In the Matter of CITY OF BOSTON

and

BOSTON POLICE PATROLMEN'S ASSOCIATION

Case No. MUP-1431

53.2	*conflicting ordinances and by-laws*
54.58	*work assignments and conditions*
54.8	*mandatory subjects*
67.15	*union waiver of bargaining rights*
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March 23, 2000
Robert C. Dumont, Chairman
Helen A. Moreschi, Commissioner
Mark A. Preble, Commissioner

John Becker, Esq.	*Representing the Boston Police Patrolmen's Association*
Thomas Greene, Esq.	*Representing the City of Boston*

DECISION[1]

Statement of the Case

On January 16, 1996, the Boston Police Patrolmen's Association (the Association) filed a charge with the Labor Relations Commission (the Commission) alleging that the City of Boston (the City) had violated Sections 10(a)(5) and (1) of M.G.L.c.150E (the Law). Following an investigation, the Commission issued a complaint of prohibited practice on September 23, 1996, alleging that the City had violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by unilaterally requiring bargaining unit member Sandra Gows (Gows) to attend the full recruit academy program (the recruit academy program) when she was reinstated to her position as an officer in the City's police department.

On February 13, 1997 and April 15, 1997, Stephanie B. Carey, Esq., a duly-designated administrative law judge (ALJ) of the Commission, conducted a hearing at which all parties had an opportunity to be heard, to examine witnesses, and to introduce evidence.[2] The Association and the City submitted post-hearing briefs on June 3, 1997 and June 10, 1997, respectively. On June 6, 1997, the Association submitted a supplementary brief with a copy of a Superior Court decision related to a civil contempt action brought by Gows against the City. The City filed no response to the Association's supplementary brief. On August 28, 1997, the ALJ issued her Recommended Findings of Fact. The Association filed timely challenges to these findings pursuant to 456 CMR 13.02(2). We have considered the Association's challenges to the findings, the arguments of the parties and the record in this matter. Based on that review, we make the following findings of fact and conclusions of Law.

Findings of Fact[3]

The Association is the exclusive collective bargaining representative for police patrol officers employed by the City of Boston in its Police Department (the Department). Prior to becoming a police officer, police recruits are required to complete a six-month training course at the police academy (academy) and a six-month probationary period subsequent to the academy. At the academy, police recruits are required to complete classes related to motor vehicle law, criminal law, cardio-pulmonary resuscitation (CPR) training, automobile training, firearms training and are also required to meet certain physical requirements. Recruits have no contractual rights under any collective bargaining agreement and have limited civil service protections. Once the recruits complete the academy and the subsequent probationary period, they attain full police officer status and are issued standard equipment, including mace, handcuffs, a radio, a firearm, two (2) kinds of batons, riot helmets and bulletproof vests.

In addition to the academy and probationary requirements, the Department may order additional training for its police officers. The training for all municipal officers is conducted by an entity known as the Criminal Justice Training Council (the MCJTC). An oversight body also known as the Massachusetts Criminal Justice Training Council (the Council) governs the MJCTC. M.G.L. c.41s.96B provides, in part:[4]

> Every person who receives an appointment on a permanent full-time basis in which he will exercise police powers ... shall, prior to exercising any police powers, be assigned to and satisfactorily complete a prescribed course of study approved by the department of criminal justice training...
>
> Upon petition to the department of criminal justice training by the appointing authority, a person ... may be exempted by said department..., in whole or in part, from the provisions of this section prior to his exercising police powers. The requirement that training be completed prior to exercising any police powers may be waived by said department ...

State regulations 550 CMR 3.00 *et. seq.* govern the scope of the Council's responsibilities and provide, in part:

> 3.02 (8) Exemptions from Statutory Training Requirement- M.G.L.c.41, 96B provides that a person appointed to a position on a permanent full-time basis in which he will exercise police powers may be exempted, in whole or in part, from the provisions of

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

2. On February 11, 1997 prior to the hearing, the City filed a motion to stay the proceeding pending a Superior Court decision. On February 12, 1997, the Commission denied that motion.

