officers and institutional security officers. Our reasons for declining to sever the campus police officers hold equally true for the institutional security officers. While they might have certain functionally distinct job duties, there is no evidence that those duties have changed since the Board's original certification in 1976. Moreover, the evidence does not reflect any facts demonstrating that the ISOs have any special bargaining concerns that have caused or are likely to cause serious conflicts or divisions within the bargaining unit that will effectively interfere with collective bargaining. Finally, the showing of interest provided by the Association in this matter is less than fifty percent of the employees in this proposed unit, and the Association has not indicated what uncommon or extenuating circumstances excuse the showing of interest requirement.[42]

Conclusion

For all of the above reasons, the Board declines to sever the campus police officers from the existing unit and allows Council 93's motion to dismiss the petition.

SO ORDERED.

* * * * * *

In the Matter of OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL 6, AFL-CIO

and

CITY OF BOSTON

Case No. SI-08-277

16. strike
108.2 withdrawal of services

December 8, 2008
Marjorie F. Wittner, Chair
Elizabeth Neumeier, Board Member

Robert S. Manning, Esq.	*Representing the Office and Professional Employees International Union, Local 6, AFL-CIO*
Paul R. Curran, Esq.	*Representing the City of Boston*

NOTICE TO PARTIES

On November 28, 2008, the City of Boston (City) filed a petition with the Division of Labor Relations (Division) requesting the Commonwealth Employment Relations Board (Board) to conduct a strike investigation pursuant to Section 9A(b) of Massachusetts General Law, Chapter 150E (the Law). The petition alleges that the Office and Professional Employees International Union, Local 6, AFL-CIO (Local 6) violated Section 9A(a) of the Law by engaging in and by inducing, condoning, and encouraging an illegal strike, work stoppage, and withholding of services.

Specifically, the petition alleged that the City's housing inspectors, who are members of Local 6's bargaining unit, refused to accept weekly on-call assignments commencing on November 7, 2008. The Board conducted an investigation of the City's petition on December 3, 2008. Both parties had an opportunity to be heard, to examine witnesses, and to introduce evidence. After considering the information submitted by the parties at the investigation and the parties' arguments, we dismiss the petition for the reasons set forth below.

Stipulations of Fact

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

2. Local 6 is an employee organization within the meaning of Section 1 of the Law.

42. Division Rule 14.05(2), 456 CMR 14.05(2), states that: "No petition filed under 456 CMR 14.03 seeking to represent a bargaining unit of employees already represented for purposes of collective bargaining and no petition filed pursuant to 456 CMR 14.04 shall be entertained, in the absence of uncommon or extenuating circumstances, unless the Board determines that the petitioner has been designated by at least fifty percent (50%) of the employees involved to act in their interest."

3. Local 6 is the exclusive bargaining representative for all housing inspectors employed by the City in its Inspectional Services Department (ISD).

4. Local 6 and the City are parties to a collective bargaining agreement (the Agreement) that by its terms is in effect from July 1, 2007 through June 30, 2010.

Findings of Fact

The City employs twenty-five housing inspectors. Housing inspectors are responsible for enforcing the state sanitary code, chapter II, 105 CMR 410. Twenty-four of the housing inspectors currently work four days per week and for 8.75 hours each day. Those inspectors have a work schedule of either Monday through Thursday or Wednesday through Saturday.[1] The remaining inspector works an administrative schedule of five days per week, Monday through Friday, and for seven hours each day.

