees' names. The employee who has worked the least number of W.O.O.G. assignments is offered the opportunity to work out of grade before anyone else on the list. If that employee refuses, the next employee on the list with the fewest number of W.O.O.G. assignments is offered the opportunity to work out of grade. If everyone on the list refuses the W.O.O.G. assignment, the firefighter with the most seniority will be ordered to take the assignment. W.O.O.G. assignments also take into consideration the location of the assignment relative to the employees' station assignments.

Since at least 1989, the City has used W.O.O.G. assignments to cover temporary vacancies in the officer ranks due to retirements, vacations, illnesses, and injuries on duty when there has been no civil service list in effect.<sup>21</sup> The length of a W.O.O.G. assignment covering an officer vacancy due to injury on duty depends on certain factors like the duration of the absence.<sup>22</sup> The length of a W.O.O.G. assignment covering an officer vacancy due to retirement depends on when the City calls for a civil service examination to fill the vacancy.<sup>23</sup>

The parties included the W.O.O.G. clause in their various collective bargaining agreements throughout the years to equalize the distribution of overtime between firefighters and officers. The parties originally intended W.O.O.G. assignments to last for a tour of duty.<sup>24</sup>

## Opinion

*Timeliness of Unilateral Change Allegation*

Section 15.03 of the Commission's regulations, 456 CMR 15.03, provides: "Except for good cause shown, no charge shall be entertained by the Commission based upon any prohibited practice occurring more than six months prior to the filing of a charge with the Commission." A charge of prohibited practice must be filed with the Commission within six months of the alleged violation or within six months from the date the violation became known or should have become known to the charging party, except for good cause shown. *Felton v. Labor Relations Commission*, 33 Mass. App. Ct. 926 (1992).

Here, the City argues that the Union's unilateral change allegation is untimely. The record reflects that the Union knew by February 27, 1999, at the latest, that the City was not going to consider departmental seniority when making provisional promotions. However, the Union did not file a charge until September 2, 1999, several days after the Commission's period of limitations expired. Thus, the Union's unilateral change allegation is time-barred.

*Unilateral Change*

Even if the Union's unilateral change allegation was timely, we conclude that the City did not violate Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law. A public employer violates Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law when it unilaterally changes an existing condition of employment or implements a new condition of employment involving a mandatory subject of bargaining without first giving its employees' exclusive collective bargaining representative notice and an opportunity to bargain to resolution or impasse. *Commonwealth of Massachusetts v. Labor Relations Commission*, 404 Mass. 124 (1989); *School Committee of Newton v. Labor Relations Commission*, 388 Mass. 557 (1983); *City of Boston*, 16 MLC 1429 (1989). The obligation to bargain extends to working conditions established through past practice as well as to working conditions contained in a collective bargaining agreement. *City of Gloucester*, 26 MLC 128 (2000); *City of Everett*, 19 MLC 1304 (1992). Procedures and criteria for promotion are mandatory subjects of bargaining. *Town of Norwell*, 18 MLC 1263 (1992); *Town of Stoneham*, 8 MLC 1275 (1981); *Town of Danvers*, 3 MLC 1559 (1977).

Here, the Union alleges that the practice for filling vacancies within the officer ranks when no civil service list existed was either to provisionally promote bargaining unit members by seniority or to use W.O.O.G. assignments. The Union further alleges that the City unilaterally changed the parties' practice on or about June 27, 1999 by provisionally promoting several bargaining unit members with less seniority than the other applicants. We turn to examine the parties' past practice regarding provisional promotions.

The City made nine provisional promotions between 1983 and 1993. In seven instances, the successful candidate had less seniority than the other bargaining unit members.<sup>25</sup> The Union points out that the record does not indicate whether the employees with earlier seniority dates were even employed at the time the City made the provisional promotions or were offered the provisional promotions prior to the City choosing the less senior candidate. However, because the record is silent regarding these points, it is possible that the employees with earlier seniority dates were employed when the City made the provisional promotions and were not offered the provisional promotions prior to the City choosing the less senior candidates. Further, the record shows that Kerwin was employed when Durkee received a provisional promotion, and Kerwin had more seniority than Durkee. Because the Union failed to meet its burden of proffering credible evidence to support its position, the Commission cannot conclude that bargaining unit members were provisionally promoted by seniority when there was no civil service list. Rather, the preponderance of the evidence

21. The City also uses overtime assignments from within the officer ranks to cover these vacancies.

22. The record does not clearly reflect the duration of a W.O.O.G. assignment to cover a vacancy caused by injury on duty.