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

4. The Association argues that the ALJ's finding that "the Council and its subcommittee the Police Standards Committee make all training determinations and retraining determinations for police officers" is misleading. After reviewing the record, we have clarified the findings to accurately reflect the record.

M.G.L.c.41, 96B upon petition to the Council by the Appointing Authority ...

(b) Permanent Exemption-A Permanent Exemption may be granted for a person who has successfully completed the same or an equivalent training program. To qualify for such an exemption, the Appointing Authority shall provide documentation of the person's: successful completion of the same or equivalent training program, and the program curriculum; and the Temporary Exemption qualification requirements... Additionally, the person must successfully complete a course of instruction, approved by the Council, on Powers and Duties of a Police Officer ...

(9) Former Police Officers Returning to Duty-Officers subject to the provisions of M.G.L.c.41, 96B, who have undergone an interruption in police service, an interruption being defined for purposes of 550 CMR 3.00 as any duration of time wherein a police officer of any rank does not, nor may be called upon to, report for duty, including, but not limited to resignation, and removal, other than for removal for cause, but exclusive of reduction-in-force and/or disability ... shall conform to the following standards ... .

(a) Interruptions of One Year or Less-

1. Be in compliance with M.G.L. c.111, Sec. 201 (First Aid and CPR)

2. Be currently qualified in Firearms by a Council-approved Firearms Instructor; and

3. Successfully complete the Council-approved Legal Update in-service training program.

(b) Interruptions of More Than One Year and Less than Three Years-

1. Same as 550 CMR 3.02 (9) (a) 1 and 3.02 (9) (a) 2; and

2. Successfully complete an annual in-service training program approved by the Council.

(c) Interruptions of Three or More Years-Successfully complete a Council-approved police training school session subject to agency sponsorship and compliance with medical and physical fitness admission requirements.

Past Practice

Prior to July 1995, full-duty police officers that returned from an administrative leave were only required to take refresher courses that might include two-day seminars in drug/alcohol and sexual harassment training. They were not required to complete recruit training prior to regaining full-duty status. Among those officers who returned without fulfilling the academy requirement were Bruce Smith (Smith), William Kelley (Kelley), Richard Walker (Walker) and Martin Kraft (Kraft). Each of those officers had been on an extended leave and were only required to take a competency exam, firearm training and CPR training to return to work. No individuals who have been separated from service for over three years due to a suspension or a termination and subsequently returned to duty were required to attend a full academy training program with two exceptions: the Department has ordered two police officers, Tony Williams (Williams) and Debra Anderson (Anderson) to attend a full academy training program after an extended leave but neither has completed this requirement to date.[5]

Martin Kraft

Kraft was placed on administrative leave prior to June 1987 and terminated effective June 8, 1988. He was reinstated on June 13, 1990 and returned to full duty with no remedial training requirement.

Richard Walker

Walker was placed on administrative leave on or before April 1988 and subsequently terminated effective June 30, 1988. On April 8, 1991, Walker was reinstated and was not required to attend a recruit academy program prior to returning to full duty status.

Bruce Smith

Smith was placed on administrative leave effective September 13, 1991. He was subsequently suspended for nine (9) months effective March 23, 1994. Smith was reinstated on December 23, 1994 and was not required to attend a recruit academy program or take any training prior to his return to service.

William Kelley

Sergeant/Detective William Kelley first joined the department in January 1966 and became a Sergeant in 1980 or 1981. In 1986, Kelley was placed on administrative leave with pay pending an investigation. At that time, he was assigned to the Auto Theft Unit. During this leave he had no duties and no assignment. On December 30, 1988, he was notified that he was suspended effective January 10, 1989 due to Grand Jury indictments. He was subsequently terminated on April 5, 1991 based on a felony conviction. On October 9, 1992, the Massachusetts Appeals Court overturned that conviction. On September 15, 1993, he was reinstated by the Department. However, prior to returning to full-duty status, he was required to qualify at the firing range, take a first aid/CPR course and complete an in-service written examination. Susan Prosnitz (Prosnitz), the Department's chief of litigation in the Legal Advisor's Office, requested a determination from the Council regarding the training Kelley was required to complete prior to his return to duty.[6] The Council responded to Prosnitz's request with a February 8, 1994 letter, which stated in part that:

> In the case of Sergeant Detective Kelley, the interruption in service commenced on April 5, 1991, his date of termination, since, during the period from December 30, 1988 to April 5, 1991, he was suspended and may have been called upon to report for duty.
>
> Should his reinstatement become effective prior to April 5, 1994, 550 CMR 3.02(9)(b), requiring current certification in First Aid and CPR; current qualification in firearms; and successful completion of a Council-approved in-service training program, would apply, provided that his interruption in police service was for "other than removal for cause". If his reinstatement were to occur after April

5. The parties have stipulated to this fact.

6. The Department has rarely experienced a situation involving a termination of a police officer, a reversal of that decision by Civil Service and a subsequent reinstatement that extended past the relevant three-year time span. In the five years leading up to the present hearing, the Department only experienced two such cases-Gows and Kelley.

> 5, 1994, then Sergeant Detective Kelley would have to successfully complete another basic police recruit academy session.
>
> Should it be determined that his interruption was initially caused by a "removal for cause" action, regardless of subsequent amendment, the re-training requirements for ... Kelley would be determined at the discretion of the Police Commissioner...[7]

The City concluded that Kelley was not required to attend the recruit academy program because his absence had been for a period of less than three years.[8]

Tony Williams

Williams was terminated effective April 19, 1991 and reinstated on April 26, 1995. On March 27, 1995, Prosnitz wrote the Council requesting a determination whether Williams was required to complete recruit training prior to returning to active duty. Howard Lebowitz, Executive Director of the MCJTC, responded on May 5, 1995 that the Police Standards Committee had voted to require Williams to complete a certified police academy training program before returning to active duty. On or about July 1995, the Department ordered Williams to attend the full academy training prior to returning to full duty status. Williams, to date, has not complied.

Debra Gibson Anderson

Anderson was terminated on February 24, 1989 and reinstated on September 16, 1992. She completed some in-service training and sometime in July 1995 was notified that the Department would require her to complete the full academy training program prior to reinstating her to full duty status.

Alleged Change in Past Practice

Sandra Gows, a bargaining unit member, has been employed by the Department since 1985. Gows attended the academy from November 1985 to April 1986. After graduation from the academy, Gows completed the six-month probationary period and was assigned to Area B2-Roxbury as a patrol officer in the rapid response unit. The Department subsequently issued Gows the standard equipment for police officers. In May 1989, Gows attended a one-week rape investigation class. On June 7, 1989, she was transferred to the Sexual Assault Unit, and assigned to rape investigations.

On June 10, 1990, Gows was involved in an accidental shooting in her home resulting in the death of her son. Following this incident, Gows was placed on administrative leave with pay from June 12, 1990 to August 1991. She was subsequently terminated from the department. A grand jury found that the shooting was accidental and no criminal charges were filed against Gows. The Department held its own hearing related to charges of conduct unbecoming an officer, situations involving family and friends, and the use of deadly force. Those charges were not sustained. Gows then contacted the Association and the Association provided an attorney to appeal Gows's discharge to the Civil Service Commission (Civil Service). Civil Service issued its decision on August 17, 1992, finding that Gows had been wrongfully discharged and ordering the department to reinstate Gows without loss of compensation or other rights. The Civil Service decision did not address whether Gows was required to attend the academy as a condition of reinstatement. The Department appealed the Civil Service decision to the Massachusetts Superior Court (Superior Court). On June 29, 1993, a Superior Court judge affirmed the Civil Service decision. The Department then sought clarification from Civil Service about the meaning of "without loss of compensation." The Department also appealed the Superior Court decision to the Massachusetts Appeals Court, but subsequently withdrew that appeal on August 22, 1994. Because Gows's break-in-service would soon total three (3) years, at some point in 1993, the Department notified Gows that she might be required to return to the academy. Settlement discussions that began at the time of the appeal to the Massachusetts Appeals Court subsequently failed and the parties returned to the Civil Service Commission in August 1994 for further hearings. After two evidentiary hearings before Civil Service, the City agreed to reinstate Gows and the parties agreed to submit a joint letter to the Council for a determination about whether Gows had to complete the recruit academy program. In a response to Prosnitz's earlier request for a determination related to Gows, the Council, on October 28, 1994 replied, in part:

> Reference is made to our telephone conversation of October 24, 1994 [on] whether Officer Harris, having undergone an interruption in police service of more than three years following her removal "for cause", is required to again successfully complete the basic police recruit academy session ... The "removal for cause" provision, as opposed to removal without prejudice, ... did not anticipate the appointment or reappointment of an officer "removed for cause" from one police department to the same or another department. Current draft revisions to that section of the CMR, although not yet promulgated, eliminate the differentiation between the two, and require that all officers who undergo a break-in-service of three or more years again successfully complete a basic police recruit academy session as a re-training requirement.
>
> The current wording of 550 CMR 3.02(9) may be interpreted in two ways: if the position is taken that the initial removal was "for cause", regardless of subsequent vacation or amendment of the action, then the determination of the re-training requirement falls within the discretion of the Police Commissioner; if the position is taken that the initial removal "for cause" was nullified by subsequent vacation

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7. The Association contends that the ALJ's finding that "the Council informed Prosnitz that because the period of time elapsing between Kelley's termination and reinstatement was less than three years, the Council would only require Kelley to complete some in-service training" incorrectly implies that the Council ordered Kelley to complete in-service training. The Association points out that the Council in its February 8, 1994 letter instead presented alternative scenarios as to what form of training that Kelley might need to undergo depending upon whether his interruption in police service was a removal for cause or a removal for other than cause. The record supports the Association's argument, and we have clarified the findings accordingly.

8. The Association argues that the ALJ's finding that "Kelley was not required to return to the academy because his absence was determined to have been less than three years" contradicts the plain language of the February 4, 1994 letter. We find the Association's argument to be supported by the record and have modified the findings to clearly indicate that the City made the determination that Kelley should attend in-service training.

> or amendment of the action, thereby rendering the removal "without prejudice", then the provisions of 550 CMR 3.02(9)(c) would apply.
>
> It is the recommended policy of the Police Standards Committee of this Council that all officers who undergo a break-in-service of three years or more, regardless of reason or circumstance, be required to repeat the basic police academy training program...[9]

At no time prior to the Gows case, did the City notify the Association that it intended to require officers returning from extended leave to complete the recruit academy program. When the Association became aware of Gows's situation, the Association did not request to bargain over the issue because it believed that the requirement in Gows's case was a *fait accompli*.

On January 26, 1995, Gows's attorney, David Jacobson, sent Prosnitz a proposed joint letter to the Council. On February 6, 1995, Jacobson agreed to a revised joint letter drafted by Prosnitz. That letter, submitted by Prosnitz to Lebowitz, read, in part:

> The Civil Service Commission has requested that the parties solicit your opinion with respect to the application and interpretation of the...Council's regulations concerning police officers returning to duty after a greater than three year absence from service... The Department sent a letter to Brian Daley...seeking a determination... The Department received a prompt response...dated October 28, 1994, from Mr. Daley, in which he concluded that Officer Martin-Gows was required to repeat the basic police academy training courses
>
> At the hearing on December 5, 1994, ...counsel asked whether the officer could be given a waiver under 550 CMR 3.02(8), so that she would not have to undergo full academy training. The Department suggested that the exemption was intended to apply only to those individuals applying in the first instance and that 3.02(9) was the only provision governing officers returning to duty... The Commission then asked counsel for both parties to submit a joint letter to the Council evaluating the propriety of granting an exemption in this instance.
>
> Accordingly, please consider this letter as a request for a determination as to whether...Gows may be granted an exemption pursuant to 550 CMR 3.02(8) in view of the above-described circumstances.[10]

