Conclusion

For the reasons stated above, I conclude that the Union did not violate Section 10(b)(1) of the Law, and I dismiss the complaint of prohibited practice.

APPEAL RIGHTS

The parties are advised of their right, pursuant to MGL Chapter 150E, Section 11 and 456 CMR 13.02(1)(j), to request a review of this decision by the Commonwealth Employment Relations Board by filing a Notice of Appeal with the Executive Secretary of the Division of Labor Relations within ten days after receiving notice of this decision. If a Notice of Appeal is not filed within ten days, this decision shall become final and binding on the parties.

* * * * * *

In the Matter of MASSACHUSETTS PORT AUTHORITY

and

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 810

Case No. UP-04-2669

54.51154	*psychological testing*
54.58	*work assignments and conditions*
67.14	*management rights*
67.15	*union waiver of bargaining rights*
67.8	*unilateral change by employer*
92.45	*motion to re-open*

June 30, 2009[1]
Elizabeth Neumeier, Member
Harris Freeman, Member

Philip G. Boyle, Esq. *James M. Pender, Esq.*	*Representing the Massachusetts Port Authority*
Alan H. Shapiro, Esq.	*Representing the International Longshoremen's Association, Local 810*

DECISION[2]

Statement of the Case

The International Longshoremen's Association, Local 810 (Union) filed a charge of prohibited practice with the former Labor Relations Commission (Commission) on August 17, 2004, alleging that the Massachusetts Port Authority (MassPort) had engaged in prohibited practices within the meaning of Section 4(5) and, derivatively, Section 4(1) of MGL c. 150A (the Law). Following an investigation, the former Commission issued a two-count complaint of prohibited practice on April 12, 2006. The complaint alleged that MassPort had violated Section 4(5) and, derivatively, Section 4(1) of the Law by: 1) ordering Port Officer P.J. (P.J.)[3] to undergo a psychological evaluation as part of a fitness-for-duty evaluation; and 2) changing P.J.'s work schedule, without giving the Union prior notice and an opportunity to bargain to resolution or impasse. The former Commission dismissed the Union's other allegations that MassPort had violated Section 4(5) of the Law. The Union did not file a request for reconsideration of the dismissal pursuant to 456 CMR 15.04(3). The former Commission also denied MassPort's request to defer the charge to arbitration on April 12, 2006. On April 21, 2006, MassPort filed its answer to the complaint.

1. The Commonwealth Employment Relations Board Chair, Marjorie F. Wittner, was recused from this case.

2. 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 Board include the former Labor Relations Commission.

3. We have used only the initials of the port officer to protect his privacy.

On August 1 and 2, 2006, Marjorie F. Wittner (Hearing Officer) conducted a hearing at which both parties had an opportunity to be heard, to examine witnesses, and to introduce evidence. Following the hearing, the Union and MassPort filed their post-hearing briefs on September 26, 2006 and September 28, 2006, respectively. The Hearing Officer issued Recommended Findings of Fact on January 5, 2007. The Union and MassPort filed challenges to the findings on February 9, 2007. The Union and MassPort respectively filed responses to each other's challenges on February 22 and February 23, 2007.

Motion to Reopen the Record

On October 16, 2007, MassPort filed a motion to reopen the hearing to submit additional evidence concerning return to work psychological examinations pursuant to Rule 13.14 of the former Commission's rules and regulations.[4] The Union did not oppose the motion. For the reasons set forth below, we deny the motion.

Generally, the Board will allow a motion to reopen the record to take additional evidence when the proffered evidence is "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." *Town of Lexington*, 22 MLC 1676, 1677, n.1 (1996) (citing *Boston City Hospital*, 11 MLC 1065, 1075 (1984)); *see also City of Worcester*, 5 MLC 1397, 1398 (1978). One of the underlying rationales for this general rule is to promote finality in Board proceedings.

In this case, MassPort seeks to reopen the record to allow the introduction of three documents that purport to show that, in 1998, MassPort unilaterally refused to allow a port officer to return to work until he submitted a letter from his psychiatrist attesting to his fitness for duty. MassPort argues that these documents are highly probative and possibly determinative of the issue of whether it unilaterally changed a pre-existing condition of employment by ordering P.J. to undergo a psychological examination as part of a fitness for duty evaluation and that MassPort would be unduly prejudiced if the Board were to exclude these documents.

To explain why it did not introduce these documents at hearing, MassPort provides the affidavit of Director of Maritime and Bridge Security Joseph Lawless (Lawless). Lawless, who did not testify at the hearing, asserts that he "most likely" did not recall the 1998 incident at the time of the hearing because of the lapse of time and because he was not directly involved with the personnel proceedings at that point.[5] MassPort has not employed the individual who would have recalled the matter since 2001. As further explanation for MassPort's failure to produce these documents before the close of the record, Lawless states that the Office of Public Safety has moved several times in the past five years, thereby making it difficult for him to research whether MassPort had previously required fitness for duty evaluations for port officers. Lawless states that the three letters were "recently discovered while personnel records were being organized in their current location."

Although evidence that MassPort may have required one other port officer to undergo fitness for duty examinations may have some relevance to this proceeding, the Board's decision to reopen a hearing is not strictly a function of the degree of relevance of the evidence, but of the factors set forth above. Here, we are not persuaded that MassPort exercised a sufficient level of reasonable diligence in finding the three letters to justify reopening the record in this case. The charge in this case was filed in August of 2004 and the former Commission issued a complaint on April 12, 2006. By the time this matter went to hearing in August of 2006, MassPort had had over two years to locate the documents it now seeks to submit. Even if MassPort chose not to look for the documents when the charge was first filed, it still had nearly four months between the time the complaint issued and the first day of hearing to do so. MassPort asserts that, because its offices moved several times, its personnel records were not "readily available" at the time of the hearing. However, it fails to explain what, if any, efforts were made to search for them before the hearing. Even now, it appears as if the documents were discovered by chance in their new location, and not because of any deliberate, organized effort to find them. In our opinion, this does not amount to excusable ignorance, especially where MassPort has presented no evidence that it had ever lost custody or control of the documents at issue. To admit this evidence under these circumstances would erode the finality of administrative proceeding. We therefore decline to admit these documents.

After reviewing MassPort's challenges and the record, we adopt the Hearing Officer's Recommended Findings of Fact, as modified where noted, and summarize the relevant portions below.