23. The record does not clearly reflect the duration of a W.O.O.G. assignment to cover a vacancy caused by retirement.

24. A tour of duty consists of two days and two nights.

25. With regard to McCauley and Brown's provisional promotions, the record lacked information establishing whether they had earlier seniority dates than other members of the bargaining unit.

establishes that, despite the existence of employees with earlier seniority dates, the City in most, if not all, cases selected candidates with less seniority when making provisional promotions. Because the City did not deviate from this practice in June 1999, the City did not unilaterally change the criteria for promotion.<sup>26</sup> Therefore, the City did not violate Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by unilaterally changing the criteria for promotion.

#### *Compliance with Grievance-Arbitration Procedure*

The obligation to bargain in good faith under Section 6 of the Law requires the parties to exercise good faith in processing and adjusting grievances arising under their collective bargaining agreement. *City of Lynn*, 9 MLC 1049, 1051 (1982), citing *Ayer School Committee*, 4 MLC 1483 (1977). While the good faith obligation to process and to adjust grievances does not compel either party to settle a dispute, unreasonable conduct in handling grievances through the contractually agreed upon mechanism may, in the totality of the circumstances, constitute a breach of an employer's continuing bargaining obligation under the Law. *Id.*, citing *Everett Housing Authority*, 8 MLC 1818 (1982).

Here, the Union alleges that the City failed to comply with the parties' contractual grievance-arbitration procedure. In particular, the Union contends that the City remained closed-minded throughout the grievance process, as evidenced by the City repeatedly insisting in its grievance responses that provisional promotions were within the Mayor's exclusive managerial prerogative. Further, the Union asserts that the City was unwilling to engage in a meaningful dialogue to resolve the grievances. However, the mere fact that the City refused to recant its position on the provisional promotion issue is not indicative of bad faith because the City's duty to bargain in good faith does not compel it to settle the dispute underlying the grievance. See, *City of Lynn*, 9 MLC at 1051, citing *Everett Housing Authority*, 8 MLC at 1822. Moreover, the record does not reflect that the City either refused to process the Union's grievances or failed to participate in the arbitration process. Compare, *Upper Cape Cod Regional Vocational Technical School Committee*, 8 MLC 1366 (1981) (school committee unlawfully prevented union representative from presenting a grievance); *Commonwealth of Massachusetts*, 8 MLC 2080 (1982) (employer unlawfully refused to arbitrate grievance). Although the City refused the Union's request to send the June 25, 1999 grievance immediately to arbitration, nothing in Article XXVII of the Agreement requires the City to bypass steps 1 and 2 of the grievance process once the Union requests to proceed directly to step 3. Further, there is no evidence that the City unreasonably delayed the grievance process by refusing to do so. Compare, *Everett Housing Authority*, 8 MLC at 1818 (employer unreasonably delayed grievance process for several months by refusing to agree to an arbitrator). Consequently, the City did not violate Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by failing to comply with the parties' contractual grievance-arbitration procedure.

#### *Retaliation*

The Commission applies the two-step analysis articulated in *Wynn & Wynn, P.C. v. Massachusetts Commission Against Discrimination*, 431 Mass. 655 (2000), in discrimination cases arising under Section 10(a)(3) of the Law where the charging party has proffered direct evidence of discrimination. According to the first step in the *Wynn & Wynn* analysis, a charging party meets its initial burden by proffering direct evidence that proscribed criteria played a motivating part in a respondent's adverse action. *Wynn & Wynn, P.C. v. Massachusetts Commission Against Discrimination*, 431 Mass. at 667. Direct evidence is evidence that, "if believed, results in an inescapable, or at least highly probable, inference that a forbidden bias was present in the workplace." *Id.*, citing *Johansen v. NCR Comten, Inc.*, 30 Mass. App. Ct. 294, 300 (1991). Stray remarks in the workplace, statements by people without the power to make employment decisions, and statements made by decision makers unrelated to the decisional process itself do not suffice to satisfy a charging party's threshold burden. *Id.*, citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989).

Here, the Union argues that the City retaliated against bargaining unit members by refusing to interview those employees who had submitted the Union form letter as an application for provisional promotion and who were otherwise qualified to fill the vacant positions in the officer ranks. During a conversation with Chief Mendonca approximately one week after the provisional promotion application deadline, Ahern asked the Chief why he had not been selected for an interview. In response to that question, Chief Mendonca stated that he thought submitting the Union form letter was unprofessional, and that the City should not fall for a "Union ploy." Those comments were not stray remarks because they were in direct response to Ahern's inquiry about why he had not received an interview. Further, the Chief was a member of the provisional promotion screening committee and had the authority to recommend whether a bargaining unit member received an interview. Accordingly, the Union has met its initial burden of showing that anti-union animus played a part in the City's decision not to interview bargaining unit members who had submitted the Union form letter as an application for a provisional promotion.