The City also offers housing inspectors the opportunity to work a weekly on-call assignment that runs from Friday at 5:45 PM to the following Friday at 8:45 AM.[2] When a housing inspector is on call, the employee carries a Nextel cellular phone and responds to complaints from members of public[3] that are received after 5:45 PM and before 8:45 AM Monday through Saturday and all day on Saturday.[4] Article XVII, Section 11 of the Agreement states:

> An on-call list shall be established on a voluntary basis. The on-call list shall be regularly rotated. When an off-duty employee is called out to work outside of his regular hours he shall receive:
>
> On call pay at time and one-half for the hours actually worked on the call out;
>
> An on-call allowance of one-hundred and fifty dollars ($150.00) for each week he or she is on-call. To be eligible for the on-call allowance an employee must be available to work at all times during his scheduled on-call week.
>
> Employees shall be entitled to travel time for one half (1/2) hour to and from any call out at a straight time rate.
>
> The Department shall attempt to contact the employee at home. If unsuccessful, the Department will contact the employee by beeper and/or Nextel Communicator while he/she is on-call. The employee will be required to call back the Department within fifteen (15) minutes of contact. Employees will further be required to remain in a location that ensures that he/she can respond in a timely fashion when he or she is called.
>
> Failure to respond to a call or to comply with the terms herein will result in forfeiture of the entire on-call allowance and progressive discipline.
>
> Any employee who is on-call shall be responsible for ensuring that his/her beeper is in working order at all times...
>
> If an employee who is on-call is unable to respond due to an emergency, the employee shall be responsible for getting a backup employee to respond.

On May 25, 2007, Samantha Doepken (Doepken), labor counsel for the City, sent a letter to Tracy Monahan (Monahan), senior business agent for Local 6, stating in pertinent part:

> The Inspectional Services Department is planning to change its on-call and priority response system. Briefly, employees on the on-call list will continue to rotate on a weekly schedule, but will also be responsible for on-call and priority response during their regular workday. Employees will not be adversely impacted by this operational change because their workload will be lightened during weeks that they are on-call. However, employees on a four (4) day work schedule will be required to work a five (5) day work schedule during their on-call weeks....

In a June 24, 2007 letter, Monahan demanded to bargain over the City's decision and its impacts, and she requested various documents from the City. On June 20, 2007, Doepken responded by proposing several dates for bargaining and by indicating that the City was gathering the documents that Monahan had requested. The parties subsequently did not meet at that time, and the Union did not receive the documents that it had requested.

In January of 2008, T. Martin Roach, Jr. (Roach), labor counsel for the City, contacted Monahan about the issue. On February 12, 2008, Roach sent Monahan a letter indicating that the City planned to require employees who worked a four-day schedule to work a five-day schedule when they were on call. He also offered certain dates for bargaining. On February 22, 2008, Monahan replied by agreeing to two of the dates and by reiterating her June 24, 2007 in-

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1. Article X of the Agreement states in relevant part:

> Section 1-All employees shall be scheduled to work on regular work shifts, and each work shift shall have a regular starting time and quitting time. Schedules of work days and workweeks shall be posted on all department bulletin boards at all times. Employees shall be given reasonable notice of any change in these work schedules.
>
> Section 10-All employees shall be scheduled to work on regular work shifts, and each work shift shall have a regular starting time and quitting time. Schedules of work days and workweeks shall be posted on all department bulletin boards at all times. Employees shall be given reasonable notice of any change in these work schedules.
>
> Section 11-The City agrees to give the Union reasonable notice of any proposed change in scheduled work shift and an opportunity to discuss the proposed change. In the event of failure to agree on this proposed change, the City shall have the right to institute the change and the Union shall have the right to take the matter up as a grievance under the grievance procedure.
>
> Section 12-Work schedules shall include the workday, workweek and ward assignment. Said schedules shall be bid once per year. Bids shall be processed and implemented by October 1 of each year. Work schedules as defined herein shall be bid by seniority. Seniority for the purposes of these bids shall be defined as length of service in the bargaining unit. Employees may bid the same ward for up to four (4) years. After four (4) years an employee may not bid on that ward for at least one (1) year.

2. Typically, only one inspector is on call each week.

3. When a member of the public contacts the Mayor's Office of Constituent Services (Constituent Services) with a complaint about a possible violation of the state sanitary code, which in the winter often concerns an allegation that a landlord is failing to provide adequate heat, a representative from Constituent Services contacts an ISD manager. The ISD manager determines whether a housing inspector should be sent out to investigate and if so, notifies the on-call housing inspector, who will travel to the complainant's residence. If necessary, the housing inspector will issue a notice to the landlord stating that the landlord must resolve the problem within twenty-four hours or the City will undertake court proceedings.