Findings of Fact[6]

The Union is the exclusive collective bargaining representative for the officers, sergeants and lieutenants employed by MassPort who are licensed to carry firearms. The Union and MassPort are parties to a collective bargaining agreement that was effective by its terms from February 1, 1997 until January 31, 2002 (Agreement). Article III of the Agreement, "Management Rights," states in pertinent part:

> The Authority, subject to the provisions of this Agreement and applicable law, shall have the control of its operations and shall not be interfered with by the Union in the operations or requirements of its facilities. It is understood that nothing herein shall affect the right of the Authority to direct its working forces, and to determine the number of employees required on particular tasks, including the right to issue rules and regulations and arrange the hours and place employ-

4. Former Commission Rule 456 CMR. 13.14 states:

> The Commission or hearing officer may reopen the hearing and receive further evidence or otherwise dispose of the matter prior to the issuance of a final decision. The Commission or hearing officer shall notify the parties of the time and place of hearings reopened under this section.

5. Lawless asserts that he became involved several months later when he discharged the port officer.

6. The Board's jurisdiction is uncontested.

ees shall work for the Authority in order to meet the demands of the business and effect efficient operations.

Article IV, Section 7 of the Agreement, *Work Shift-Bid Procedures*, allows employees to bid for vacancies in work shifts. Under this provision, employees may bid for placement into work shifts in their employed classifications at their current facility at any time. Where qualifications are equal, seniority governs the award of the bid. If there is no vacancy at the time of the bid, it is held in abeyance for three months. At the conclusion of the three-month period, the bid is awarded to the most senior qualified bidder.

MassPort Facilities

Bargaining unit members perform policy and security functions for four facilities operated by MassPort. Three of these facilities are located in South Boston: Conley Terminal, which handles containers, the Black Falcon Cruise Terminal and the Seaport District. The fourth facility, Piers Park, is a recreational facility located in East Boston.[7]

P.J.

P.J., a port officer since approximately 1986, is a member of the Union's bargaining unit. At the time of the hearing, P.J. was serving his third year as a Union shop steward. Until January 26, 2004, P.J. worked at Conley Terminal, where he was responsible for the day-to-day security operations. Until January 26, 2004, P.J. worked Monday, Tuesday and Wednesday from 3:00 - 11:00 p.m., Friday night from 11:00 p.m. until 7:00 a.m. Saturday, and Saturday night from 11:00 p.m. until 7:00 a.m. Sunday. P.J. and his predecessor on this shift thought of it as the "money shift" because of the many overtime opportunities it afforded, particularly during the summer months.[8]

MassPort's Decision to Suspend P.J.

In late December of 2003 and January of 2004, Union President and Port Officer Brian McDonough (McDonough)[9] and three other port officers, including Union Vice President Michael Riley (Riley), informed MassPort's Director of Maritime and Bridge Security Joseph Lawless (Lawless) that they believed that P.J. posed a physical threat to their personal safety.[10]

MassPort did not act on this information immediately, believing that it involved internal Union matters. However, in January of 2004, after Lawless was advised that P.J. had made a threat against a particular port officer, Lawless asked all of the officers who had previously complained to him about P.J. to put their concerns in writing; the complaining officers did so.[11] Lawless also informed a number of upper-level managers of these concerns, including Director of Labor Relations Patricia Day (Day). Consequently, on January 26, 2004, MassPort convened a meeting of the Threat Assessment Team pursuant to its Policy Against Violence in the Workplace (Policy), which has been in effect since at least 1999.[12]

The Threat Assessment Team is the management team that handles incidents of violence in the workplace. Under Section 2 of the Policy, the Threat Assessment Team is comprised of the Director of Labor Relations, the Director of Human Resources, the Director of Public Safety, and the Chief Legal Counsel, or their designees.[13] The Policy requires the Threat Assessment Team to convene within twenty-four hours after a reported threat to determine: 1) whether the situation warrants further monitoring; 2) whether the employee should be suspended; and/or 3) whether to start an internal investigation. If the Threat Assessment Team decides to conduct an investigation, Section (e)(5) of the Policy requires the investigator to meet with "all relevant witnesses" and to obtain any documents and information regarding the threat, including "whether the individual has prior incidents of threats or violence" and "any other information which will help management ensure that the threat will not be carried out or that violent conduct will be repeated." Under Section (c)(1) of the Policy, "Prohibited Conduct," at the completion of the investigation, the Director of Human Resources or the Director of Labor Relations, in consultation with other members of the Threat Assessment Team, may impose further discipline, up to and including termination. Under Section (e)(6) of the Policy, if, at the conclusion of the investigation, the Threat Assessment Team decides not to terminate the violent employee, it may recommend counseling or work reassignment. Under Section e(7) of the Policy, if the Threat Assessment Team determines that termination is not the appropriate course of action, "[it] will develop a plan to continue to monitor and control the situation in addition to whatever remedial action is decided upon."[14] The Policy does not refer to fitness-for-duty evaluations.

The January 26, 2004 Threat Assessment Team meeting was attended by Director of Maritime Operations Michael Leone (Leone), Director of Human Resource Marie Bowen (Bowen), Director of Corporate Security Dennis Treece (Treece), MassPort attorney David Mackey (representing the Chief Counsel's office), Day and Lawless.[15] During the course of the meeting, the Threat Assessment Team collectively determined that P.J. posed an im-

7. This finding, which is supported by the record, was amended at MassPort's request.

8. In April of 2004, the Union changed the overtime list, which it controlled, from a site-specific list to a single list for all port officers. The goal of this change was to even out overtime distribution, regardless of port officers' location or shift. This footnote and its accompanying text were added in response to a challenge by MassPort, which we have found to be supported by the record.

9. McDonough was elected Union president in December of 2003 and served for approximately two years.

10. This finding, which is supported by the record, has been modified by adding the word "physical."

11. This finding has been modified in response to a challenge by MassPort.

12. The Policy appears as Section 8.01 of MassPort's Human Resources Policies and Procedures Manual. The record is silent as to whether the Policy was negotiated, but McDonough received a copy of it in the mail every year. This footnote and the accompanying text were modified in response to a challenge by MassPort, which we have found to be supported by the record evidence.

13. This finding was modified in response to a challenge by MassPort.

14. This finding was added in response to a challenge by MassPort, which is supported by the record.

15. Lawless participated in the meeting via speakerphone. This finding has been modified to reflect that Attorney Mackey represented the Office of the Chief Legal Counsel.

minent danger to the workplace and decided to suspend him with pay, pending completion of an investigation.

Later that day, Lawless and Leone informed P.J. that he had been suspended due to violence in the workplace.[16] They asked P.J. to turn over his badge, gun, lock and key, and banned him from entering MassPort property. After he was suspended, P.J. called McDonough to tell him what had happened. McDonough then called Union attorney John Burke (Burke), who began handling the matter on behalf of the Union.