Once a charging party meets its initial burden under the two-step mixed-motive analysis set forth in *Wynn & Wynn*, the burden shifts to the respondent to "show that its legitimate reason, standing alone, would have induced it to make the same decision." *Id.* at 666, citing *Johansen v. NCR Comten, Inc.*, 30 Mass. App. Ct. at 301. The appropriate question in a mixed-motive case is whether the respondent's proffered legitimate reason also motivated the adverse action and, if so, to what extent. *Id.*

The City maintains that applicants who submitted the Union form letter did not provide the information that the City had requested regarding their job qualifications and, consequently, did not receive interviews for provisional promotions. The Union argues that the City's proffered reason is not credible and is inconsistent

26. We briefly note that the City did not unilaterally change the procedures for promotion by provisionally promoting employees instead of making W.O.O.G. as-

signments because, as the Union readily concedes, the City has previously filled vacancies in the officer ranks using both methods.

with the testimony of the City's own witnesses. However, Wood initially submitted the Union form letter as an application for a provisional promotion, but subsequently submitted a resume and other documents to the City detailing his job qualifications before the application deadline. After Wood had submitted the additional information, the City interviewed him and provisionally promoted him to the rank of lieutenant, even though he had submitted the Union form letter as his initial application. Those actions demonstrate that the City's legitimate reason, (the failure of the applicants who submitted the Union form letter to submit sufficient information on their application) standing alone, would have induced it to make the same decision. Therefore, we conclude that the City did not violate Section 10(a)(3) and, derivatively, Section 10(a)(1) of the Law.

*Section 10(a)(1)*

A public employer violates Section 10(a)(1) of the Law if it engages in conduct that tends to restrain, coerce, or interfere with employees in the free exercise of their rights under Section 2 of the Law. *City of Fitchburg*, 22 MLC 1286 (1995). A finding of illegal motivation is not generally required in a Section 10(a)(1) case. *Town of Winchester*, 19 MLC 1591, 1596 (1992). Rather, the focus of the Commission's inquiry is the effect of the employer's conduct on a reasonable employee. *City of Boston*, 20 MLC 1154, 1161 (1994).

Here, the Union contends that the City chilled reasonable employees from exercising their rights under Section 2 of the Law by refusing to interview anyone who had submitted the Union form letter for a provisional promotion. However, as discussed more fully above, Wood received an interview and a provisional promotion even though he had initially submitted the Union form letter as an application. Because Wood received an interview despite having submitted the Union form letter, we conclude that a reasonable employee would not be chilled from submitting the Union form letter as an application for a provisional promotion. Accordingly, we find that the City did not violate Section 10(a)(1) of the Law.

*Conclusion*

Based on the record before us, we conclude that the City did not violate Sections 10(a)(5), (3), and (1) of the Law in the manner alleged by the Union. Accordingly, we dismiss the complaint of prohibited practice.

SO ORDERED.

\* \* \* \* \*

1. Pursuant to 456 CMR 13.02(2), the Commission has designated this case as one in which the Commission shall issue a decision in the first instance.

CITY OF BOSTON

AND

BOSTON POLICE PATROLMEN'S ASSOCIATION

Case No. MUP-2419

54.589 *bargaining unit work*  
67.164 *pre-existing practice*  
91.1 *dismissal*  
91.11 *statute of limitations*

January 15, 2003

Helen A. Moreschi, Chairwoman

Peter G. Torkildsen, Commissioner

Robert J. Boyle, Jr., Esq. *Representing the City of Boston*

Amy Laura Davidson, Esq. *Representing the Boston Police Patrolmen's Association*

**DECISION<sup>1</sup>**

*Statement of the Case*

On June 16, 1999, the Boston Police Patrolmen's Association (the Association) filed a charge with the Labor Relations Commission (the Commission) alleging that the City of Boston (the City) had violated Sections 10(a)(5) and (1) of M.G.L. c.150E (the Law). Following an investigation, the Commission issued a complaint of prohibited practice on February 10, 2000 alleging that the City had violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by transferring the duties of the assistant to the supervisor of cases at the South Boston District Court to a non-bargaining unit employee. The City filed an answer on March 1, 2000.

On August 16, 2000, Margaret M. Sullivan, Esq., a duly-designated Commission hearing officer, conducted a hearing at which all parties had an opportunity to be heard, to examine witnesses and to introduce evidence. The Association and the City filed post-hearing briefs on October 31, 2000. The Association filed a supplemental statement to its brief on November 6, 2000, and the City moved to strike the Association's supplemental statement on November 9, 2000.<sup>2</sup>

On May 30, 2002, the hearing officer issued Recommended Findings of Fact. On June 6, 2002, the City filed challenges to the Recommended Findings of Fact. On July 9, 2002, the Association filed challenges to the Recommended Findings of Fact and an opposition to the City's challenges. After reviewing those challenges and the record, we adopt the Hearing Officer's Recommended Findings of Fact, as modified where noted, and summarize the relevant portions below.

2. Because the City had the opportunity to respond to the Association's supplemental statement, we decline to strike the statement.