In the Matter of CITY OF NEWTON

and

NEWTON MUNICIPAL EMPLOYEES ASSOCIATION

Case No. MUP-04-4254

54.5842 light duty
67.8 unilateral change by employer

May 27, 2009
Marjorie F. Wittner, Chair
Elizabeth Neumeier, Board Member

James Pender, Esq. — *Representing the City of Newton*

Olinda R. Marshall, Esq. — *Representing the Newton Municipal Employees Association*

DECISION[1]

Statement of the Case

On October 18, 2004, the Newton Municipal Employees Association (Association) filed a charge with the former Labor Relations Commission (Commission), alleging that the City of Newton (City) had violated Sections 10(a)(5) and 10(a)(1) of MGL c. 150E (the Law). Following an investigation, the former Commission issued a complaint of prohibited practice and partial dismissal on May 17, 2006 dismissing some allegations and alleging that the City had violated Sections 10(a)(5) and, derivatively, 10(a)(1) of the Law by failing to bargain to resolution or impasse with the Association when the City placed a unit member returning from disability leave in a lower paying position.[2] The City filed its answer to the complaint on May 30, 2006.

On June 7, 2007, June 11, 2007, July 17, 2007, and August 10, 2007, Victor Forberger, Esq., a duly-designated hearing officer, conducted a hearing at which all parties had the opportunity to be heard, to examine witnesses, and to introduce evidence. On November 27, 2007, the Association filed its post-hearing brief. The City did not file a brief in this matter. The Hearing Officer issued Recommended Findings of Fact on July 17, 2008. Neither party filed challenges to the Hearing Officer's Recommended Findings of Fact.

Findings of Fact[3]

Because no party filed challenges to the Hearing Officer's Recommended Findings of Fact, we adopt those findings, as modified where noted, and summarize the relevant portions below.

The Association is the exclusive bargaining representative for the following City employees:

> **Department of Public Works/Parks & Recreation**: all employees, including working foremen, but excluding the Commissioner; the Forestry Superintendent; professional, administrative, secretarial and clerical employees; recreational supervisors, recreational leaders; seasonal, provisional, emergency, and intermittent employees; and Civil Service Foremen;
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> **Department of Public Works/Public Buildings**: all employees, but excluding the Commissioner; the Assistant Commissioner; Supervisors and Assistant Supervisors of Maintenance; all wire, plumbing, and gas fitting inspectors; professional, administrative, secretarial and clerical employees; City Hall custodians; provisional, emergency, and intermittent employees; and classified Civil Service Foremen; and
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> **Department of Public Works/Public Works**: all employees, including working foremen, time and construction clerks, and bookkeepers (time and equipment clerk), but excluding the Public Works Commissioner; the general superintendent; division foremen and general sewer foremen; superintendent and assistant superintendent of mechanical equipment; Water Division Superintendent; plans and programs analyst; traffic foremen-inspector; public relations representative; street foremen and sewer inspectors; the senior time and construction clerk; professional, administrative, secretarial and clerical employees; provisional, emergency, and intermittent employees; and classified Civil Service Foremen; and
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> **Police Department**: laborers, building custodians, and mechanics, but excluding all other employees.

The City's Public Works operations include a Highway Division that has facilities located on Elliot Street in the City of Newton, Massachusetts, and another set of facilities located on Craft Street. The Highway Division is separate from the Department of Public Works' Water & Sewer Division.

Given the physical and strenuous nature of the work done by bargaining unit members in the Highway Division, serious work-related injuries sometimes occur. For employees who still might return to their original positions, the City attempts to transition an employee back to his or her original position through light-duty work. In these transitional assignments, the City keeps these employees at the same rate of pay associated with their original positions.[4] Until the incident described below, the City had not been confronted with an employee who was: (a) covered by workers'

1. Pursuant to 456 CMR 13.02(1) of the former Labor Relations Commission's regulations, this case was designated as one in which the former Labor Relations Commission would issue a decision in the first instance. Pursuant to Chapter 145 of the Acts of 2007, the Division of Labor Relations (Division) "shall have all of the legal powers, authorities, responsibilities, duties, rights, and obligations previously conferred on the labor relations commission." The Commonwealth Employment Relations Board (Board) is the Division agency charged with deciding adjudicatory matters. References to the Division and the Board include the former Labor Relations Commission.