On March 22, 1995, Lebowitz informed Prosnitz that he had presented Gows's case to the Police Standards Committee who unanimously voted to require Gows to complete a certified recruit academy program before returning to active duty.[11] Gows was the first officer reinstated after an extended leave that the Department required to complete the recruit academy program prior to a return to full duty status.[12]

The Department reinstated Gows on October 26, 1994, assigned her to the Bureau of Administrative Services but placed her on administrative leave with pay until December 1994. When Gows physically returned to the Department, she was assigned to the academy with no duties and she was not given any department-issued equipment.[13]

Gows sat at a desk at the academy for eight (8) hours per day until April 6, 1995 when she was placed on injured leave. Because she was restricted to administrative duties and the Department had not resolved the issue of her return to the academy, Gows was denied the opportunity to attend computer training, in-service training and CPR training. Because only full-duty police officers are eligible for paid details and overtime, Gows was not eligible for either.[14]

In July 1995, Gows received a letter from the Superintendent of the Bureau of Administrative Services, Joseph V. Saia (Saia), telling her to prepare to go to the next academy. That letter read, in part:

> On July 25, 1995, the Department was informed that your physician cleared you for return to active duty on July 19, 1995. In accordance with this authorization and Department policy and procedure, you were ordered to report to the Academy today.
>
> I wish to further advise you that you will be required to attend the first available Massachusetts Criminal Justice Training Council certified academy program in accordance with the Council's regulations governing officers returning to duty after a greater than three year absence. It is anticipated that the next available academy will begin in September 1995 ...

On January 4, 1996, Gows filed a contempt action regarding the Department's attempt to require her to return to the academy. On June 3, 1997, Superior Court Judge John Cratsley issued a decision, denying the contempt petition and finding: (1) that the Department must restore Gows to the rank of detective; (2) that although the Department has the discretion to decide what type of re-training or return to service, there is no statute or regulation that requires Gows to re-attend the entire new recruit-training program at the academy; (3) that the Department has the discretion and managerial prerogative to decide issues related to a police officer's right to carry a revolver and perform police functions that require a possession of such a weapon; (4) that the City owed Gows lost overtime and detail pay.[15]

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9. The Association requests a finding that, "It is the recommended policy of the Council that officers who undergo a break in service of three or more years re-attend the full academy. The Council's regulations indicate that training requirements for officers removed for cause fall within the discretion of the Police Commissioner." Upon reviewing the record, we conclude that the plain language of the October 24, 1994 letter is sufficient to explain the Council's interpretation of its training requirements at that point in time. Thus, the Commission declines to amend the findings to include the additional facts requested by the Association.

10. Jacobson authorized Prosnitz to sign this joint letter on his behalf.

11. Although Lebowitz's March 22, 1995 letter indicates that the Police Standards Committee voted unanimously to require Gows to complete a certified recruit academy before returning to active duty, the minutes of the meeting indicate that the Committee actually voted to deny Gows a permanent exemption from training.

12. The record reflects that, prior to Gows's case, the City sought a Council determination in Kelley's case but he was not required to attend the recruit academy program prior to his return to full duty status. After Gows's case, the department requested a determination for Williams in March 1995 and notified Gibson Anderson of the academy requirement in July 1995.

13. The Department placed Gows at the academy as a job assignment and not as part of the recruit academy program.

14. At the time of this hearing, Gows is assigned to the Warrant Unit, has no department-issued equipment, is not eligible for paid details and her overtime opportunities are limited to those available in the Warrant Unit.

15. The Association argues that the ALJ's finding that "the Council, in addition to its oversight responsibilities, has the statutory authority to order training for police officers" contradicts Judge Cratsley's ruling. We agree with the Association and have amended the findings accordingly.