About three days later, Lawless, who along with Day and Leone, was a member of the Threat Assessment Team's investigation team, called P.J. to discuss the situation. P.J. told Lawless that he would have to speak to his personal attorney before speaking with him. Neither Lawless nor any other member of the Threat Assessment Team ever interviewed P.J. regarding the allegations that had been made against him.

Day, Leone, Bowen, Treece and Lawless met several times in the week after P.J.'s suspension. During one of those meetings, Day suggested that P.J. undergo a fitness-for-duty evaluation as part of MassPort's investigation into the matter.[17] The Threat Assessment Team agreed with this suggestion.[18] MassPort did not consult with or give notice to the Union before making this decision. There is no evidence that prior to P.J.'s evaluation, MassPort had previously subjected a port officer to a fitness for duty evaluation.[19]

On a number of occasions between January 26, 2004 and February 17, 2004, Day contacted licensed psychologist Dr. Guy Seymour (Dr. Seymour). Day explained to Dr. Seymour that an armed port officer[20] had been suspended because he had made threats of violence and that MassPort needed to determine whether this officer was fit to return to work. Day could not recall whether she provided Dr. Seymour with copies of the complaining port officers' written statements, but did not rule out the possibility that she had. Dr. Seymour agreed to conduct the evaluation.[21]

On February 17, 2004, Leone wrote a letter to P.J. stating:

> You are hereby directed to report for your regularly scheduled shift on Monday, February 23, 2004 at 3:00 p.m. You are to report to the office of the Director of Maritime and Bridge Security at Fish Pier West for a fitness for duty evaluation, which is being conducted as part of the Authority's on-going investigation. Your failure to report as directed will be considered a violation of a direct order and will constitute grounds for discharge.

MassPort did not consult with or give notice to the Union before sending this letter. On February 20, 2004, Burke called Day to discuss the letter.[22] He told Day that MassPort could not require P.J. to undergo a fitness-for-duty evaluation without first meeting with the Union. Day disagreed that this was a mandatory subject of bargaining or that there was a need to bargain, given the facts of the case. However, reserving management's rights to act unilaterally on this issue, she agreed to meet with the Union. Burke confirmed their conversation later that day in a letter stating in pertinent part:

> I have been informed by Patricia Day, Director of Labor Relations that Mr. P.J. . . . will be required to submit to a drug and alcohol screen and a psychological examination.
>
> As I understand the facts and history of this unit, management has not required such evaluations of the members of this Union in similar or other circumstances. Further, the standards and methods by which an employer determines whether individuals are fit for duty are mandatory subjects of bargaining.
>
> As such, this letter is to serve as Local 810's demand to bargain over the issues related to the above-stated evaluations.

Burke and Day spoke again on February 23, 2004. They agreed to postpone P.J.'s evaluation and discussed several possible dates to meet. Burke confirmed this conversation in writing that same day, stating that the evaluation would be postponed pending "negotiations." McDonough called Day back a few days later and the two of them scheduled the March 1 meeting described below.[23]

The Meeting of March 1, 2004

Day, Lawless and Leone met with McDonough and Riley on March 1, 2004.[24] Day began the meeting by announcing that it was not a bargaining session, but rather a courtesy meeting, and that management was reserving all rights with respect to its bargaining obligations, including its rights under the management rights clause of the Agreement. Notwithstanding this statement, the Union presented a list of ten proposals that Burke had drafted regarding fitness-for-duty evaluations. The management team broke for 30 to 45 minutes[25] to caucus over the proposals, and then returned to discuss them one-by-one with the Union representatives.[26]

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16. This punctuation in this finding has been modified in response to a challenge by MassPort.

17. Day made this recommendation based on her past experience with police officers at several large transit authorities, including the Massachusetts Bay Transportation Authority (MBTA).

18. Day was unable to recall whether this decision had been made at a formal meeting of the Threat Assessment Team or whether she spoke with team members individually.

19. McDonough testified that he could not recall MassPort requiring any port officer to undergo an exam in the five years he had worked there. He also testified that he asked Riley, who had worked there for 15 years, and Riley similarly could not recall one. At hearing, MassPort presented no evidence that it had previously ordered any member of the Union's bargaining unit to submit to a fitness for duty examination. This footnote and its accompanying text have been added in response to a challenge by the Union, which was supported by the record evidence.

20. The record does not reflect whether Day specifically referred to P.J. by name during her discussions with Dr. Seymour.

21. A finding regarding Dr. Seymour's status has been omitted at MassPort's request.

22. The record does not reflect how Burke learned about this letter. The Union is not copied at the bottom of the letter. However, based on Burke's quick response, it is reasonable to assume that P.J. showed Burke a copy of the letter or that Leone sent him a blind copy.

23. This finding, which is supported by the record, has been modified at MassPort's request.

24. Burke was not present at this meeting due to a scheduling conflict. This finding was modified in response to a request by the Union, which was supported by the record evidence.

25., 26. [See next page.]

The Union's first proposal stated:

> MassPort shall not require a Port Officer to undergo any fitness for duty examination in the absence of reasonable suspicion that said Port officer is unfit for duty. Reasonable suspicion shall mean that Management has a credible basis for requiring any Port Officer to submit to such an examination including but not limited to credible information that said Port Officer is suffering from a psychiatric condition affecting his fitness for duty.

According to Day's notes from this meeting, MassPort disagreed with the Union's definition of reasonable suspicion and changed the proposal to allow MassPort to require an evaluation when reasonable suspicion exists as to whether the employee can perform the duties and responsibilities of his or her position. The Union did not proffer a counterproposal to these changes.

The Union's second proposal sought evaluation by a "mutually acceptable board-certified psychiatrist." MassPort rejected the term "mutually agreeable," reserving to itself the right to select the psychiatrist. MassPort also sought to change the description of the evaluator to "Board certified physicians and/or psychiatrist." Day informed the Union that she had already selected Dr. Seymour to evaluate P.J.[27] The Union asked some questions about Dr. Seymour and Day agreed to provide the Union with a copy of his resume.[28] Other than asking for a copy of Dr. Seymour's resume, the Union did not object to Dr. Seymour or make a counterproposal to MassPort's proposed changes.

The Union's third proposal states:

> Management shall initiate a fitness-for-duty examination by written notification to the Port Officer and the Union President requesting the appointment of a mutually acceptable psychiatrist and by setting forth, in detail, the basis for the reasonable suspicion that said Port Officer may be unfit for duty.

