In the Matter of CITY OF BOSTON

and

BOSTON POLICE SUPERIOR OFFICERS FEDERATION

and

BOSTON POLICE DETECTIVES BENEVOLENT SOCIETY

and

BOSTON POLICE PATROLMEN'S ASSOCIATION

Case Nos. MUP-13-3371, MUP-14-3466, and MUP-14-3504

54.513	***promotion***
67.3	***furnishing information***
67.8	***unilateral change by employer***
68.31	***bad faith bargaining during factfinding***

November 7, 2014
Marjorie F. Wittner, Chair
Elizabeth Neumeier, Board Member
Harris Freeman, Board Member

Michael McDevitt, Esq.	*Representing City of Boston*
Joshua Segal, Esq.:	
Patrick Bryant, Esq.	*Representing Boston Police Superior Officers Federation*
Scott Dunlap, Esq.	*Representing Boston Police Detectives Benevolent Society*
Amy Laura Davidson, Esq.	*Representing Boston Police Patrolmen's Association*

DECISION

SUMMARY

This case is being heard by the CERB in the first instance on a stipulated record. The claims and defenses presented arise out of a bargaining dispute between the City of Boston and its police officer unions regarding the promotional exam procedures the City put in place in 2013 to rank and evaluate applicants for sergeant, lieutenant, and captain positions. The Complaint issued on behalf of the charging parties, the BPSOF, BPDBS and the BPPA, alleges that the City violated Chapter 150E by unilaterally implementing a change in established testing procedures (Count I, Section 10(a)(5) violation); failing to respond to information requests made by the BPSOF and the BPDBS (Counts II & III, Section 10(a)(5) violation); and implementing new promotional procedures while this issue was pending before the Joint Labor Management Committee on Police and Fire (JLMC) in a case between the City and the BPSOF. (Count IV, Section 10(a)(6) violation). Based on the record and for the reasons explained below, we find that the City did not violate the Law when it failed to provide notice or an opportunity to bargain before implementing a promotional process that includes an assessment center or by implementing this process while this issue was pending in a case between the BPSOF and the City at the JLMC. We further conclude that the City violated Section 10(a)(5) of the Law when it failed it to provide relevant and reasonably necessary information requested by the BPSOF and the BPDBS. The City's failure to provide this information to the BPSOF also violated Section 10(a)(6) of the Law.

STATEMENT OF THE CASE

On December 27, 2013, February 5, 2014, and February 21, 2014, the BPSOF, BPDPS, and BPPA filed charges with the Department of Labor Relations (DLR) alleging that the City had engaged in prohibited practices within the meaning of Sections 10(a)(5), 10(a)(6)[1] and 10(a)(1) of the Law. On April 23, 2014, a DLR Investigator issued a Complaint of Prohibited Practice and Partial Dismissal (Complaint). The City filed an answer to the Complaint on May 15, 2014. The Unions did not challenge the partial dismissal.

Prior to the scheduled hearing, the parties waived their right to a hearing with witness testimony and agreed to submit evidence in the form of a stipulated record. The parties also jointly requested that the Commonwealth Employment Relations Board (Board or CERB) decide the case in the first instance. The request was allowed. On July 23, 2014, the parties filed a Joint Motion to Reopen the Record to add two stipulations and an exhibit, and to substitute a previously-submitted exhibit with a fully executed version. We hereby allow the motion.

The City and Unions filed their briefs on July 25, 2014. Based on the record, which includes stipulated facts and documentary exhibits, and in consideration of the parties' arguments, we render the following opinion.

FACTUAL STIPULATIONS

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

2. The Unions are employee organizations within the meaning of Section 1 of the Law.

3. The BPSOF is the exclusive bargaining representative for (non-detective) Sergeants, Lieutenants and Captains employed by the City in the Police Department (Department).

4. The BPDBS is the exclusive bargaining representative for Detectives employed by the City in one collective bargaining unit and Sergeant Detectives, Lieutenant Detectives and Captain Detectives employed by the City in another collective bargaining unit.

5. The BPPA is the exclusive bargaining representative for (non-Detective) Patrol Officers employed by the City in the Police Department.

6. The BPSOF, BPDBS, and BPPA collectively are "the Unions."

1. The 10(a)(6) allegation involves only the BPSOF.

7. Promotions of sworn Boston police officers are subject to Chapter 31, the Civil Service law. The administration of Chapter 31 is overseen by the Civil Service Unit of the Commonwealth of Massachusetts Human Resources Department (HRD). The Police Commissioner is the Appointing Authority for sworn Boston police officers.

8. The City's promotional process for police superior officer positions in 2005 and 2008 included only a multiple-choice examination for 80 percent of a candidate's score and education and experience factors for the remaining 20 percent.

9. In 1992 and 2002, the City's promotional process for police superior officers included an assessment center. In the 1992 and 2002 promotional process, the written test was worth 40 points, the assessment center [was] worth 40 points, and Education & Experience [was] worth 20 points.

10. There were no agreements between the parties regarding the 1992 promotional process, nor any record of bargaining to impasse on that subject. Neither the content, methodology, nor weighting of scores for the 2002, 2005 and/or 2008 promotional process and/or examination were bargained between the parties.

11. HRD permits the use of components other than [a] multiple choice examination during an appointing authority's promotional process. These components are collectively referred to as [an] "assessment center." Assessment center exercises may include, among other exercises, Job Related Problem Analysis, Officer Interviews, In-Basket Scenarios, Oral Boards, and Emotional Intelligence Evaluations.

12. HRD permits assessment centers either as: the sole method to rank candidates on a promotional list; one component of the method to rank candidates on a promotional list; or a method used after the establishment of a promotional list to determine which of the available candidates will be selected for promotion.

13. In May 2010, the City and the BPPA entered into negotiations for a successor collective bargaining agreement.

14. On July 12, 2010, the City notified the BPPA that it intended to enter into a delegation agreement with the State Human Resources Division to delegate the promotional examination process[2] for the titles of sergeant, lieutenant and captain to the City's Police Department.

15. On September 8, 2010, the BPPA and the City met to discuss the promotional exam and/or process. This meeting was outside of contract negotiations.

16. At that meeting, BPPA President Thomas Nee demanded that the City bargain over the matter of promotional examinations and/or process at the main table contract negotiations. The City did not agree that this was a proper subject for bargaining.

17. On June 9, 2011, the BPSOF filed a petition with the Joint Labor Management Committee pursuant to Chapter 1078 of the Acts of 1973 for mediation and interest arbitration.

18. In February 2012, the BPPA and the City discussed the promotional process at the main table. No agreement was reached.

19. On April 18, 2012, the BPPA filed a petition with the Joint Labor Management Committee pursuant to Chapter 1078 of the Acts of 1973 for mediation and interest arbitration.

20. By email dated August 9, 2012, then-Commissioner Ed Davis announced that then-Mayor Menino secured $2.2 million for the "development of a new promotional exam." Davis wrote, "The Boston Police Department intends to move forward with the development of a new testing process. The development of this process will take place only after consultation with the bargaining units affected and also with the Diversity Council to assure appropriate input to the process. I know this is good news for those of you who have been waiting for real change and opportunity."