2. The Association did not request reconsideration of the dismissed allegation and had previously withdrawn another allegation.

3. The Board's jurisdiction in this matter is uncontested.

4. The collective bargaining agreement between the parties contains only one article regarding workers' compensation coverage, Article X, and this article is silent regarding the issues in dispute here. The Association argues that the City failed to follow the past practice established by the City's prior treatment of individuals in light-duty work because of medical restrictions.

compensation; (b) medically precluded from returning to his original position; and (c) still capable of performing other job duties.[5]

Stephen Cronin (Cronin) first began working for the City in 1970, and in 1987, he became a Special Motor Equipment Operator/Paver Operator, one of the higher-paid positions in the bargaining unit.[6] Around 1992, Cronin injured his back while at work, and for the next eleven years, Cronin underwent several surgeries and numerous treatments for chronic back problems connected to his work as a Paver Operator. During the course of those treatments, the City placed Cronin on industrial accident leave, and those treatments subsequently allowed Cronin to resume his Paver Operator position. On April 23, 2003, Cronin reinjured his back while at work and again went out on industrial accident leave while physicians treated his back injury.

In a letter dated May 5, 2004, Cronin's physician indicated that: (1) Cronin had recovered sufficiently to return to work; (2) Cronin's chronic back problems, however, prevented him from ever returning to his original Paver Operator position; and (3) Cronin could only return to a position that did not require him to lift more than fifteen pounds. In a letter dated May 20, 2004, the City's Workers' Compensation Manager asked Cronin's physician to review job descriptions for Cronin's Special Motor Equipment Operator (SMEO) position as well as a Heavy Motor Equipment Operator (HMEO) to determine if Cronin was medically capable of performing any of the job duties associated with these titles,[7] whether Cronin could perform these duties given his lifting restriction, and whether his lifting restriction was permanent. The next day, May 21, 2004, Cronin's physician stated that it was too early to make a final determination regarding these matters.

After additional examinations and treatment, Cronin's physician found on June 24, 2004 that Cronin could return to work on July 6, 2004 with the following restrictions: (a) climbing ladders or performing overhead work; (b) operating electrical equipment or machinery; (c) squatting, crawling, or kneeling; and (d) lifting no more than 50 pounds. Cronin and the City then discussed what positions other than his original Paver Operator position he might perform. Cronin did not have current hoisting or hydraulic licenses necessary to operate a back hoe, grade-all, excavator, or similar kinds of equipment. Furthermore, even if Cronin's licenses for this equipment were current, he could not position himself to operate this machinery.[8] As a result, the City concluded that it would offer him the less strenuous position of Heavy Motor Equipment Operator/Truck Driver, a W-6 title, with the difference between Cronin's current and former pay covered by workers' compensation.[9] Cronin returned to work under this arrangement in July of 2004, and he informed the Association of this arrangement.

In July of 2004, the Association and City met to discuss Cronin's return to work. The Association proposed that Cronin be returned as an Assistant Paver Operator, a W-9 title. The City had once employed two Paver Operators,[10] and the Association proposed that Cronin be returned as an Assistant Paver Operator, who, from the ground, could guide the Paver Operator in maneuvering the asphalt paver.[11] By letter dated August 12, 2004, the Association asked the City for its position on placing Cronin in an Assistant Paver Operator position. The Association was concerned because supplemental workers' compensation payments were not included in calculations for determining Cronin's pension and retirement entitlements. On August 19, 2004, Association and City representatives discussed further the possibility of Cronin returning to work as an Assistant Paver Operator. In a letter dated August 24, 2004, however, the City, through Department of Public Works Commissioner Robert R. Rooney (Rooney) rejected the idea of placing Cronin in an Assistant Paver Operator position, explaining that Cronin's injuries "rendered him unable to operate any heavy equipment of any kind."[12] Rooney added that the combination of a