MassPort sought to modify this proposal by substituting the word "evaluation" for "examination" and the word "employee" for "Port Officer." Day's notes also reflect that she crossed out the words "in detail" and "mutually acceptable psychiatrist." The record does not reflect what discussion, if any, the parties had regarding this proposal. The Union did not make a counterproposal.

The fourth proposal states "all evaluations shall be tape-recorded and shall be maintained in the possession of the Port Officer or his designee and the director of Labor Relations." Day rejected this proposal because she believed it would be inappropriate to do so, given the psychological component of the fitness for duty evaluation.[29]

The fifth proposal required the examination to take place at a mutually agreeable time, at the offices of the "agreed-upon examiner." Day's notes reflect that MassPort sought to substitute the term "earliest convenient" for "mutually agreeable" and substituted "identified" for "agreed-upon." The Union did not make a counterproposal.

The sixth proposal states that the "examiner shall not, in any way, interrogate the subject Port Officer concerning the facts or circumstances related to any investigation." MassPort rejected this proposal, believing that the evaluator needed to understand the surrounding circumstances in order to conduct an effective evaluation of whether the individual had the potential to be violent.[30]

The Union's seventh proposal states:

> Neither the Union nor Management shall have contact with the mutually agreed upon examiner beyond that related to the scheduling of the examination unless other information, written or oral, is mutually agreed upon by the Union and Management to be provided to the examiner.

Day rejected this proposal, explaining, as she had with respect to the sixth proposal, that she needed to contact the evaluator to make clear what MassPort wanted him to do.[31] The record does not re-

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25. McDonough testified on direct examination that the caucus lasted between one to one and a half hours. However, during cross-examination, MassPort counsel showed him an affidavit that McDonough had given in September of 2004, in which he stated that the meeting lasted approximately one-half hour. Day testified that the meeting lasted between one-half hour and forty-five minutes. The Hearing Officer credited Day's testimony, because Day recalled the March 1, 2004 meeting in far greater detail than McDonough and because it is consistent with McDonough's affidavit, which was given much closer in time to the actual event than his hearing testimony.

26. McDonough had no clear recollection of the content of any discussions during this meeting, other than Day's insistence that: the meeting was not negotiations; MassPort had a right to have an officer undergo a fitness-for-duty evaluation where probable cause exists; and MassPort alone would choose the evaluator. In this regard, his recollection is consistent with Day's. With respect to particular discussion over the Union's numbered proposals, however, Day's recollection, particularly when refreshed by her contemporaneous notes, was much clearer than McDonough's. As a result, the Hearing Officer largely relied on Day's testimony regarding specific proposals.

27. McDonough testified that Dr. Seymour was not discussed at this meeting. However, the Hearing Officer credited Day's testimony on this point because: (a) as discussed in notes 24 and 25, above, her recollection of this meeting was much sharper than McDonough's; and (b) McDonough admitted knowing that P.J. was going to see Dr. Seymour when the evaluation was rescheduled in March of 2004, even though none of the rescheduling documents reference Dr. Seymour by name. It is therefore plausible that McDonough first learned about Dr. Seymour at this meeting.

28. Although Day believed that she had provided the Union with a copy of Seymour's resume, there is no evidence reflecting that she did. This finding has been modified in response to one of MassPort's challenges. Day did not learn that Dr. Seymour was a psychologist, not a psychiatrist, until this fact was pointed out to her during cross-examination.

29. This finding has been modified to reflect MassPort's reason for rejecting this proposal. Day put an "x" through the numbers of the proposals that MassPort disagreed with. There are x's on proposals 4, 6, 7, 8, 9 and 10.

30. Day believed that McDonough and Riley, as the complaining individuals, understood this concern. As noted above, however, McDonough had no clear recollection of any discussion on this point and Day's notes do not reflect agreement on this point. In the absence of objective evidence of agreement, the Hearing Officer gave no weight to Day's subjective belief that the Union understood MassPort's concerns. The Union did not, however, make a counterproposal.

31. Day testified that Riley and McDonough understood these concerns. In particular, Day recalled that Riley was concerned with P.J. returning at all. Because McDonough told Day that he did not want P.J. to return to Conley because it would be a hostile environment (see text, *infra*), it is plausible that Riley and McDonough expressed sympathy with MassPort's stated reasons for conducting the evaluation. However, even assuming this to be the case, the Hearing Officer did not find the

flect that Day told the Union that she had already contacted Dr. Seymour and provided him with this information.

The eighth proposal called for examinations to occur "*only* following the conclusion of any investigation and after the issuance of [an] investigatory determination by MassPort." (Emphasis in original.) There was much discussion over this proposal; MassPort ultimately rejected it asserting it conflicted with its right to order an evaluation based upon reasonable suspicion. MassPort also stressed that it was most concerned with determining whether it was safe for P.J. to return to work.[32] The Union did not make a counterproposal.

The ninth proposal states:

> The results of any examination shall be provided to the subject Port Officer or his designee and the Director of Labor Relations and/or the Department Head only and shall not be divulged to any other person without the express written consent of the subject Port Officer.

Day's notes reflect that MassPort believed that the report should first be issued to her or to the Department Head and that further dissemination would have to be on a case-by-case basis. The Union did not make a counterproposal.[33]

The tenth proposal states:

> In the event that a Port Officer fails an examination, the Port Officer shall be allowed to utilize the MassPort Employee Assistance Program to the extent appropriate and shall be allowed to petition MassPort for reinstatement to his/her position pending a second fitness-for-duty examination conducted in accordance with these rules.

Day rejected this proposal, stating that it was premature to determine what would happen with respect to P.J. and that much depended on the results of Dr. Seymour's evaluation. The meeting ended cordially, with Day believing that agreement had been reached on some of the proposals. McDonough did not have any further meetings with MassPort after the March 1, 2004 meeting, nor did any Union representative ever request a subsequent meeting with MassPort to discuss P.J.'s fitness for duty assessment.[34] Moreover, at no point after this meeting did the Union ask for or initiate further discussions, or make any counterproposals, orally, or in writing. McDonough believed that it would be futile to do so based on MassPort's declaration that the March 1 meeting did not constitute "negotiations" and what he perceived as MassPort's rejection of all of the Union's proposals.

On March 17, 2004, Lawless wrote a letter to P.J. directing him, under penalty of discharge, to report to his regularly scheduled shift on Monday, March 22, 2004 for a fitness-for-duty evaluation. P.J. reported as scheduled and Dr. Seymour conducted the evaluation.