4. Because housing inspectors, who are on call, must report to complainants' homes within one hour of being contacted by an ISD manager, housing inspectors cannot travel significant distances during the weeks that they are on call. It is also expected that they will not consume alcoholic beverages while they are on call.

formation request. On June 23, 2008, the City provided Local 6 with information via email. Local 6 responded via email on June 30, 2008 and identified certain information that it claimed that the City still had not provided. The City and Local 6 subsequently bargained over the issue on various dates, including June 23, 2008, July 21, 2008, and October 27, 2008.[5] At the October 27, 2008 bargaining session, the City declared impasse and announced that it was going to implement the requirement of a five-day workweek for employees who were on-call.

Local 6 subsequently held a meeting with its unit members on October 30, 2008. Monahan, Eric Burnett, another Local 6 business agent, and chief steward Evangeline Maxwell (Maxwell)[6] were present and informed the membership about what had taken place at the prior bargaining sessions between the City and Local 6, which included the City invoking impasse and stating that it intended to implement a five-day workweek for employees who were on-call. Unit members expressed their displeasure with the City's pronouncement and were concerned that accepting an on-call assignment would result in them working a five-day schedule. Various inspectors commented that a five day schedule would impact negatively with their second jobs, childcare arrangements, or educational programs. They asked whether the on-call assignment was voluntary, and Monahan stated that it was. They also asked for copies of the Agreement in order to review the language of Article XVII, Section 11.

Local 6 also informed its members about a settlement proposal that the City had made at the October 27, 2008 meeting.[7] The proposal was that the ISD would endorse a pending compensatory grade appeal (CGA)[8] in exchange for Local 6 agreeing to a five-day schedule for housing inspectors who were on-call.[9] Unit members held a vote, and rejected the proposal.[10]

On Thursday, November 6, 2008, Rhonda Yanovitch (Yanovitch), a payroll clerk at the ISD,[11] contacted the eight [sic] housing inspectors[12] whose names were on the on-call list[13] and offered each of them the opportunity to perform the on-call assignment for the period from Friday, November 7, 2008 to Friday, November 14, 2008. On that same date, Yanovitch informed Grace that all eight employees had declined the opportunity to work. On Friday, November 7, 2008, Grace and O'Donnell met individually with all of the housing inspectors who were on duty,[14] even housing inspectors whose names were not on the on-call list, and asked them if they would accept the on-call assignment for the next week.[15] None of the unit members[16] accepted the opportunity to work.[17] Certain employees cited other commitments, such as trips or family gatherings, while other employees did not give a reason. Some employees simply did not return Grace's telephone call. Major[18] informed Grace and O'Donnell that, "we decided as a group not to take it."

Also, on that same date, Paul Curran (Curran), Esq., labor counsel for the City, contacted Monahan, informed her that the City was contemplating the filing of a strike petition, and asked her to investigate whether any unit members would accept the on-call assignment. Monahan, in turn, contacted Maxwell, who was not at work that day. Maxwell then contacted O'Donnell and asked him if it would be permissible to hold a conference call at ISD headquarters with the approximately nine housing inspectors that were on duty. O'Donnell agreed, and at 4:30 PM that day, the nine housing inspectors gathered in the conference room and spoke via telephone with Maxwell. Maxwell asked whether any of the unit members would accept the on-call assignment for that week. All the housing inspectors declined with various employees shouting out different reasons including the short notice, family obligations, and out of town travel. Maxwell then notified Monahan that no unit member had agreed to accept the assignment,[19] and Monahan subsequently contacted Curran.