5. The Association presented a great deal of evidence regarding various individuals who had been returned to light-duty work at their original pay rate. The City presented a great deal of evidence clarifying the circumstances of these individual's light-duty work and the reasons for their temporary placements (*e.g.*, workplace injury or an illness unrelated to their work). Much of this evidence fails to indicate with any specificity the reasons for the employees' leave from work, the length of their leave, the length of their transitional job duties, and how their job duties and positions changed relative to their medical conditions. From this evidence, the Hearing Officer discerned only two individuals that had reached a medical endpoint in their treatments. One individual reached a medical endpoint regarding a workplace-related injury to his knees only after numerous efforts at transitional assignments had failed and no other position with the City was available. He subsequently received a disability retirement. The other individual was medically excluded from his original position for reasons unrelated to his work. During his transitional assignment, the City maintained him at his original pay rate. When he informed the City that his medical restrictions were permanent, however, the City downgraded his pay rate to his current position. The record is silent regarding the Association's awareness of this arrangement. Additionally, it is unclear from the record whether the City differentiates between employees whose medical restrictions are subject to workers' compensation and those employees whose medical restrictions are not covered by workers' compensation.

6. At the time of the events at issue here, pay for bargaining unit members was based on an eleven point pay scale. The higher the grade, the higher the employee's hourly pay rate was. In 2003, a Paver Operator received a W-9 pay rate.

7. An SMEO's essential job functions, activities, and requirement include: operating excavation equipment, including grade-alls, back hoes, excavators, bobcats, front-end loaders, crane trucks, and asphalt pavers; driving snow plows and sanding trucks; regularly climbing, stooping, kneeling, crouching, or crawling; and frequently lifting more than 60 pounds and occasionally as much as 100 pounds. An MEO's essential job functions, activities, and requirements include: operating medium and heavy duty motor equipment that requires a Commercial Driver's License; driving snow plows and sanding trucks; regularly climbing, stooping, kneeling, crouching, or crawling; and frequently lifting more than 60 pounds and occasionally as much as 100 pounds.

8. Cronin is well over six feet tall and weighs more than 200 pounds. For equipment with small cabs, Cronin cannot fit within the confines of the cab. Furthermore, because of his back injury, Cronin lacks the flexibility to place his large frame at the controls of this equipment or to tolerate the jostling to his body and back from using that equipment for an extended period of time. Testimony from the Association President about equipment Cronin could possibly have used does not outweigh Cronin's testimony and the relevant documentation regarding the medical restrictions on what Cronin could do. Indeed, after re-injuring his back in May of 2005, Cronin had not returned to work with the City in 2007, the time of this hearing.

9. MGL c. 152, § 35 provides for employees suffering a partial incapacity to receive up to 60% of their original pay for a period of time. For Cronin, this payment period went from July of 2004 to June of 2009.

10. The second Paver Operator position had been vacant for several years, after the Paver Operator who worked alongside Cronin retired and the City decreased its paving operations by contracting out some of that work.

11. When there were two Paver Operators, one served as a guide to the other driving the single asphalt paver owned by the City.

12. [See next page.]

W-6 pay rate and the workers compensation adjustment to which Cronin was entitled meant that he would annually earn $3,682 more than he would have received at his regular W-9 pay rate. Rooney concluded the letter by stating, "I appreciate your time and interest in these important matters and look forward to working out solutions to each of these issues."[13]

The City subsequently posted and filled Cronin's vacant Paver Operator position.