The Evaluation Report

On May 4, 2004, Dr. Seymour issued a report determining that P.J. did not pose a violent threat to the workplace as long as he abided by three conditions connected with his treatment; specifically, 1) continuing in psychotherapy with his present counselor and providing MassPort with biweekly documentation verifying his participation until such time as he was released by his counselor; 2) continuing with medications prescribed by treating physicians and providing proof he was taking his medications and the effect the medications may have on his ability to perform his duties; and 3) participating in an interview/evaluation process with a local counseling group once back to work.

Based on Dr. Seymour's evaluation, Day, Lawless and Leone decided not to take any disciplinary action against P.J. and allowed him to return to work, provided he comply with the three conditions set forth above. They communicated this conclusion to the Union. Shortly after receiving this information, McDonough told Lawless that he did not want P.J. to return to Conley because P.J. would be returning to a "hostile" environment.[35] McDonough made a similar statement to Day in July of 2004, about one week before P.J. was scheduled to return to work. Day told McDonough that, under the Agreement, MassPort had no right to keep him from Conley.

Shortly after P.J. was cleared to return to work, Burke told Day that P.J. was not willing to comply with the conditions that MassPort had imposed on his return. Burke also wrote a series of letters to Day in May of 2004 asking her to send him and P.J. a copy of Dr. Seymour's evaluation pursuant to MGL c. 149, §19A.[36] On May 20, 2004, P.J. wrote to Day requesting his own copy of Dr. Seymour's evaluation pursuant to MGL c. 149, §19A.

On May 21, 2004, Burke, P.J., and Union Representative Terry McCrevan met with Lawless and Leone to discuss P.J.'s return to work. According to a May 24, 2004 letter that Burke wrote to Day, during this meeting, Leone proposed forwarding a settlement agreement to settle all outstanding issues surrounding P.J.'s suspension and return to work. Burke requested a copy of the draft settlement agreement and reiterated his request for a copy of Dr. Seymour's report.

Union's general accord with the safety issues raised by the Employer to be tantamount to an agreement to drop the proposal.

32. Day testified that Riley and McDonough accepted that MassPort's main goal at that time was to determine whether it was safe for P.J. to return to work, but the record does not otherwise indicate that the Union decided to drop its original proposal.

33. On direct examination, Day testified that MassPort agreed to the ninth proposal and just "wordsmithed" it a bit. However, on cross-examination, Day testified that she could not recall the outcome of the discussion regarding whether to give the report to the employee. Based on Day's testimony on cross-examination and MassPort's apparent reluctance to provide P.J. or Burke with a copy of Dr. Seymour's evaluation, despite repeated requests (see text, *infra*), the Hearing Officer did not credit Day's testimony that MassPort agreed to the proposal.

34. The Board has added this finding in response to a request by the Union, which was supported by the record evidence.

35. McDonough testified that he was not acting in his official Union capacity when he made this statement. He did not, however, make this clear to Lawless.

36. MGL c. 149, § 19A states:

> Any employer requiring a physical examination of an employee shall, upon request, cause said person to be furnished with a copy of the medical report following the said examination.

Day provided Burke with a copy of the draft settlement agreement on May 24, 2004.[37] The terms of the settlement included P.J. returning to work under the three conditions set by Dr. Seymour. It also called for the parties to: 1) make best efforts to relocate P.J. to return to a site other than Conley terminal; and 2) maintain the confidentiality of P.J.'s evaluation. The settlement also called for the Union to withdraw with prejudice all grievances relating to P.J.'s suspension and all future grievances or causes of action arising out of this incident.[38]

Throughout this period, McDonough had been in contact with International Longshoremen's Association Vice President Bernie O'Donnell (O'Donnell), who was concurrently working with MassPort officials to return P.J. to work. In or around June of 2004, O'Donnell called P.J. and asked if he would be willing to transfer to one of MassPort's East Boston facilities as part of a "deal" to return to work. At first, P.J. considered accepting the transfer because he was anxious to return to work. However, after discussing the matter with his wife, P.J. told O'Donnell that he wanted to return "whole"—that accepting a transfer would be like an admission of guilt. P.J. spoke only once with O'Donnell. Some time later, Leone told Day that O'Donnell had told him that it would be acceptable for P.J. to return to East Boston.[39]

By July of 2004, neither P.J. nor the Union had signed the proposed settlement agreement. As a result, on July 9, 2004, Lawless sent a letter to P.J. ordering him to report to work on July 16, 2004, at which time he would be advised of his work hours and location. The letter reiterates the three conditions recommended by Dr. Seymour. The concluding sentence of the letter advises P.J. that his failure to comply with any of the directives contained therein would constitute a refusal to comply with a direct order and would result in his discharge.

Return to Work

P.J. reported to work on July 16, 2004, at which time he was told by Lawless and Leone that he would be working at Piers Park, Wednesday through Sunday, from 3:00 p.m.-11:00 p.m.. This schedule, which was different than the one he had worked at Conley, decreased the number of overtime shifts that had been available to him prior to his suspension and reduced the amount of time that he could spend at home with his family, particularly on the weekends. McDonough knew before July 16 that P.J. would not be returning to Conley, but MassPort did not inform him that P.J.'s hours were also going to change.[40]

P.J. complied with the conditions imposed upon his return to work, but filed two grievances once he was back. The first grievance related to his transfer to East Boston on a different shift, which P.J. claimed was a violation of the bidding, seniority, overtime, and non-discrimination provisions of the Agreement. MassPort denied the grievance on September 1, 2004 and P.J. appealed it to the next step. The Union withdrew the grievance on July 14, 2005.[41] P.J. also filed a grievance over the three conditions imposed on his return to work. The record does not reflect the content or disposition of the grievance.

About five or six months after he returned to work, P.J. bid into what he considered a better shift at Piers Park. Two or three months later, he bid back to Conley, where he was working at the time of hearing.

Opinion

An employer violates Section 4(5) and, derivatively, Section 4(1) of the Law when it unilaterally changes a condition of employment that involves a mandatory subject of bargaining. *Commonwealth of Massachusetts*, 27 MLC 11, 13 (2001), *Massachusetts Port Authority*, 26 MLC 100, 101 (2000); *Woods Hole, Martha's Vineyard and Nantucket Steamship Authority*, 12 MLC 1531, 1555 (1986). The duty to bargain extends to conditions of employment established through custom and past practice as well as to those conditions of employment that are established through a collective bargaining agreement. *City of Boston*, 16 MLC 1429, 1434 (1989); *Town of Wilmington*, 9 MLC 1694, 1696 (1983). To establish a violation, an employee organization must show that: (1) the employer altered an existing practice or instituted a new one; (2) the change affected a mandatory subject of bargaining; and (3) the change was established without prior notice and an opportunity to bargain. *City of Boston*, 20 MLC 1603, 1607 (1997); *Commonwealth of Massachusetts*, 20 MLC 1545, 1552 (1994).