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5. Michael Grace (Grace), the ISD's director of human resources, testified that the parties also bargained on August 20, 2008. Conversely, Monahan testified that the parties did not engage in negotiations on that date. However, we need not reconcile the contradictory testimony on this point, because it is not material to our determination of whether Local 6 violated Section 9A of the Law.

6. Maxwell also is a housing inspector.

7. The City had requested that Local 6 submit this proposal to its membership.

8. Local 6 previously had filed a CGA on behalf of the housing inspectors alleging that they were performing similar duties to other inspectors at the ISD, who had higher rates of pay. The housing inspectors currently hold a job classification of R-H16A.

9. The City informed Local 6 that it could not guarantee that the City's Budget Office would approve the CGA, even with the ISD's endorsement.

10. Monahan subsequently informed the City's Office of Labor Relations that unit members had rejected the proposal.

11. Yanovitch typically contacted the housing inspectors each Thursday to offer them the opportunity to take the on-call assignment commencing the next day.

12. The housing inspectors on the on-call list were Al Major (Major), Terrance Yancey, Melvin Johnson, Julia Scott, Maxwell, Yolanda Thomas, and Angel Nazario.

13. The ISD had no written procedure for housing inspectors to add or remove their names from the on-call list. Instead, housing inspectors would verbally inform Steven O'Donnell (O'Donnell), an ISD assistant director, and/or Yanovitch to add or remove their names. Also, the ISD did not require unit members to work a minimum number of on-call assignments in order for their names to remain on the on-call list and did not discipline employees for refusing opportunities to perform on-call assignments. For instance, Maxwell had declined numerous on-call opportunities in the prior year, and accepted an on-call assignment only once.

14. Grace also telephoned the other housing inspectors who were not scheduled to work that day and either spoke with them or left messages offering them the opportunity to perform the on-call assignment.

15. Of the twenty-five housing inspectors, Grace and O'Donnell did not offer five employees the opportunity to perform the on-call assignment, because the City deemed them as ineligible for on-call assignments because of their probationary status, medical conditions, or status as an administrative inspector.

16. Grace characterized three of the housing inspectors that he had spoken with or left messages for as having never previously accepted opportunities to perform on-call assignments.

17. In the prior twenty years, every on-call assignment had been accepted voluntarily by a housing inspector.

18. Major does not hold a leadership position in Local 6.

19. Maxwell also declined the on-call assignment. She stated that she had decided not to accept any more on-call assignments after she had taken an on-call assignment the week of October 24, 2008.

On Friday, November 14, 2008, Grace and O'Donnell again contacted the twenty housing inspectors whom the City had deemed as eligible to accept on-call assignments (the twenty housing inspectors) to offer them the on-call assignment for the period from Friday, November 14, 2008 through Friday, November 21, 2008.[20] None agreed to take the assignment. Some simply declined and others cited various personal reasons. When O'Donnell offered Major the assignment, Major replied that, "you know we are not taking the pager."[21] Also, on November 14, 2008, Curran asked Monahan to look into whether a unit member would accept the assignment.[22] Monahan then contacted Maxwell at home, and asked her to reach out to unit members. Because Maxwell was not at work, she did not have telephone numbers available for all of the unit members. However, none of the unit members that she reached, which included all eight employees on the on-call list, would accept the on-call assignment.

On Wednesday, November 19, 2008, Grace again contacted or left messages for the twenty housing inspectors offering them the on-call assignment for the period from Friday, November 21, 2008 through Friday, November 28, 2008. No housing inspector accepted the assignment.

On Tuesday, November 25, 2008 and Wednesday, November 26, 2008, Dion Irish (Irish), an ISD assistant commissioner, spoke individually to the twenty housing inspectors and offered them the on-call assignment for the period from Friday, November 28, 2008 through Friday, December 5, 2008. None accepted the assignment, and Major told him that, "we're not taking that yet."

The City did not direct any housing inspector to accept the four above-referenced on-call assignments, nor did the City convert those on-call assignments to overtime assignments. Instead, three assistant directors at ISD, who are members of the Salaried Employees of North America's (SENA) bargaining unit, took over the on-call assignments on a rotating basis.