21. On the same day, *The Boston Globe* published an article that described the City's intent to "replace a written promotion exam used statewide with a testing system that could include interviews and other components designed to provide a broader measure of leadership and potential." *The Globe* quoted Mayor Menino as stating the City is "moving forward with this plan to change the current testing system."

22. In September 2012, after Commissioner Davis announced that money had been appropriated to develop a new promotional exam, the City and the BPPA attended a 3A hearing before the JLMC.

23. During that 3A hearing before the JLMC, the BPPA proposed that the issue of promotions be certified as an issue to be submitted to interest arbitration. By letter dated October 5, 2012 in response to BPPA's request that the issue of promotional process be certified for determination by the arbitrator, the City urged the JLMC to not certify the issue. The City's labor counsel, Joseph Ambash, wrote:

> the City has not formulated a proposal on promotion and cannot do so until the Court reaches a decision in *Pedro Lopez v. City of [Lawrence]* ... In addition, since the promotion policies are extremely complicated, the City intends to engage qualified consultants to assist in formulating policy. This process will be quite lengthy and will not be completed prior to or even during the arbitration.

24. After reviewing the briefs of the BPPA and City, the JLMC decided that the issue of promotions would be certified and advanced to interest arbitration.

25. By letter dated August 15, 2012, the BPSOF asked the Joint Labor Management Committee, for the first time, to certify the issue of promotional process for interest arbitration.

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2. The City and the Unions dispute whether to characterize the issue as involving an "examination" or "process." Unless obvious by context, they use the terms interchangeably in the stipulations.

26. By letter dated September 20, 2012 and in response to BPSOF's request, the City urged the JLMC to not certify the issue. The City's labor counsel wrote:

The City has not formulated a proposal **and cannot do so** until the Court reaches a decision in *Pedro Lopez et al. v City of [Lawrence]* USDC CA. No. 07-11693-GAO, which concerns the legality of the City's current promotion process. As of this date the Court has not issued a decision. In addition, since promotion policies are extremely complicated, the City intends to engage qualified consultants to assist in formulating its process. This process will be quite lengthy and will not be completed prior to or even during the arbitration.

27. On September 21, 2012, the Joint Labor Management Committee certified the issue of promotional process, over the City's objections, as a subject to be resolved by a tripartite arbitration panel regarding the BPSOF collective bargaining agreement.

28. On February 7, 2013, all three sworn unions were invited via email to attend the Diversity Advisory Council meeting on February 11, 2013. The e-mail stated that the Department was hoping "to publish the RFP in the next couple of weeks, therefore before any RFP is finalized we need to convene quickly to get your input regarding the kinds of things you would like to see in the promotional testing process." The meeting did not constitute bargaining.

29. On or about March 4, 2013, the City issued a request for proposals for a consultant on the development and administration of Boston Police Department promotional exams that may include: written knowledge exam, assessment center, Job Related Problem Analysis, Officer Interviews, In Basket Scenarios, Oral Boards, and Emotional Intelligence Evaluations.

30. In April 2013, [HRD] entered into three Delegation Agreements with the Boston Police Department delegating, *inter alia*, much of its authority pertaining to the selection process for Boston Police Sergeants, Lieutenants, and Captains. As such, the Boston Police Department operated throughout the development of this promotional process as a delegate of HRD.

31. On June 6, 2013, the City selected EB Jacobs, a consulting company, to develop and administer its new promotional examination process. HRD approved the selection on June 25, 2013. A standard contract was fully executed on July 7, 2013.

32. On July 11, 2013, Police Commissioner Edward F. Davis sent a letter to the three sworn unions informing them of the selection of EB Jacobs and inviting them to a meeting with EB Jacobs and representatives from the Boston Police Department.

33. The BPSOF responded by letter dated July 24, 2013, objecting to the job analysis survey and anticipated changes to promotional process.

34. In the Summer of 2013, the City asked or ordered Federation bargaining unit members to participate in a job analysis that consulting company EB Jacobs was conducting as part of the City's development of a new promotional examination process.

35. The job analysis consisted of surveys, then individual interviews and lastly panel discussions.

36. On June 24, 2013, counsel for the BPPA gave a presentation to the arbitrators concerning promotions and requested that the City be ordered to conduct the standard civil service test that had been given in 2005 and 2008.

37. Counsel for the City objected to the BPPA's proposal and again indicated that the matter was premature. Attorney Ambash represented that: "we're waiting for a court decision, we haven't formulated any kind of a test." He also indicated that the process had "not yet begun." And that the process of developing the exam "is going to take, we would guess, a couple of years."

38. Attorney Ambash also asked the arbitrator to "simply issue a statement saying that the parties should bargain as required by law in connection with any new promotional process to be used by the City."

39. The arbitrators issued their award on the BPPA interest arbitration on September 27, 2013. A copy of the award is in evidence as Exhibit 15.

40. Throughout Summer and Fall of 2013, the BPSOF demanded that the City not adjust the promotional process until exhausting the JLMC process.

41. On August 22, 2013, the Department held an informational meeting with the unions and EB Jacobs regarding the promotional process.

42. In Fall 2013, the BPSOF requested a copy of EB Jacobs report.

43. On October 3, 2013, the BPSOF requested the following information:

> 1. All allegations and all investigations into said allegations, about misconduct or improprieties pertaining to examinations or promotional processes for superior officers or detectives, from 2000 to present.
>
> 2. All documents, including notes and internal written and electronic correspondence and communications with HRD and City Hall, pertaining to the promotions of five patrol officers to sergeants on or about August 2, 2013, and the promotions of two patrol officers to sergeant immediately thereafter on or about August 2, 2013.
>
> 3. All security plans developed or proposed by EB Jacobs.
>
> 4. All correspondence between the City and EB Jacobs and between the City and HRD about promotional process from 2012 to present.

44. The City never responded specifically to this information request and never responded to requests 1, 2, or 3.

45. The City received a copy of EB Jacobs' report on November 15, 2013.

46. On December 11, 2013, the BPSOF renewed its request, in writing, for a copy of the report. The City declined to provide a copy of the report until HRD approved the exam and/or process plan.

47. On December 19, 2013, the BPSOF renewed its request for EB Jacobs report. That same day, the City said it would not provide the report until approved by HRD.

48. On December 20, 2013, HRD approved EB Jacobs' exam plan and/or process.

49. Via letter dated December 26, 2013, the City notified Union representatives that HRD approved the City's promotional process, which included a portion for an assessment center.

50. The Department did not receive a redacted version of the report from EB Jacobs until January 14, 2014.

51. The City provided the report to the Federation and other sworn unions on January 14, 2014, after HRD approved the City's promotional process. As stated in the letter of that date, the City provided the report after it was redacted by EB Jacobs to preserve the integrity of the promotional exam.