With respect to Count I of the Complaint, alleging that MassPort ordered P.J. to undergo a psychological evaluation as part of a fitness-for-duty evaluation without giving the Union prior notice and an opportunity to bargain to resolution or impasse, MassPort argues that the Union contractually waived its right to bargain. Alternatively, MassPort argues that it bargained for and reached agreement with the Union over P.J.'s fitness for duty evaluation and the Union never requested subsequent bargaining. Neither argument has merit.

As a preliminary matter, we note, and MassPort does not dispute, that the criteria and procedure by which an employer determines whether individuals are fit for employment have a direct and profound effect on employees' job security and are, therefore,

37. Day did not believe that she provided a copy of the Dr. Seymour's report with her draft settlement proposal, although the settlement did include, in paragraphs 3-5, the three recommendations that Dr. Seymour had made regarding P.J.'s return to work.

38. As discussed below, the record reflects that P.J. filed two grievances after he returned to work. Because the settlement agreement was drafted before P.J. returned to work, it is not clear from the record which grievances are being referenced, although P.J. did file a complaint with MassPort's compliance division on or before May of 2004. The record does not reflect the substance or outcome of the complaint.

39. Neither O'Donnell nor Leone testified. The Hearing Officer made this finding based on Day's description of what Leone said to her. The Hearing Officer included this finding only for purposes of relaying what Leone told Day, and not for the truth of any of the statements contained therein.

40. The record does not show that MassPort informed any other Union officials of the change to P.J.'s hours before July 16, 2004.

41. McDonough could not recall why the grievance had been withdrawn.

quintessential conditions of employment, subject to collective bargaining. *City of Haverhill*, 16 MLC 1077, 1081 (H.O. 1999), *aff'd.*, 17 MLC 1215 (1990) (citing *Town of Dedham*, 10 MLC 1252, 1258 (1983)); *Boston School Committee*, 3 MLC 1603, 1607 (1977). Nor has either party offered evidence that prior to March 17, 2004, MassPort required port officers to submit to a psychological examination as a condition of a return to work where, among other things, MassPort unilaterally determined the time, date and method of the examination, selected the evaluator, and contacted him or her in advance of the examination to discuss the reasons for the evaluation. As such, under the three-prong test set forth above, the first two prongs have been met. We must therefore determine whether MassPort made these changes without satisfying its statutory bargaining obligation or whether the Union waived its right to bargain over these changes by contract or inaction.

Waiver by Contract

Where an employer raises the affirmative defense of waiver by contract, it bears the burden of demonstrating that the parties consciously considered the situation that has arisen, and the union knowingly and unmistakably waived its bargaining rights. *Massachusetts Port Authority*, 26 MLC at 101; *Massachusetts Board of Regents*, 15 MLC 1265, 1269 (1988); *Town of Marblehead*, 12 MLC 1667, 1670 (1986). The initial inquiry focuses upon the language of the contract. *Town of Mansfield*, 25 MLC 14, 15 (1998). If the language clearly, unequivocally and specifically permits the employer to make the change, no further inquiry is necessary. *City of Worcester*, 16 MLC 1327, 1333 (1989). However, a broadly-framed management rights clause is too vague to provide a basis for inferring a clear and unmistakable waiver. *Massachusetts Port Authority*, 26 MLC at 101. If the contact language is ambiguous, the Board reviews the parties' bargaining history to determine whether the Union intended to waive its bargaining rights. *Id.* (citing *Town of Marblehead* 12 MLC at 1670) (further citations omitted).

To support its argument that it had the contractual right to require P.J. to submit to a psychological examination before returning to work, MassPort offers the following multi-step analysis. It first contends that under Article III of the Agreement, the management rights clause, it is authorized to "issue rules and regulations ...in order to meet the demands of business and effect efficient operations." It next contends that pursuant to this right, MassPort promulgated its Policy Against Violence in the Workplace which, among other things, authorizes the Threat Assessment Team to develop a plan to continue to "monitor and control" situations involving workplace violence. Pursuant to this authority, MassPort states that it required P.J. to undergo a fitness for duty evaluation to deal with the situation created when five port officers complained that P.J. posed a physical threat to them. Thus, MassPort reasons that its actions were authorized under the "express terms" of the Policy, which, in turn, it was authorized to promulgate under the express terms of Article III.

MassPort's argument lacks merit for a number of reasons. First, the former Commission held that the identical contract provision is the very type of broad management rights clause that does not constitute a waiver. *Massachusetts Port Authority*, 26 MLC at 101. Thus, although this provision unambiguously gives MassPort the right to issue rules and regulations, it does not refer to fitness for duty evaluations or psychological examinations. It therefore cannot be construed as clearly and unambiguously permitting MassPort to act unilaterally with respect to these evaluative tests. If we were to hold otherwise, then under MassPort's reasoning, by agreeing to Article III, the Union would have also agreed to waive—in advance—its right to bargain over every possible rule or regulation MassPort promulgated under that provision without knowing what those rules were or whether they have an impact on a mandatory subject of bargaining. MassPort's expansive interpretation of an already-broad management rights clause is simply too attenuated to support a conclusion that the Union waived its right to bargain here.

Moreover, even assuming *arguendo* that the Policy were somehow incorporated into the collective bargaining agreement—which it is not—even the Policy itself does not expressly authorize MassPort to order a fitness for duty evaluation or a psychological examination. This omission is particularly notable where the Policy expressly authorizes MassPort to take other actions, including determining whether the individual had a prior history of violence, and recommending counseling or reassignment in lieu of termination. Therefore, there is no basis for us to conclude that by agreeing to Article III of the Agreement, the Union consciously waived its right to bargain over the terms and conditions of fitness-for-duty psychological examinations. Consequently, we consider whether MassPort ordered P.J. to undergo his psychological examination without first giving the Union notice and an opportunity to bargain to resolution or impasse.

Once a union has actual notice of a proposed change and makes a demand for bargaining about the change to the employer, the employer bears the responsibility to ensure that bargaining takes place, either to resolution or to impasse, before the change is implemented. *Town of Dennis*, 12 MLC 1027, 1033 (1985); *City of Cambridge*, 4 MLC 1620 (H.O. 1977), *aff'd.*, 5 MLC 1291 (1978). Here, the parties disagree on the results of the March 1st meeting. The Union asserts that no agreement was reached on March 1st and that MassPort wholly or partly rejected each one of its written proposals. MassPort claims that the Union agreed to all of its counterproposals and changes and this agreement was manifested by the Union's failure to make counterproposals or to request bargaining after the meeting was over. If, as MassPort claims, the parties reached agreement on March 1st, then the complaint must be dismissed, because MassPort would have fulfilled its statutory obligation to bargain to resolution over this subject. If, on the other hand, no agreement was reached, the Board must further inquire as to whether by failing to demand further bargaining, the Union waived its right to bargain by inaction.