Opinion

Section 9A(a) of the Law prohibits public employees and employee organizations from engaging in, inducing, encouraging, or condoning any strike, work stoppage, slowdown or withholding of services. Section 9A(b) permits a public employer to file a petition to have the Board investigate alleged violations of Section 9A(a) of the Law "whenever a strike occurs or is about to occur." MGL c.150E, Section 9A(b). Section 1 of the Law defines a strike as:

> A public employee's refusal, in concerted action with others, to report for duty, or his [or her] willful absence or his wilful absence from his position, or his stoppage of work, or his [or her] abstinence in whole or in part from the performance of the duties of employment as established by an existing collective bargaining agreement or in a collective bargaining agreement expiring immediately preceding the alleged strike, or in the absence of any such agreement, by written personnel policies in effect at least one year prior to the strike; provided that nothing herein shall limit or impair the right of any public employee to express or communicate a complaint or opinion on any matter related to conditions of employment.

In prior cases, the Board has considered whether public employees were refusing to perform some portion of their assigned duties in violation of Section 9A(a) of the Law. *Town of Nahant*, 13 MLC 1041 (1986); *City of Newburyport*, 8 MLC 1373 (1981). To determine whether public employees are engaging in a strike or withholding of services, the Board considers: 1) whether the service is one that employees must perform as a condition of employment; 2) whether the service was in fact withheld or is about to be withheld; and 3) the party responsible for the withholding of the service. *Newton School Committee*, 9 MLC 1611, 1613 (1983).

In the present case, the City argues that because sufficient numbers of housing inspectors have historically performed on-call assignments, those on-call assignments have become services that those employees must perform as a condition of employment. "Duties of employment, ... include ... those practices ... which have been performed by employees as a group on a consistent basis over a sustained period of time." *Lenox School Committee*, 7 MLC 1761, 1775 (1980), *aff'd. sub nom. Lenox Education Association* v. *Labor Relations Commission*, 393 Mass. 276 (1984).

Upon review of the record, we agree that, in the past, the City has offered housing inspectors the opportunity to work weekly on-call assignments and, in the past, some but not all of the housing inspectors have voluntarily accepted those assignments. However, this does not establish that on-call assignments are an implied condition of employment for the housing inspectors, because the parties have negotiated a contract that confers upon employees the right to decline to accept on-call assignments. Specifically, Article XVII, Section 11 of the Agreement provides that employees' acceptance of on-call assignments is purely voluntary. Having agreed to such contractual language, the City cannot now claim that the performance of on-call assignments is a mandatory duty of employment simply based upon the number of employees who agreed to accept in the past. *See Newton School Committee*, 9 MLC at 1614 (employees free to decline voluntary work); *City of Newburyport*, 8 MLC at 1374 (when an employer and a union have negotiated contractual language making paid details voluntary, a longstanding practice of police officers accepting such details does not establish an implied condition of employment); and *City of Beverly*, 3 MLC 1229, 1231 (1976) (where the collective bargaining agreement between the employer and the union deemed overtime as voluntary, Board held that no strike took place when police officers subsequently refused overtime); *cf. City of Newton*, 13 MLC 1462, 1466 (1987) (performance of overtime is not a mandatory duty of employment when the employer had es-

20. Grace left telephone messages for about half of the inspectors, and certain of those inspectors, including Maxwell, did not respond to his messages.

21. When housing inspectors are on call, they carry a pager as well as a Nextel cellular phone, but the cellular phone has replaced the pager as the primary means of communication.

22. Curran and Monahan also scheduled a meeting for November 21, 2008 to discuss the matter, but Monahan subsequently cancelled the meeting because of a scheduling conflict.

tablished a practice that employees could decline to accept offered overtime).