52. The City never agreed that it had any bargaining obligation about promotional process between 2011 and present.

53. The promotional process announced by the City will determine rankings of officer based upon a mixture of examination, assessment center and education/experience. The rankings on the sergeants promotion list will be determined by three components: rank will be determined 40 percent by examination, 40 percent by assessment center [16 percent by written work sample and 24 percent by oral board] and 20 percent by education [and] experience. The rankings on the lieutenants promotion list will be determined by three components: 36 percent by written examination, 44 percent by assessment center [20 percent by in-basket test and 24 percent by oral board] and 20 percent by education and experience. The rankings on the captains promotion list will be determined by three components: 32 percent by examination, 19.2 percent by in-basket test, 28.8 percent by oral board, and 20 percent by education and experience.

54. On January 21, 2014, the City held an informational meeting with the police unions with EB Jacobs to explain the new promotional exam structure and to respond to questions.

55. On January 29, 2014, Deputy Director of the Office of Labor Relations Stephen B. Sutliff sent a letter to the Unions responding to questions that the Unions raised during the January 21, 2014 meeting and supplementing the information provided during the meeting.

56. On February 4, 2014, counsel for the BPPA sent a letter to counsel for the City's police department objecting to the City's unilateral decision to make changes in the promotional process.

57. On February 12, 2014, the City provided EB Jacobs' job analysis to the Unions. The City's cover letter acknowledged that it was withholding the non-redacted version of the report from EB Jacobs that discussed percentages allocated to specific areas of knowledge on the examination so as not to give anyone an unfair advantage.

58. On February 18, 2014, the Boston Police Department posted a Promotional Exam Announcement announcing a new examination structure.

59. On April 4, 2014, the BPSOF and the City reached agreement on all unresolved successor contract matters certified by the JLMC, except for promotional examination and/or process. The parties agreed to remove promotional exam and/or process as an issue from the JLMC. On that same day, the BPDBS Superior Detectives Unit also settled [a] successor collective bargaining agreement with the City. The BPDBS Detectives Unit remains without a contract.

60. The City did not bargain with the BPPA concerning the changes in the promotional exam and/or process.[3]

61. By the time of this [stipulated record], the U.S. District Court of Massachusetts has yet to issue a decision on the merits in *Pedro Lopez et al. v. City of Lawrence*, USDC CA. No. 07-11693-GAO. Post-trial closing arguments in this jury-waived matter were held February 1, 2011. The City never notified the Court or the Plaintiffs of its decision to conduct a job analysis or include an assessment center to the promotional exam and/or process.

62. During all relevant times, the City never provided an opportunity to bargain with the Unions regarding [the] promotional exam and/or process.

63. On June 17, 2014, counsel for the City sent counsel for the Unions the remaining documents that HRD reviewed when approving EB Jacobs's proposal for the promotional examination. These documents were also redacted by EB Jacobs so as to prevent any test takers from having an unfair advantage.

64. The 2002 promotional process was modified by the City following complaints by the Unions at the Civil Service Commission. See *BPSOF et al v. BPD*, I-02-6-6 et al, 21 MCSR 59 (2008) & 21 MCSR 237 (2008). Specifically, the City agreed to remove the Performance Review System component. *See id.*

Additional Facts Derived from Joint Exhibits and Stipulated Facts

- A joint exhibit entitled, "Boston Police Department Sergeants' Promotional Process Chronology" provides the following, in relevant part:

  1987: [The City] contracts with MMI which designs promotional exam for sergeants and lieutenants: (1) multiple choice exam; (2) assessment center: (a) in-basket exercise; (b) video performance exercise; (c) leaderless group exercise; and (3) training and experience...

  1987: Following allegations of misconduct, Personnel Administrator removes assessment center from 1987 sergeants exam...

  1987: **Promotional exam conducted.** (Emphasis in original.)

  ...

  1991: Commonwealth's Department of Personnel Administration conducts job analysis for police sergeant position.

3. The City asserts that the JLMC arbitration satisfied any bargaining obligations.

6/91: **Promotional exam conducted.** No evidence that assessment center was used. (Emphasis in original.)

...

9/1/92: **Promotional examination conducted**, consisting of (1) written exam; (2) presentation before group of assessors (New England police commanders).... (Emphasis in original.)

...

1998: **Promotional examination conducted through HRD.** No assessment center included. (Emphasis in original.)

- A joint exhibit, entitled "The 1992 Lieutenants Promotional Examination Announcement," provides that the exam includes a "Boston-specific practical test" that is worth 40 points of the 100 total points. This practical test is described as "a structured oral interview designed to assess the supervisory skills required of Lieutenants. Each candidate will appear before a panel composed of three officers permanent at the rank of Lieutenant or higher. The panel will present situationally-based scenarios and ask questions which the candidates must answer."
- The September 27, 2013 JLMC Arbitration Award for the City and BPPA provides that there will be two three-year contracts, effective 7/1/10 - 6/30/13 and 7/1/13 - 6/30/16. On the issue of "Promotional Exam," it states that "[t]he neutral arbitrator denied the Union's proposal." (See Jt. Stip. # 39 and Exhibit 15).
- By emails dated December 11 and December 19, 2013, the BPSOF requested the status of the EB Jacobs' report it had requested from the City.
- By email dated December 19, 2013, the City advised the BPSOF that it would provide EB Jacobs' report "when approved by HRD."
- By email dated December 26, 2013, BPSOF again demanded a copy of the EB Jacobs' report.
- By email dated January 2, 2014, the City advised the BPSOF that it would provide the EB Jacobs' report.
- By email dated January 10, 2014, the City advised the BPSOF that it was "concerned that some of the information on the EB Jacobs' recommendation could compromise the exam process," and that it would be asking EB Jacobs to redact any information that would give a test taker an advantage.
- An undated memorandum from HRD entitled, "Assessment Centers - Use in Civil Service Promotions" provides, in relevant part:

  B. ASSESSMENT CENTER USED AS A WEIGHTED, GRADED EXAMINATION COMPONENT - may have an [e]ffect on the relative ranking of individuals on the eligible list. HRD will be in attendance during the administration of the assessment center.

  Process:

  Appointing authority sends a written request to the Personnel Administrator to include an assessment center as a weighted, graded examination component of the promotional selection process.

  HRD issues a delegation agreement to the appointing authority.

  Appointing authority hires a qualified consultant, approved by HRD, to work with the appointing authority and HRD to: determine the relative weights of the three examination components which are based on job analysis data; design, develop, and construct the assessment center exercises; administer and score the assessment center exercises which includes determination of an appropriate scoring scheme and training of the assessors; and forward the assessment center scores to HRD for incorporation with the scores from the other two examination components.

  Individuals apply to HRD to participate in the written examination.

  Results of the written examination are forwarded to all applicants so they can decide if they wish to continue with the selection process.

  Assessment center is conducted; results are forwarded to HRD so that the eligible list may be established.

  Appointing authority requisitions to fill a vacancy; certification is issued; appointing authority conducts its usual interview-process; promotes and returns the certifications to HRD for review and approval.

  Notes: The weights of the examination components must be determined prior to the distribution of the examination announcement.