We agree with the Union that the parties did not reach agreement on March 1st over the methods and conditions under which P.J. would undergo a psychological examination. As noted above, Day began the March 1st meeting by declaring that what would follow was not a bargaining session, but rather a courtesy meeting, and that MassPort was reserving all rights to act under the manage-

ment rights clause. The parties then spent the next few hours discussing each of the Union's proposals, which MassPort either rejected or modified. The Union proffered no counterproposals and the meeting ended cordially, with both parties shaking hands and Day believing that agreement had been reached on some of the proposals.

From these basic facts, MassPort argues that the Union's silence, coupled with the cordial end to the meeting, reasonably led Day to believe that the Union had acquiesced to all of its changes. However, silence or the failure to make a counterproposal is not tantamount to affirmative acquiescence where MassPort had already made it clear that the meeting was merely a courtesy session and not a bargaining session. MassPort attempts to diminish the import of Day's opening statement, by arguing that her reservation of rights was a "prudent business habit" and should not be taken as any type of unwillingness to meaningfully bargain over the issue. That may be the case—however, even if Day did spend some time with the Union going over the proposals, the Union cannot be expected to read Day's mind as to her true intentions. As the Union argues in its brief, good faith bargaining does not allow for such mixed messages. More importantly, it is inherently unreasonable for MassPort to declare that it is not having a bargaining session and then ask the Board to interpret the Union's silence in the face of such statements as tacit agreement to its rejection or modification of all of the Union's proposals. Accordingly, in the absence of any evidence that the Union affirmatively acquiesced to MassPort's changes to its original ten proposals, we decline to conclude that the parties reached agreement on any of them.

We must therefore consider whether the Union's failure to request additional bargaining following the March 1st meeting constitutes a waiver by inaction of its right to do so. The Board has consistently held that a union waives its right to bargain by inaction if it: 1) had actual knowledge or notice of the proposed action; 2) had a reasonable opportunity to negotiate about the subject; and 3) had unreasonably or inexplicably failed to bargain or request bargaining. *Town of Hudson*, 25 MLC 143, 148 (1999) (citations omitted). An employer's duty to notify the union of a potential change before it is implemented is not satisfied by presenting the change as a *fait accompli* and then offering to bargain. *Id.* (citing *City of Everett*, 2 MLC 1471 (1976)). A *fait accompli* exists where, "under all the attendant circumstances, it can be said that the employer's conduct has progressed to a point that a demand to bargain would be fruitless." *Id.* (citing *Holliston School Committee*, 23 MLC 211, 212-213 (1997) (additional citations omitted). The Board will not apply the waiver by inaction doctrine in cases where a union is presented with a *fait accompli*. If it appears that the union's demand to bargain could still bring about results, the union must make such a demand to preserve its rights. *Id.*

Here, by the time the Union met with MassPort officials on March 1, 2004, Day had already contacted Dr. Seymour about P.J. and he had agreed to perform an evaluation. During that meeting, Day told the Union that she had already selected Dr. Seymour, and further made it clear during her discussion of Proposal 10 that MassPort intended to go forward with the evaluation. When those statements are coupled with Day's statement that the parties were not having a bargaining session, but only a courtesy session, it was reasonable for the Union to assume that any further requests to bargain would be futile, even if that would not have necessarily been the case. As noted above, the Union should not be expected to read the minds of MassPort officials and MassPort should not have expected it to do so. At no time after the meeting did MassPort take actions consistent with its duty to ensure that bargaining take place to resolution or impasse by, for example, seeking to confirm whether the Union had agreed to the terms of the evaluation, or notifying the Union that, unless it requested further bargaining, it would go forward with the evaluation. Instead, two and a half weeks later, on March 17, it ordered P.J. to report for a fitness for duty evaluation on March 22, 2004, under penalty of discharge.

By March 17, this short period, five days, was clearly insufficient to afford the Union any meaningful opportunity to bargain. *See Town of Hudson*, 25 MLC at 148 (nine days between the notice of implementation of detail policy and its effective date was inadequate time to bargain). Moreover, the evidence does not reflect that MassPort made any effort to justify that short deadline. In sum, by March 17, 2004, the totality of the circumstances indicate that MassPort's conduct had progressed to the point at which a demand to bargain by the Union would have been fruitless. *Id.* (citing *Scituate School Committee*, 9 MLC 1010 (1982)). Therefore, we find that the Union did not waive its right to bargain by inaction over the terms and conditions of P.J.'s fitness for duty evaluation and therefore MassPort violated Section 4(5) of the Law by requiring a fitness for duty evaluation without bargaining to impasse.

Count II - P.J.'s Change in Work Schedule

The evidence reflects that before P.J. was suspended, he worked at the Conley terminal Monday through Wednesday from 3:00 p.m. to 11:00 p.m. and Friday and Saturday from 11:00 p.m. to 7:00 a.m. When he returned to work in July of 2004, MassPort assigned him to a different schedule at Piers Park—Wednesday through Sunday from 3:00 p.m. to 11:00 p.m. The facts demonstrate that before P.J. returned, McDonough had told Day and Lawless that he (McDonough) did not want P.J. to return to Conley. However, there is no evidence that MassPort ever discussed changing P.J.'s work schedule with the Union before doing so. Changes to wages and hours and other conditions of employment are mandatory subjects of bargaining and MassPort was therefore obliged to give the Union notice and an opportunity to bargain over these changes prior to implementing them. *See generally School Committee of Newton* v. *Labor Relations Commission*, 388 Mass. 557 (1983); *Town of Arlington*, 21 MLC 1125 (1994).

MassPort defends P.J.'s reassignment on two grounds, Applying the same reasoning it used with respect to the fitness for duty examination, it first argues that its authority under the management rights clause, and by extension, the Policy, permitted it to order P.J. to return to Piers Park as a reasonable measure to remove him from the work location of the complaining officers. We reject this argument for the reasons set forth above, *supra* at 24-26.