In a letter dated September 15, 2004, the Association expressed its disagreement with the City regarding Cronin's return to work:

> The Association is concerned over the decision of the City to carry Stephen Cronin, a W-9 rated employee, on the City payroll at a W-6 level and to supplement that pay through its workers' compensation account. We are concerned because the City has never before provided compensation in the manner. This concern is exacerbated because the portion of his pay coming from the workers' compensation account is not used for calculating pension benefits. At a meeting on July 21, 2004, we discussed with you a reassignment of Mr. Cronin as an assistant paver operator, also rated as a W-9 position. You agreed that this might be a reasonable solution. Subsequently, however, [the City] has declined to assign Mr. Cronin to the assistant paver operator position as a resolution of this matter. Accordingly, no such assignment has been made and Mr. Cronin remains in a W-6 position at W-6 pay. In the Association's view, the decision to reduce Mr. Cronin to a W-6 level constitutes a unilateral change in working conditions in violation of Chapter 150E.

Opinion

The issue here is whether the City [violated] Section 10(a)(5) and (1) of the Law by requiring Cronin, formerly a Grade W-9 paver/operator to return to work in a lower grade and at a lower rate of pay after suffering an on-duty injury that permanently prevented him from performing his paver/operator duties. 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). To establish a unilateral change violation, a charging party must show that: 1) the respondent has changed an existing practice or instituted a new one; 2) the change affected employee wages, hours, or working conditions and thus implicated a mandatory subject of bargaining; and 3) the change was implemented without prior notice and an opportunity to bargain. *Town of Hudson*, 25 MLC 143, 146 (1999) (citing *Town of North Andover*, 1 MLC 1103, 1106 (1974)). Here, the City's decision to restore Cronin to a position in a lower grade at a lower salary directly affected his wages, including his future pension benefits, and thus impacted a mandatory subject of bargaining.

The obligation to bargain extends not only to contract terms, but also to working conditions that have been established through past practice. *City of Boston*, 16 MLC 1429, 1434 (1989). The Association argues that the City had a practice of compensating individuals who returned to work on a light duty assignment at the same rate they had earned before their injury and that the City deviated from this practice when it brought Cronin back to work at a lower salary grade. The examples the Association provided are distinguishable from Cronin's situation, however, because Cronin was both eligible for workers compensation *and* could no longer perform the duties of his former position. Accordingly, we decline to find that the City deviated from an established, clearly-defined past practice when it returned Cronin to work at a lower grade level and rate of pay.

The Law, however, requires bargaining over not only established conditions of employment, but new ones as well. *City of Westfield*, 25 MLC 163, 165 (1999) (even if circumstances surrounding police officer's return to work order from injured on duty leave had never occurred before, employer was obligated to bargain before implementing a new condition of employment). Therefore, because Cronin's situation was unique for the reasons described above, the City had an obligation to bargain over the precise conditions under which he would return to work, given his physical restrictions and entitlement to Workers Compensation. *Id.*

The City failed to bargain in this case. The facts reflect that the City initially placed Cronin in the position of Grade 6 Heavy Motor Equipment Operator on or about July 6, 2004 after discussing the matter with Cronin, but not the Union.[14] The City's unilateral action violated Section 10(a)(5) of the Law.

After Cronin returned to work, the City bargained with the Association over his pay grade and classification on two occasions, sometime in July and on August 19, 2004. However, post-implementation bargaining does not satisfy an employer's bargaining obligation in the absence of any evidence that circumstances beyond the employer's control required immediate action. *Boston School Committee*, 4 MLC 1912 (1978). Here, there is no evidence that the City was under any external, exigent time constraints. There is also no evidence that as of August 24, 2004, the day that the City wrote a letter declining to create an Assistant Paving Operator position for Cronin or otherwise change his W-6 pay grade, that the parties had reached resolution or were deadlocked on these issues, particularly since the City indicated in that letter a willingness to continue to work out solutions to the issues raised therein. That the City continued to pay Cronin at a lower grade level with-

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12. In addition, the City was at the time considering eliminating its paving operations completely and contracting out the work to a third-party company.

13. For the sake of completeness, we have supplemented the Hearing Officer's findings regarding the contents of the City's August 24, 2004 letter, which was entered into the hearing record as Charging Party Exhibit 3.

14. The Association does not argue that the City engaged in unlawful direct dealing, and therefore, the Board will not address that issue.

out exhausting its bargaining obligation violates Section 10(a)(5) of the Law.