  All applicants who pass HRD's written examination must be afforded an opportunity to participate in the assessment center exercises.

  Appointing authorities may elect to wait until HRD determines who has passed the written examination if they feel the need to cull down the number of applicants participating in the assessment center. This could delay the establishment of the eligible list since HRD needs these scores and to allow the statutory appeal periods to play out before the list can be established. Some appointing authorities elect to use the assessment center exercises as a professional development tool for their staff and do not wait until the results of the written examination are known.

- The Delegation Agreement between the City and HRD for the selection process for Police Sergeant, provides in relevant part:[4]

  In accordance with the provisions of MGL Chapter 31, Section 5(l), this agreement between [HRD] and the [Department] is for the purpose of delineating the responsibilities of the parties in the delegation of certain duties and powers of HRD to the City pertaining to the selection process for Police Sergeant, Boston Police Department.

  The City has agreed to hire a consultant to develop, validate, administer, and score an Examination Plan that may include, but is not limited to, the following components: Written Knowledge Examination, Assessment Center, Job Related Problem Analysis, In Basket Scenarios, Oral Boards, and Emotional Intelligence Evaluations, for the rank of Police Sergeant and to pay all attendant costs associated with the same. With the exception of additional points as required by statute or rule, including credit for employment or experience in the Police Sergeant title, this delegated selection process for Police Sergeant will be used as the **sole basis** for scoring and ranking candidates on an eligible list. The City may forego the use of any written test administered by HRD. Nothing in this delegation agreement precludes the use of a written examination component developed by the consultant as part of the overall Examination Plan.

  Upon the City's submission to HRD of the credentials and references of the proposed consultant and the approval of HRD regarding the selection of the consultant, HRD will work with and approve the actions of the consultant in, but not limited to, the following areas:

4. The Delegation Agreements for the Lieutenant and Captain positions are substantially the same, other than the identification of the position.

1. Determination of the knowledges, skills, abilities and personal characteristics (KSAP's) that are supported by job analysis data that will be evaluated during the Examination Plan exercises.

2. The development of the departmental promotional examination announcement to be used to solicit applications including a description of duties; the required knowledges, skills, abilities and personal characteristics as supported by job analysis data which will be measured by the delegated selection activities; a description of the testing process to be used including any reading lists and preparation guides; testing date(s); deadline for filing applications; salary for the position; and any applicable fees. HRD will, upon request, provide sample language for the announcement, consistent with statutory requirements, regarding eligibility for the selection process and statutory preferences. The City must ensure proper posting of the examination announcement in all Police Department stations.

3. Discussions relative to the job-related, content valid questions/activities that will be used during the Examination.

4. The security plan that will be utilized to ensure the integrity of the Examination.

5. Any training materials or sessions that will be distributed to/conducted for applicants prior to the administration of the Examination in order to familiarize them with Examination procedures.

6. The review of any validation materials which support the Examination Plan components.

7. The composition and selection of the assessors for the Examination Plan exercises.

8. The training of the assessors in the use of the rating schedules and administration of the exercises.

9. The review and approval of the rating schedules to be used.

10. The Human Resource Division's and City's representation as observers only for the Examination Plan components.

11. Reviews permitted pursuant to Section 22 of Chapter 31 shall be the responsibility of the consultant, with the approval of HRD.

12. The determination of a passing point for the Examination.

It is agreed that:

I. HRD authorizes George Bibilos, Director, Organizational Development Group/Civil Service, (617) 878-9727, to act as its representative in all matters relative to this delegation agreement.

II. Primary responsibility for the administration of all delegated civil service functions, as described herein, for the City will be assigned to Edward F. Davis, who will serve as Delegation Administrator. He, or his designee, will be responsible for all matters relative to this delegation agreement.

III. The Delegation Administrator shall be responsible for the following:

A. all notifications to all eligible candidates, acceptance and processing of examination applications, verification of examination eligibility, and security of the administration and scoring of the selection process that results in the establishment of an eligible list for Police Sergeant;

B. establishment and maintenance of the eligible list for Police Sergeant for a minimum of two years in accordance with applicable statutory preferences; and

C. certification from the eligible list in accordance with laws, rules, regulations and procedures.

D. notifying HRD of all appointments/promotions made from the eligible list established pursuant to this agreement, to include an individual's name, date of appointment/promotion, and all other pertinent information.

IV. The Delegation Administrator will be responsible for ensuring continued public access to all records determined to be public information. The eligible list, certifications and reasons for selection must be made available for review by any individual or group of individuals upon request. All information relating to name and standing is deemed public information and must be made available; information relative to date of birth/age, social security number, marital status and other personal data must be removed by the Delegation Administrator from lists or certifications undergoing public review.

V. Copies of the eligible list and certifications must be made available to members of the public upon request at a reasonable cost.

VI. The Delegation Administrator will be responsible for ensuring that candidates can review their standing on the established eligible list upon written request. (Such review must be made in the presence of the Delegation Administrator or designee to ensure that there is no alteration or destruction of material.) Should an individual wish copies of any materials such copies shall be provided to the individual at a reasonable cost.

VII. Periodic or random audits of all delegated personnel transactions may be conducted at any time by representatives from HRD. All records, ledgers and correspondence relating to the delegated civil service functions shall be made readily available and accessible to the HRD auditor. A report on audit findings will be made available to the Delegation Administrator and corrective action, if necessary, on any problems or errors found during that audit must be taken by the City within 30 days from receipt of the audit report. A written report of that corrective action shall be submitted to HRD.

VIII. It will be the responsibility of HRD to provide and explain to the Delegation Administrator any changes in civil service law and rules which may directly affect any of the delegated functions.

IX. The Human Resources Division will be responsible for notifying the Delegation Administrator on a timely basis of any changes in internal procedures which may affect the delegated functions.

X. The assistance of HRD will be consistently available to the Delegation Administrator throughout the delegation process and HRD will provide technical assistance to the Delegation Administrator for any delegated function as required.

XI. Changes in approved procedures for the administration of delegated functions may not be made without the review and approval of both parties. No duties may be assumed by the Delegation Administrator which have not been authorized by this agreement or subsequent attachment.

XII. The cost of all services, forms and materials provided directly by HRD shall be assumed by HRD unless otherwise agreed to by

both parties. All other costs involved in the delegation of civil service functions will be the responsibility of the Department.

XIII. The City may elect to charge a reasonable fee, as set by statute (currently $250 per application), to offset the administrative costs of the selection process. Any processing fees realized through the delegation of these functions are considered property of the City.

XIV. If at any time after this initial agreement either the City or HRD determines that delegation authority should be discontinued, reversion of the authority for all delegated functions to the City may be effected through 30 days' written notice, by registered mail, by either the City or the Personnel Administrator (Chief Human Resources Officer).

XV. The specific functions to be delegated are described and detailed in this Agreement. As further functions are delegated, detailed descriptions shall be reviewed by both parties and appended to this agreement.

ADMISSIONS OF FACT

1. On December 27, 2013, the BPDBS requested a copy of the documents that the City sent to HRD for HRD to use to evaluate and approve EB Jacobs' proposal. The BPDBS renewed the request on January 6, 2014.