MassPort also contends that it fully bargained with the Union over the reassignment. It notes that it had fully intended to return P.J. to Conley, but that the Union insisted that P.J. go elsewhere. We dis-

agree with MassPort's assertion that it satisfied its bargaining obligation here. Although McDonough did state to Day and Lawless that he did not want P.J. to return to Conley, the Union never signed off on the settlement agreement that Day drafted, which included a provision that the parties make best efforts to relocate P.J. to a site other than the Conley terminal. Moreover, other than McDonough's statement, MassPort presented no direct evidence that anyone in the Union ever told them that it would be acceptable for MassPort to relocate P.J.. Most importantly, even if the Union had clearly agreed that P.J. be returned to a different location, the record is entirely devoid of evidence that MassPort ever gave the Union notice and an opportunity to bargain over the change in P.J.'s work shift.[42] Even the July 9th letter ordering P.J. back to work on July 16th fails to disclose this information. MassPort argues that neither P.J. nor the Union objected to his reassignment on July 16, but by that point, the Union was not required to because it was so clearly presented as a *fait accompli*. *See Town of Hudson*, 25 MLC at 148.

Based on the foregoing, we conclude that the Union has proven the allegations contained in Count II of the complaint—that MassPort violated Section 4(5) and, derivatively, Section 4(1) of the Law when it changed P.J.'s work location and shift without giving the Union prior notice and an opportunity to bargain to resolution or impasse.

Remedy

Section 11 of the Law authorizes the Board to fashion "make whole" remedies for parties who have incurred an economic loss due to another's unlawful acts. *Town of Shrewsbury*, 15 MLC 1230 (1988). In this case, MassPort disputes P.J.'s claim that he lost overtime wages as a result of his reassignment and shift change, but rather argues that any such losses were due to the Union's recent overhaul of its overtime system, which attempted to distribute overtime more equally. Although that may be true, there is insufficient information in the record for the Board to determine conclusively that because of his suspension and reassignment, P.J. suffered no monetary loss at all. Accordingly, we leave to the parties to determine the exact amount of monetary losses, if any, sustained by P.J.. If the parties are unable to agree, they may avail themselves of the Board's compliance proceedings, set forth at 456 CMR 16.08.

Order

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

1. Cease and desist from:

a) Refusing to bargain collectively in good faith with the Union by not providing the Union with notice and an opportunity to bargain to resolution or impasse concerning the terms and conditions of psychological evaluations as part of fitness-for-duty examinations.

b) Refusing to bargain collectively in good faith with the Union by not providing the Union with notice and an opportunity to bargain to resolution or impasse before changing bargaining unit members' work schedules or locations;

c) 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) Upon request, bargain to resolution or impasse with the Union concerning requiring psychological evaluations as part of fitness-for-duty examinations;

b) Upon request, bargain to resolution or impasse with the Union concerning changes to bargaining unit members' location and work schedules;

c) Make P.J. whole for the loss of wages or other benefits he suffered, if any, as a result of MassPort's actions referred to in subparagraphs 1(a) and (b), above, together with interest on the sums, compounded quarterly, as specified in MGL c. 231, § 6I.

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

APPEAL RIGHTS

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

THE COMMONWEALTH OF MASSACHUSETTS
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 Massachusetts Port Authority (MassPort) violated Section 10(a)(5), and, derivatively Section 10(a)(1) of Massachusetts General Laws, Chap-

42. Although MassPort's brief contends that the Union, as represented by O'Donnell and McDonough, proposed that P.J. return to a different location and shift (MassPort brief, p. 23), there is no record evidence that the Union ever discussed changing P.J.'s shift.

ter 150E by: 1) unilaterally requiring a bargaining unit member to undergo a psychological evaluation as part of fitness for duty examination and 2) unilaterally changing the bargaining unit member's work location and work shift without providing the International Longshoremen's Association, Local 810 (Union) with notice and an opportunity to bargain.

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

> WE WILL NOT unilaterally require bargaining unit members to undergo psychological evaluations as part of fitness for duty examinations
>
> WE WILL NOT unilaterally change bargaining unit members' work locations or shifts.
>
> 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:

> Upon request, meet and bargain in good faith with the Union over the decision to require bargaining unit members to undergo psychological evaluations as part of fitness for duty evaluations.
>
> Upon request, meet and bargain with the Union over changes to the affected bargaining unit members' work location and shift.
>
> Make the affected bargaining unit member whole for any loss of earnings or benefits suffered as a result of the Employer's decision to change his work shift and location, plus interest at the rate specified in MGL c. 231, §6I, compounded quarterly.

[signed]
MassPort

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).

* * * * * *

In the Matter of AFSCME, COUNCIL 93, LOCAL 507, AFL-CIO

and

BOARD OF TRUSTEES, UNIVERSITY OF MASSACHUSETTS

Case No. CAS-06-3637

34.2 community of interest
34.91 accretion

July 15, 2009
Marjorie F. Wittner, Chair
Elizabeth Neumeier, Board Member
Harris Freeman, Board Member

James B. Cox, Esq.	*Representing the Board of Trustees, University of Massachusetts*
Jaime DiPaola-Kenny, Esq.	*Representing AFSCME, Council 93, Local 507, AFL-CIO*

DECISION[1]

Statement of the Case

On April 26, 2006, AFSCME, Council 93, AFL-CIO, Local 507 (Union) filed a unit clarification petition with the former Labor Relations Commission regarding the following two Staff Assistant positions at the University of Massachusetts at Dartmouth (University): External Budget Analyst and Internal Budget Analyst. On August 9, 2006, the University of Massachusetts Faculty Federation, Local 1895, AFT, Massachusetts AFL-CIO (Federation) moved to intervene in this matter, indicating that it believed the disputed position properly belonged to the bargaining unit represented by the Union. On August 23, 2006, the Federation withdrew its motion to intervene, reiterating its belief that the position belonged in the Union's bargaining unit.

The parties participated in an informal conference before Victor Forberger, Esq. a duly-designated Hearing Officer (Hearing Officer) on August 24, 2006. At the conference, the Union decided to withdraw the position of Internal Budget Analyst from the petition because the position was unfilled at the time and agreement regarding the job duties could not be reached.[2] The informal conference proceeded before the Hearing Officer for the position of External Budget Analyst.

Soon after the informal conference, the University filled the Internal Budget Analyst position, and the Union indicated it wanted to

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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."

2. The Division generally does not take up unit clarification petitions for positions that are unfilled unless the parties to the petition can stipulate as to the job duties of the position that are material to the questions raised in the petition. *Upper Cape Cod Regional Vocational-Technical School Committee*, 9 MLC 1503, 1506-7 (1982); *see also Town of Tisbury*, 30 MLC 77, 84 (2003) (coverage under MGL c.150E is based on actual, not potential, job duties).