Thus, having determined that the performance of on-call assignments was not a condition of employment for the housing inspectors, we conclude that their conduct in declining to accept such assignments was not a strike, slowdown or withholding of services within the meaning of Section 9A. Because we conclude that the housing inspectors' actions did not constitute a strike, Local 6 accordingly did not induce, condone or encourage a strike. Therefore, we dismiss the petition.

* * * * * *

In the Matter of CITY OF BOSTON

and

BOSTON POLICE PATROLMEN'S ASSOCIATION, IUPA, LOCAL 16807, AFL-CIO

Case No. MUP-04-4050

67.3 furnishing information
82.122 expenses, counsel fees
92.45 motion to re-open

December 10, 2008
Marjorie F. Wittner, Chair
Elizabeth Neumeier, Board Member

Stephen B. Sutliff, Esq.	*Representing the City of Boston*
Amy Laura Davidson, Esq.	*Representing the Boston Police Patrolmen's Association, IUPA Local 16807, AFL-CIO*

DECISION[1]

Statement of the Case

On February 14, 2004, the Boston Police Patrolmen's Association, IUPA Local 16807, AFL-CIO (Association, Union, or BPPA) filed a charge with the former Labor Relations Commission (Commission) alleging that the City of Boston (City) had violated Sections 10(a)(1) and 10(a)(5) of MGL c.150E (the Law). Following an investigation, the former Commission issued a complaint on September 8, 2004, alleging that the City had violated Sections 10(a)(5) and, derivatively, 10(a)(1) of the Law by not providing in a timely manner relevant information reasonably necessary for the Association to execute its duties as collective bargaining representative. The City filed its answer to the complaint on December 3, 2004.

On May 3 and 4, 2005, a duly designated Board agent, Victor Forberger, Esq. (Hearing Officer), conducted a hearing at which all parties had the opportunity to be heard, to examine witnesses, and to introduce evidence. On November 18, 2005, the Association and the City filed their post-hearing briefs.

On October 13, 2006, the Hearing Officer issued Recommended Findings of Fact. The Association filed challenges on December 14, 2006, the City filed challenges on December 26, 2006, and the Association filed opposition to the City's challenges on January 5, 2007. In light of the challenges filed by the parties, we have modified the Hearing Officer's Recommended Findings of Fact where appropriate and summarize the relevant portions below.

Motion to Reopen Hearing

As a preliminary matter, we address the City's motion to reopen the hearing. On December 15, 2006, the City moved to reopen the hearing and enter a transcript of the hearing in Case No. MUP-02-3349 and a fixed copy of an exhibit to correct testimony in the instant matter about who requested a postponement in Case No. MUP-02-3349 and to rectify the impression that the documents in an exhibit for Case No. MUP-02-3349 were in no apparent order. The Union filed its opposition to this motion on January 16, 2007.

Section 13.14 of the former Commission's regulations, 456 CMR 13.14, authorizes reopening records "prior to the issuance of a final decision" in a case. However, absent extraordinary circumstances, the Board will not reopen a record. *City of Haverhill*, 17 MLC 1215, 1218 (1990). The Board has previously determined that to do otherwise jeopardizes the finality of the Board's administrative proceedings and wastes the Division's limited resources. *Boston School Committee*, 17 MLC 1118, 1121 (1990); *Town of Wayland*, 5 MLC 1738, 1740 (1979). Evidence that a party seeks to include in the record after the close of the hearing generally must be newly discovered evidence which was in existence at the time of the hearing but of which the moving party was excusably ignorant, despite the exercise of reasonable diligence. *Boston City Hospital*, 11 MLC 1065, 1075 (1984) (citations omitted). A transcript of a prior proceeding or an exhibit from a prior proceeding does not qualify as newly discovered evidence, and so, for these reasons, and the general principles set forth above, we deny the City's motion to reopen the record to admit these documents.

Findings of Fact[2]

The following facts are derived from the testimonial and documentary evidence introduced during the hearing as well as from the parties' stipulations.

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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. All references to the Division or the Board include the former Commission.

2. The Board's jurisdiction is uncontested.