OPINION[5]

Failure to Bargain Over Promotional Process - Unilateral Change

Count I of the Complaint alleges that the City implemented a new promotional procedure[6] on December 26, 2013 without giving the Unions an opportunity to bargain to resolution or impasse about the decision and impacts of the decision. A public employer violates Section 10(a)(5) of the Law when it implements a change in a mandatory subject of bargaining without first providing the employees' exclusive collective bargaining representative with prior notice and an opportunity to bargain to resolution or impasse. *School Committee of Newton v. Labor Relations Commission*, 338 Mass. 557 (1983). The duty to bargain extends to both conditions of employment that are established through past practice as well as conditions of employment that are established through a collective bargaining agreement. *Town of Burlington*, 35 MLC 18, 25, MUP-04-4157 (June 30, 2008), *aff'd sub nom., Town of Burlington v. Commonwealth Employment Relations Board*, 85 Mass. App. Ct. 1120 (May 19, 2014); *Commonwealth of Massachusetts*, 27 MLC 1, 5, SUP-4304 (June 30, 2000).

To establish a unilateral change violation, the charging party 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 or an opportunity to bargain. *City of Boston*, 20 MLC 1603, 1607, MUP-7976 (1994); *Commonwealth of Massachusetts*, 20 MLC 1545, 1552, SUP-3460 (May 13, 1994).

We first address whether the employer altered an existing practice or instituted a new one. To determine whether a practice exists, we analyze the combination of facts upon which the alleged practice is predicated, including whether the practice has occurred with regularity over a sufficient period of time so that it is reasonable to expect that the practice will continue. *Swansea Water District*, 28 MLC 244, 245, MUP-2436, MUP-2456 (January 23, 2002); *Commonwealth of Massachusetts*, 23 MLC 171, 172, SUP-3586 (January 30, 1997). A condition of employment may be found despite sporadic or infrequent activity where a consistent practice that applies to rare circumstances is followed each time that the circumstances preceding the practice recurs. *Commonwealth of Massachusetts*, 23 MLC at 172; *City of Everett*, 8 MLC 1036, 1038 MUP-3807 (June 4, 1981), *aff'd* 8 MLC 1393 (October 21, 1981) (applying this standard with respect to practice of allowing time off to take promotional Civil Service exams and acknowledging that it "is only because the promotional Civil Service exams are given on an irregular basis that the City has had few occasions to implement the practices").

Critical to our analysis of unilateral change are the following dates and events: In 1992 and 2002, the City's promotional process for police superior officer positions included a written exam and an assessment center.[7] In 2005 and 2008, the City's promotional process for police superior officer positions included a multiple-choice exam for 80% of a candidate's score, and education and experience for 20% of the score ("80/20").[8]

The City does not argue that it has not instituted a changed or new practice. Nevertheless, the Unions bear the burden of demonstrating that the City has unilaterally changed a condition of employment embodied in a binding past practice. *See City of Westfield*, 25 MLC 163, 165, MUP-9697 (April 20, 1999). The Unions' argument in this regard focuses exclusively on the 80/20 process.[9] The Unions claim that the 80/20 process is a binding practice because it

5. The Board's jurisdiction is uncontested.

6. In their stipulations, the parties note that they dispute whether to characterize the issue as involving an "examination" or "process" and, therefore, use the terms interchangeably. In this decision, we also use the terms interchangeably along with the term "procedure," as used in the complaint.

7. The Unions note that in 2002, they challenged the inclusion of a performance review system in the promotional process at the Civil Service Commission (CSC) and the City agreed to remove it. Further, "the City and HRD were forced to remove the assessment center component of the 2002 process to candidates who filed timely appeals." As explained in the relevant CSC decisions, the performance review system was a separate component of the exam process, and therefore not relevant here. *See Boston Police Superior Officers et al. v. Boston Police Dept. and HRD*, 21 MCSR 59 (2008). In addition, the CSC decided that the assessment center was unfair because it required knowledge of a rule that the candidates had been advised would not be tested. However, only those candidates who had filed timely appeals were entitled to have the assessment center score removed from their overall score, and the assessment center was not completely removed from the promotional process for all unit members. *Id.* This also is irrelevant to the instant controversy.

8. The Unions also contend that assessment centers were not used in 1987, 1991, or 1998. However, the joint exhibit upon which the Unions rely is a document entitled "Boston Police Department *Sergeants'* Promotional Process Chronology." (Emphasis added.) It shows that assessment centers were not used for the sergeant exam in these years, but there is no evidence of the components included in the lieutenant and captain exams.

9. In the section of their brief addressing whether promotional procedures are mandatory subjects of bargaining, the Unions argue that other aspects of the promo-

has been used for at least the past nine years, i.e., since 2005. In support of their argument, the Unions cite cases in which binding past practices have been established when such practices occurred for seven years and ten years. *City of Boston*, 28 MLC 369, 362, MUP-2267 (May 31, 2002); *City of Cambridge*, 28 MLC 28, MUP-9181 (June 28, 1996).However, the events at issue in the cited cases did not involve infrequent or sporadic activity, as is the situation here.

In order for the Unions to succeed in their argument that only the events from 2005 to date are legally relevant, we would have to disregard the fact that the City used an assessment center in 2002 and 1992.[10] As the Board recognized in *City of Boston*, 20 MLC 1603, 1608-1609, MUP-7976 (May 20, 1994):

> Neither the [CERB] nor the National Labor Relations Board has ever set a definitive length of time required for a practice to become a binding term or condition of employment. Nor do we believe that it is practical to consider an artificial or arbitrary length of time as a proper standard to be applied in making these decisions. A case-by-case approach appears to be the sensible method.

Ignoring the exams prior to 2005 would impose an arbitrary time frame on our analysis and would require that relevant evidence regarding those earlier exams be ignored. Accordingly, we must consider the exams that occurred prior to 2005.

Further, it is evident that in the cases where there was a sporadic action, the action had to be consistently followed, and without any deviance, in order for it to be considered a binding past practice. In *City of Boston*, we held that the only constant in the police department's deployment of patrol supervisors was that the deployment has been inconsistent, and it was therefore inappropriate to seize upon a limited period of high deployment and rule that it established a "condition of employment." 20 MLC at 1609. Moreover, in *City of Newton*, we held that the City did not unilaterally change a practice of promoting the highest scoring candidate because, although the City most often did promote the highest scorer, the history was not unwavering. 32 MLC 37, MUP-2849 (June 29, 2005). Similarly, in *Town of Hingham*, we held that there was no past practice of not requiring a town-designated physician exam despite the fact that the town did not require the exam in nearly all cases, but did require it on at least two occasions. 21 MLC 1237, MUP-8189 (August 29, 1994). *Accord Town of Lee v. LRC*, 21 Mass. App. Ct. 166 (1985) (substantial evidence supported Board's conclusion that union established past practice of town not enforcing residency requirement where in 30-year history of residency requirement bylaw, three officers were permitted to live out of town and there was no evidence of town enforcing the residency requirement); *Town of Winthrop*, 28 MLC 200, MUP-2288 (January 4, 2002) (the union established a past practice with evidence that between the early 1980s to 1995, the town offered the unit members the opportunity to work private paid details outside the town on several occasions, and no evidence that town had prevented unit members from working details until 1998); *City of Everett*, 8 MLC 1036 (evidence establishes that there has been a past practice of providing time off without loss of pay for firefighters assigned to work a shift immediately prior to a promotional exam when it has been allowed on three occasions between 1971 and 1977, and no evidence was presented to suggest that there were exams over the last ten years for which paid leave was not allowed).