The City did not file a post-hearing brief. However, in its answer to the Complaint, it raised a number of affirmative defenses, including: 1) that it had the management right to hire Cronin in the Grade 6 position; 2) that the Union had waived by inaction its right to bargain over Cronin's placement; and 3) that the City's actions were, in part, performed in compliance with its obligations under the American with Disabilities Act (ADA) and MGL c. 151B. Because the City did not elaborate on these defenses, we address them only briefly. First, the management rights clause contained in the parties' 2000-2003 collective bargaining agreement, (Joint Exhibit One) does not authorize the City to unilaterally reduce an individual's rate of pay. Second, the unchallenged findings reflect no waiver by inaction because there is no evidence that the City informed the Union before it lowered Cronin's rate of pay. Moreover, the Union did bargain with the City after Cronin returned to work. Finally, even if the City were obliged by law to make a reasonable accommodation to Cronin's condition, it still had to bargain over the impacts of that action on terms and conditions of employment before taking action. *See, e.g., Board of Regents of Higher Education*, 19 MLC 1248, 1267 (1992) (employer must bargain over impacts of GIC's decision to change employee health insurance benefits). For all these reasons, the Board rejects the Employer's defenses in this case.

Conclusion

Based on the foregoing, we conclude that the City violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law when it reduced Cronin's pay grade and job classification without first giving the Association prior notice and an opportunity to bargain to resolution or impasse.

Order

WHEREFORE, based on the foregoing, IT IS HEREBY ORDERED that the City shall:

1. Cease and desist from:

a. Refusing to bargain collectively in good faith with the Association by not providing the Association with prior notice and an opportunity to bargain to resolution or impasse over the changes to Stephen Cronin's wages and job classification.

b. In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights guaranteed under the Law.

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

a. Restore the *status quo ante* by restoring Stephen Cronin to a W-9 pay grade and job classification.

b. Upon request, meet and bargain in good faith with the Association over the decision to decrease Stephen Cronin's pay grade and job classification.

c. Make Stephen Cronin whole for any loss of earnings or benefits suffered as a result of the City's decrease in his pay grade and job classification, plus interest at the rate specified in MGL c. 231, §6I, compounded quarterly.

d. Post immediately in all conspicuous places where members of the Association'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 email, and maintain for a period of thirty (30) consecutive days thereafter, signed copies of the attached Notice to Employees;[15] and,

e. Notify the Division in writing within thirty (30) days of receiving this Decision and Order of the steps taken to comply with it.

SO ORDERED.

THE COMMONWEALTH OF MASSACHUSETTS
DIVISON OF LABOR RELATIONS

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE MASSACHUSETTS DIVISION OF LABOR RELATIONS

AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

The Massachusetts Division of Labor Relations, Commonwealth Employment Relations Board (Board) has held that the City of Newton violated Section 10(a)(5), and, derivatively Section 10(a)(1) of Massachusetts General Laws, Chapter 150E by unilaterally changing the pay grade and job classification of Stephen Cronin, a member of the bargaining unit represented by the Newton Municipal Employees Association (Association), without providing the Association with notice and an opportunity to bargain.

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

WE WILL NOT unilaterally change Stephen Cronin's pay grade or job duties.

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

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

1) Immediately restore Stephen Cronin to a W-9 pay grade.

2) Upon request, meet and bargain in good faith with the Association over the decision to decrease Stephen Cronin's pay grade and job classification.

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15. In *City of Boston*, Case No. MUP-04-4077 (May 20, 2009), the Board announced that henceforth it would order respondents that customarily communicate to employees via intranet or email to post both hard and electronic copies of the Board's Notice to Employees.

3) Make Stephen Cronin whole for any loss of earnings or benefits suffered as a result of the City's decrease in his pay grade and job classification, plus interest at the rate specified in MGL c. 231, §6I, compounded quarterly.