Given this consistent body of precedent, as we explained in *City of Boston*, it would be inappropriate for us to only consider the years in which the City used the 80/20 process and find that it constitutes a condition of employment. 20 MLC at 1609. Therefore, because the City used an assessment center, in addition to the written exam, in 2002 and 1992, the Unions have failed to establish a binding 80/20 practice.[11] Based on all of the foregoing, we dismiss the allegation that the City failed to provide notice or an opportunity to bargain before implementing a promotional process that includes an assessment center.

Because we have dismissed this allegation under the first prong of the unilateral change analysis, we do not reach the City's claim that it had no obligation to bargain over the promotional process because requiring it to bargain would cause conflicts with various sections of Chapter 31, (the Civil Service Statute), and Chapter 589 of the Acts of 1987, (the JLMC statute). We note generally, however, that we have previously analyzed the extent to which promotions are a mandatory subject of bargaining under Chapter 150E. These decisions all stand for the proposition that, while there is no obligation to bargain over which candidate to promote, or when a promotional vacancy must be filled, an employer is obligated to bargain over the means of implementing such decisions. *Town of Danvers*, 3 MLC 1559, MUP-2292, MUP-2299 (April 6, 1977) (procedures for promotion that affect an employee's conditions of employment to a significant degree are a mandatory subject of bargaining). *See also, Town of Wilbraham*, 5 MLC 1773, MUP-3242 (H.O. March 29, 1979) (procedures for promotion are a mandatory subject of bargaining), *aff'd* 6 MLC 1668 (December 14, 1979).

BPSOF and BPDBS Information Requests

We find in favor of the Unions on Counts II and III of the Complaint, which allege that the City violated Section 10(a)(5) of the Law by failing to provide requested information. If a public em-

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tional process could have been negotiated, such as recording the assessment center exercises, sequestering candidates, etc. However, in the section of their brief addressing the issue before us, i.e., whether the Unions established the first prong of the unilateral change analysis, the Unions did not argue that the implementation of these aspects of the promotions process constituted a unilateral change. Rather, the Unions' brief focused exclusively on the claim that they had established the 80/20 promotional process as a binding past practice. Accordingly, we limit our analysis to this argument.

10. The Unions highlight certain public statements made by City officials, which reference the testing process as "new" or a "change." However, we are not able to consider these statements as admissions that the promotional process is new or changed in the context of a Section 10(a)(5) unilateral change allegation. Instead, we must examine the actual history of the promotional process.

11. Even considering the sergeant exam separately, in which the evidence shows that the City did not use an assessment center in 1987, 1991, or 1998, the Unions still have failed to establish an 80/20 practice because of the assessment centers used in 1992 and 2002.

ployer possesses information that is relevant and reasonably necessary to an employee organization in the performance of its duties as the exclusive collective bargaining representative, the employer is generally obligated to provide the information upon the employee organization's request. *City of Boston*, 32 MLC 1, MUP-1687 (June 23, 2005) (citing *Higher Education Coordinating Council*, 23 MLC 266, 268, SUP-4142 (June 6, 1997)).

The employee organization's right to receive relevant information is derived from the statutory obligation to engage in good faith collective bargaining, including both grievance processing and contract administration. *Id.* The Board's standard for determining whether the information requested by an employee organization is relevant is a liberal one, similar to the standard for determining relevancy in civil litigation proceedings. *Board of Higher Education*, 26 MLC 91, 92, SUP-4509 (January 11, 2000).

Once a union has established that the requested information is relevant and reasonably necessary to its duties as the exclusive representative, the burden shifts to the employer to establish that it has legitimate and substantial concerns about disclosure, and that it has made reasonable efforts to provide the union with as much of the requested information as possible, consistent with its expressed concerns. *Board of Higher Education*, 26 MLC at 93 (citing *Boston School Committee*, 13 MLC 1290, 1294-1295, MUP-5905 (November 21, 1986)). If an employer advances legitimate and substantial concerns about the disclosure of information to a union, the Board will examine the facts contained in the record, and balance the employer's concerns against the employee organization's need for information. *Boston School Committee*, 13 MLC at 1295. Absent a showing of great likelihood of harm flowing from disclosure, the requirement that a bargaining representative be furnished with relevant information necessary to carry out its duties overcomes any claim of confidentiality. *Greater Lawrence Sanitary District*, 28 MLC 317-319, MUP-2581 (April 19, 2002).

BPSOF

Count II of the complaint alleges that the City failed to provide the BPSOF with a copy of the EB Jacobs' report.[12] In the fall of 2013, the BPSOF requested a copy of the EB Jacobs' report. EB Jacobs provided the report to the City on November 15, 2013. On December 11 and 19, 2013, the BPSOF again requested the report, and the City responded that it would provide the report when HRD approved it. On December 20, 2013, HRD approved the promotional process, and by letter dated December 26, 2013, the City notified the Unions of this. On the same date, BPSOF again renewed its request for the report, and on December 27, 2013, it filed a charge of prohibited practice alleging, in part, that the City failed to respond to its information request. By email dated January 2, 2014, the City advised the BPSOF that it would provide the report. By email dated January 10, 2014, the City further advised that it was concerned that some of the information in the report could compromise the exam process, and that it would ask EB Jacobs to redact any information that would give test takers an advantage. EB Jacobs provided the City with a redacted report on January 14, 2014, and the City provided it to the BPSOF on the same date.

The City argues that it provided the requested information despite the fact that it did not have to since it was not obligated to bargain over the promotional process. It further explains that it could not provide the report until it was redacted because it contained materials that would give test takers an improper advantage.[13]

The City's argument that it did not have to provide the information regarding the promotional process because it did not have to bargain over the process fails as this is not the standard in determining whether an employee organization is entitled to receive information. Instead, the information must be relevant and reasonably necessary for the union to perform its duties. Generally, absent prevailing legitimate concerns, a union has a right to information that may explain an employer's proposals or course of action and assist a union in formulating its own proposals and counter-proposals. *Boston School Committee*, 25 MLC 181, 186, MUP-9794 (May 20, 1999). The EB Jacobs report contained information on the promotional process for superior officers. The report clearly could assist the BPSOF in deciding what actions, if any, it would pursue in response. Consequently, we find that the report was relevant and reasonably necessary for the BPSOF to perform its duties as the exclusive collective bargaining representative.

Because the BPSOF does not object to the fact that the City provided it with a redacted copy of the report, we need not determine whether the City had legitimate and substantial concerns about the unredacted report. Instead, we only consider the City's arguments that the unredacted report could have possibly advantaged test takers in the context of its delay in providing the report. The evidence shows that the City did not explain its concerns to the BPSOF until almost two months after it received the report from EB Jacobs in November. Nor did it request a redacted report from EB Jacobs until almost two months after it received the report. In fact, the City originally advised the BPSOF that it would provide the report when HRD approved it.[14] Once that happened, the City then waited over two weeks before informing the BPSOF that it was requesting a redacted report from EB Jacobs. The City has provided no explanation as to why it did not advise the BPSOF of its concerns earlier or request a redacted report sooner. Thus, even assuming that the City's concerns about disclosing certain aspects of the report were legitimate and substantial, it did not make reasonable efforts to provide the BPSOF with as much of the requested information as possible, consistent with its expressed concerns, in a timely manner. For these reasons, we conclude that the City violated the Law by its unreasonable delay in providing the BPSOF with the report. *See Higher Education Coordinating Council*, 25 MLC 37, SUP-4225 (August 24, 1998) (an employer's belated

12. The parties' stipulations and exhibits include references to additional BPSOF information requests, such as written correspondence regarding the promotional process, the security plans, and allegations and investigations into exam misconduct. The complaint does not include any allegations pertaining to these information requests and we therefore decline to address them.

13. The BPSOF has not alleged that the City violated the Law by redacting certain information from the report.

14. The City also did not explain why it would not provide the report to the BPSOF until HRD approved it.

provision of information does not bring it into compliance with the Law).

BPDBS

The complaint alleges that the City violated the Law by failing to provide the BPDBS with a copy of the documents that the City sent to HRD to evaluate and approve the EB Jacobs proposal. The City admits that the BPDBS made this request on December 27, 2013 and January 6, 2014.[15] The parties stipulated that "[o]n June 17, 2014, the City sent counsel for the Unions the remaining documents that HRD reviewed when approving EB Jacobs' proposal for the promotional examination. The documents were also redacted by EB Jacobs so as to prevent any test takers from having an unfair advantage." We therefore conclude that the City fully responded to the request on June 17, 2014.

The City's arguments regarding this information request are the same as those pertaining to the BPSOF's request, detailed above. Our rationale in rejecting the City's arguments with regard to the BPSOF's request also applies here. The information that the City provided to HRD for it to evaluate and approve EB Jacobs' proposal could also have assisted the BPDBS in assessing the promotional process and formulating a response. Additionally, there is no record evidence that the City provided any explanation to the BPDBS for delaying its production of the information for almost six months. Accordingly, we find that the City violated Section 10(a)(5) of the Law by its unreasonable delay in providing the requested information to the BPDBS.

Section 10(a)(6) Allegation: Pending JLMC Case

Count IV of the Complaint alleges that the City violated Section 10(a)(6) of the Law when it implemented a new promotional procedure while the same issue was pending between the BPSOF and City at the JLMC after being certified for resolution by an arbitrator. The Unions argue that even if the Board concludes that the City's actions did not violate Section 10(a)(5) of the Law, the Board should still rule that the City's announcement and implementation of a promotional process involving an assessment center during the pendency of the JLMC proceeding independently violated Section 10(a)(6) of the Law.

A public employer violates Section 10(a)(6) of the Law if it fails to participate in good faith in the mediation, fact-finding and arbitration procedures set forth in Sections 8 and 9 of the Law. In *City of Melrose*, 28 MLC 53, MUP-1010 (June 29, 2001), the Board held that an employer who refuses to participate in good faith in an arbitration invoked by the JLMC violates Section 10(a)(6) of the Law. However, unlike the situation where one or both parties have filed a petition pursuant to Section 9 of the Law for a determination of impasse following negotiations, it is not a *per se* violation of Chapter 150E for a municipal employer of police officers or fire fighters to implement a bargaining proposal prior to exhaustion of JLMC procedures. *Town of Stoughton*, 19 MLC 1149, 1156-1157 (1992) (discussing differences between Section 9 of the Law and the JLMC statute and rules)..[16] *See also Town of Brookline*, 20 MLC 1570, 1596 n. 21,

MUP-8426, MUP-8478, MUP-8479 (May 20, 1994)

In *Town of Stoughton*, one of the issues the Board considered was whether the employer had violated Sections 10(a)(5) and 10(a)(6) of the Law by implementing a proposal regarding light duty while the parties were engaged in successor negotiations and while a petition was pending before the JLMC (but before the JLMC asserted jurisdiction). 19 MLC at 1157. Although the Board found that the town violated Section 10(a)(5) of the Law by implementing the proposal before the parties reached impasse on the subject, it did not separately find a Section 10(a)(6) violation because:

> The parties have stipulated that the Town advised the Union that it was willing to participate in further bargaining and mediation. There is no evidence that the Town refused to attend any mediation session or otherwise failed to participate in good faith in the JLMC's mediation or fact-finding procedures.

19 MLC at 1161, n. 14.

In other words, in *Stoughton*, although the Board found that the town could not lawfully implement the change to light duty procedures, the fact that the change was implemented at a time when the petition was pending at the JLMC did not provide a factual basis for the Board to separately conclude that the town had also violated Section 10(a)(6) of the Law in the absence of additional evidence showing that the town otherwise refused to participate in good faith in the JLMC's mediation or fact-finding procedures. *Id.*

Here, the crux of the Unions' argument, and the sole basis of Count IV of the complaint, is that the City violated Section 10(a)(6) of the Law by implementing the promotional procedures while the matter was pending at the JLMC. Therefore, under *Town of Stoughton*, that fact, standing alone, is insufficient to establish a violation of Section 10(a)(6) of the Law.[17] Further, there is no evidence, and the Unions do not argue, that the City refused to participate in any mediation or arbitration sessions. Rather, the BPSOF and the City

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15. Although the Unions' brief provides further information pertaining to this request and the City's initial responses, this information is not contained in the record.

16. In 1986, the Legislature amended Section 9 of the Law by adding the following language:

> Upon the filing of a petition pursuant to this section for a determination of an impasse following negotiations for a successor agreement, an employer shall not implement unilateral changes until the collective bargaining process, including mediation, fact finding or arbitration if applicable shall have been completed.

St. 1986 c. 198. No similar amendment to Section 4A of the JLMC statute has been enacted.

17. Moreover, unlike the situation in *Town of Stoughton*, we have found that the City did not implement an unlawful unilateral change. Thus, even assuming that Section 9 of the Law's proscription against employers implementing unilateral changes while parties are participating in Section 9 impasse procedures applies equally to the JLMC's procedures, we would still find no violation of Section 10(a)(6) on these grounds because, as detailed above, we have found that the City did not implement an unlawful unilateral change.

withdrew the issue of promotional processes from the JLMC prior to arbitration.

In their post-hearing brief, however, the Unions argue that other behavior the City engaged in while this matter was pending at the JLMC "underscored" the City's bad faith during JLMC proceedings. Specifically, the Unions point to the City providing "misinformation" to the JLMC regarding its timeframe for making a proposal and its refusal to provide information to the BPSOF.