[signed]
City of Newton

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

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In the Matter of AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 93, AFL-CIO, LOCAL 193

and

BRUCE GAUVAIN

Case No. MUPL-03-4449

72.2 obligation to arbitrate grievance

June 10, 2009
Marjorie F. Wittner, Chair
Elizabeth Neumeier, Board Member

James J. Dever, Esq. — *Representing the American Federation of State, County and Municipal Employees, Council 93, AFL-CIO Local 193*

Bruce Gauvain — *Pro Se*

DECISION[1]

On February 19, 2003, Bruce Gauvain filed a charge with the former Labor Relations Commission (Commission), alleging that the American Federation of State, County, and Municipal Employees, Council 93, AFL-CIO, Local 193 (Union) had violated Section 10(b)(1) of the Law by engaging in conduct that was arbitrary, perfunctory, improperly motivated and constituted inexcusable neglect when it failed to investigate, evaluate or process a grievance concerning Gauvain's layoff. The Union filed its answer to the complaint on December 12, 2003. On January 23, 2004, the Union elected to present evidence at the hearing showing that even if Gauvain's grievance is found to be arguably meritorious, the grievance would have been lost at arbitration for reasons not attributable to the Union's misconduct.

On March 15, 2004 and March 16, 2004, Margaret M. Sullivan, Esq., a duly-designated Commission hearing officer (Hearing Officer) conducted a hearing. Both parties had the opportunity to be heard, to examine witnesses, and to introduce evidence. Gauvain and the Union chose to make oral statements at the close of the hearing rather than to submit post-hearing briefs. On May 10, 2006, the Hearing Officer issued her Recommended Findings of Fact. Neither party challenged the Hearing Officer's Recommended Findings of Fact. Therefore, we adopt them in their entirety and summarize the relevant portions below.

After considering the facts and the parties' arguments, we conclude that the Union did not violate its duty of fair representation to Gauvain, because there is no evidence that its decision not to submit his grievance to arbitration was improperly motivated, arbitrary, perfunctory or demonstrative of inexcusable neglect.

Findings of Fact[2]

The Union is the exclusive bargaining representative for certain employees of the City of Lynn (City). The Union and the City were parties to a collective bargaining agreement in effect from July 1, 2001 through June 30, 2004[3] containing the following provisions:

> Article 4-Grievance Procedure
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> Definition: A grievance shall be defined as a dispute arising between the employer and the Union and/or any employee concerning the application, meaning or interpretation of this Agreement.
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> Step 1: Any employee having a grievance shall take it up with his immediate supervisor-in-charge within three (3) working days of the date of the grievance or his knowledge of its occurrence. He may, if he so desires, have his steward present. The immediate supervisor shall, upon receipt of a complaint from an employee under his jurisdiction, attempt to adjust the matter and respond to the grieving employee within twenty-four (24) hours.
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> Step 2: If the grievance has not been settled at Step 1, it may be presented in writing by the grievance committee of the Union to the Department Head or his designated representative within two (2) calendar weeks after the answer by the Step 1 supervisor is due. Any grievance over which the Step 1 supervisor has no authority, may be presented by the Union at Step 2. The Department Head or his designated representative shall respond to the Union's Grievance Committee in writing within five (5) calendar days after discussions are completed, but in no event no more than two (2) weeks after the grievance was presented by the Union at Step 2.
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> Step 3: If the grievance still remains unadjusted, it may be presented by the Union's Grievance Committee to the Mayor or his designated

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1. Pursuant to Chapter 145 of the Acts of 2007, the Division of Labor Relations (Division) "shall have all of the legal powers, authorities, responsibilities, duties, rights, and obligations previously conferred on the labor relations commission." The Commonwealth Employment Relations Board (Board) is the body within the Division charged with deciding adjudicatory matters. References in this decision to the Board include the former Labor Relations Commission (Commission). Pursuant to Section 13.02(1) of the Commission's Rules in effect prior to November 15, 2007, the Commission designated this case as one in which it would issue a decision in the first instance.

2. The Board's jurisdiction in this matter is uncontested.

3. The City and the Union executed this agreement on December 27, 2001.