As a preliminary matter, we decline to reach the issue of whether the City's statements to the JLMC violate Section 10(a)(6) because this conduct was not the subject of any part of the complaint and the City did not have the opportunity to fully litigate this allegation.[18] *See Town of Randolph*, 8 MLC 2044, MUP-4589 (April 23, 1982) (quoting *Soule Glass and Glazing Co. v. NLRB*, 652 F. 2d 1055 (1st Cir. 1981)) ("[T]he test is one of fairness under the circumstances of each case — whether the employer knew what conduct was in issue and had a fair opportunity to present his defense").

By contrast, however, Count II of the Complaint alleges that the City violated Section 10(a)(5) of the Law by its delay in providing relevant and reasonably necessary information to the BPSOF regarding promotions procedures. This allegation was fully litigated and we have found that it has merit because, among other things, the information was necessary to assist the union in formulating its own proposals and counterproposals regarding promotional processes. Because this information request arose while the subject of promotional processes was pending interest arbitration at the JLMC, we conclude that this conduct also violated Section 10(a)(6) of the Law. *City of Melrose*, 28 MLC at 55 (citing *Framingham School Committee*, 4 MLC 1809, 1814 (1978)) (finding a Section 10(a)(6) violation where an employer's violation of Section 10(a)(5) of the Law arose out of a JLMC arbitration in which the City failed to submit an appropriation to fund a JLMC award). On these specific grounds, we find that the City violated Section 10(a)(6) of the Law.

In so holding, we reject the City's argument that this count is moot because the BPSOF and the City agreed to remove the promotional process from the JLMC after reaching an agreement on all unresolved successor contract matters certified by the JLMC, except for the promotional process. In analogous situations, the Board recognizes an exception to the mootness doctrine if there is a possibility that the challenged conduct will recur in substantially the same form, especially if the asserted violator contends it was properly engaged in the conduct. *City of Cambridge*, 35 MLC 183, MUP-04-4429 (March 5, 2009) (citing *City of Boston*, 7 MLC 1707, 1709, MUP-3812 (December 31, 1980)). Here, despite the parties' subsequent agreement to remove the issue from the JLMC, a similar wrong could occur in the future because the parties have a continuing bargaining relationship and there is no indication that the City has admitted that its actions were in violation of the Law. *See Massachusetts Board of Regents of Higher Education*, 10 MLC 1196, 1203, SUP-2673 (September 8, 1983). We therefore decline to deem this issue moot.

CONCLUSION

Based on the stipulated record and for the reasons explained above, we find that the City violated Sections 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by failing to timely provide relevant and reasonably necessary information requested by the BPSOF and BPDBS. We also find that the City violated Section 10(a)(6) and, derivatively Section 10(a)(1) of the Law by failing to provide relevant and reasonably necessary information to the BPSOF regarding promotional procedures while that issue was pending at the JLMC. We dismiss the remaining allegations.

REMEDY

Because we have dismissed Count I of the Complaint, we decline the Unions' request to order the City not to use or rely upon any assessment center components. We also decline to order the City to notify members of their violations by press release and individual emails. Moreover, because the City ultimately provided the information described in Counts II and III of the Complaint, and because the parties ultimately withdrew the issue of promotional processes from the JLMC, we order the City to post a notice and, upon request of the Unions, provide information that is relevant and reasonably necessary to their duties as exclusive collective bargaining representatives.

ORDER

Based on the foregoing, IT IS HEREBY ORDERED THAT the City shall:

1. Cease and desist from:

   a. Failing and refusing to bargain collectively in good faith with the BPSOF and BPDBS by refusing to provide relevant and reasonably necessary information when requested;

   b. Failing to participate in good faith in JLMC procedures by refusing to provide relevant and reasonably necessary information when requested;

   c. In any like or similar manner interfering with, restraining or coercing employees in the exercise of their rights protected under the Law;

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

   a. Upon request of the BPSOF and BPDBS, provide information that is relevant and reasonably necessary to their duties as exclusive collective bargaining representative.

   b. Sign and post immediately in conspicuous places employees usually congregate or where notices to employees are usually posted, including electronically, if the City customarily communicates to its employees via intranet or email, and maintain for a period of thirty

18. In this regard, we also note that unlike the BPPA, the BPSOF did not allege that the City's purportedly false statement were independent violations of Section 10(a)(6). Further, the Investigator dismissed this aspect of the BPPA's charge and the BPPA did not appeal.

(30) consecutive days thereafter signed copies of the attached Notice to Employees.

c. Notify the DLR within thirty (30) days after the date of service of this decision and order of the steps taken to comply with its terms.

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
DEPARTMENT OF LABOR RELATIONS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE COMMONWEALTH EMPLOYMENT RELATIONS BOARD

AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

The Commonwealth Employment Relations Board has held that the City of Boston violated Section 10(a)(6), Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by its unreasonable delay in providing relevant and reasonably necessary information to the Boston Police Superior Officers Federation (BPSOF) and Boston Police Detectives Benevolent Society (BPDBS).

Section 2 of MGL Chapter 150E gives public employees the following rights:

> to form, join or assist any union; to bargain collectively through representatives of their own choosing; to act together for the purpose of collective bargaining or other mutual aid or protection; and to refrain from all of the above.

WE WILL NOT fail to bargain in good faith with the BPSOF and BPDBS by refusing to provide relevant and reasonably necessary information when requested.

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 to effectuate the purposes of the Law:

Upon request of the BPSOF and BPDBS, provide information that is relevant and reasonably necessary to their duties as exclusive collective bargaining representative.

[signed]
City of Boston

Date

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

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

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In the Matter of CITY OF SPRINGFIELD

and

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 93

Case No. MUP-12-2466

54.519	***technological change***
54.523	***standards of productivity and performance***
67.7	***refusal to meet or delay in meetings***
67.8	***unilateral change by employer***

November 25, 2014
Kendrah Davis, Hearing Officer

Maurice M. Cahillane, Esq.	*Representing the City of Springfield*
Joseph L. DeLorey, Esq.	*Representing AFSCME, Council 93*

HEARING OFFICER'S DECISION

SUMMARY

The issues are whether the City of Springfield (City or Employer) violated Section 10(a)(5) and derivatively, Section 10(a)(1) of MGL c.150E (the Law): (1) by installing tracking devices in vehicles driven by City employees and recording the employees' location, idle time, distance driven, number of stops and speeding events in those vehicles without first giving the American Federation of State, County and Municipal Employees, Council 93 (Union or AFSCME) prior notice and an opportunity to bargain to resolution or impasse over the decision to install the tracking devices and record relative data, and the impacts of that decision; and (2) by failing to bargain in good faith with the Union when it refused to bargain on November 27 and 28, 2012 after AFSCME requested to meet with the City on those dates to negotiate over the decision to install tracking devices and record relative data.

For the reasons explained below, I find that the City violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by installing tracking devices in vehicles driven by City employees and recording the employees' location, idle time, distance driven,