Opinion

Timeliness

456 CMR 15.03 states that: "Except for good cause shown, no charge shall be entertained by the Commission based upon any prohibited practice occurring more than six (6) months prior to the filing of a charge with the Commission." The City argued that the Association had notice in August 1994 that Gows would need to again complete recruit training and that the six-month period of time had elapsed for the filing of a charge.[16] Since an allegation that a charge is untimely is an affirmative defense, the City has the burden of showing that the Association had knowledge of the requirement that Ms. Gows undergo recruit training prior to July 1995. *Town of Wayland*, 5 MLC 1738, 1741 (1979). During settlement talks in August 1994, Prosnitz informed Gows's private attorney Jacobson that, if Gows remained out of work for more than three years, Gows would need to attend recruit training.[17] However, the City has failed to demonstrate how a reference made in settlement talks to a private attorney can be imputed to the Association. *Id.* at 1741; *see also City of Leominster*, 3 MLC 1530, 1534 (1977), *amended on other grounds*, 4 MLC 1512 (1977). The Commission has previously ruled that, even if certain unit members knew of a proposed course of action by the employer, knowledge by individual unit members is not sufficient to impute knowledge to the bargaining representative. *Town of Wayland* at 1738.

Here, the City wrote to the Council on October 25, 1994 and February 6, 1995 to inquire about the Council's opinion as to whether Gows needed to attend the recruit academy program. The City's letters to the Council indicate that the City had not reached a final determination about whether Gows would be required to undergo the recruit academy program. Because the City had not made a final determination, there is no way the Union could have known what the City would decide. Therefore, we must determine whether the Union had notice during the period between March 22, 1995, the date of Lebowitz's letter to the City, and July 25, 1995. During that time period, the City never informed the Association that Gows would need to repeat the recruit academy program. The City also presented no evidence that would cause the Commission to conclude that the Association had knowledge from March 22, 1995 to July 25, 1995 that Gows would need to attend recruit training again. *Contra Scituate School Committee*, 9 MLC 1010, 1012 (1982). Therefore, we conclude the Association filed its prohibited practice charge on January 16, 1996, which was within six months of the City's July 25, 1999 order that Gows attend the recruit academy program.

Unilateral Change

A public employer violates Section 10(a)(5) of the Law when it unilaterally changes a condition of employment involving a mandatory subject of bargaining. *School Committee of Newton* v. *Labor Relations Commission*, 388 Mass. 557 (1983). The duty to bargain extends to both conditions of employment that are established through custom and past practice as well as those conditions of employment which are established through a collective bargaining agreement. *City of Boston*, 16 MLC 1429, 1434 (1989); *Town of Wilmington*, 9 MLC 1694, 1697 (1983). To establish a violation, the Association must show that: (1) the employer altered an existing practice or instituted a new one; (2) the change affected a mandatory subject of bargaining; (3) the change was established without prior notice or an occasion to bargain. *Commonwealth of Massachusetts*, 20 MLC 1545, 1552 (1994); *City of Boston*, 20 MLC 1603, 1607 (1994).

Here, the Complaint alleged that the City failed to give the Association prior notice and an opportunity to bargain to resolution or impasse before requiring Gows to attend recruit training after her reinstatement, in violation of Section 10(a)(5) of the Law. Therefore, we must first consider what practice, if any, existed prior to July 25, 1995 if a police officer returned to active duty after an extended absence from work. Martin Kraft, Richard Walker, Bruce Smith and William Kelley were all police officers in the Department and were absent from active duty for extended periods of time. The City did not require any of those officers to undergo the recruit academy program as a condition for returning to active duty status. Gows was the first patrol officer the City required to attend the recruit academy again after an extended absence from active duty. The City instituted an actual change in an existing condition of Gows's employment. *City of Peabody*, 9 MLC 1447 (1982).

The City's change in an existing condition of employment affected a mandatory subject of bargaining because the City altered the compulsory training that a police officer must undergo when returning to active duty after an extended absence. The Commission has previously found that compulsory training is a mandatory subject of bargaining. *Town of Bridgewater*, MUP-8634, slip op., (June 20, 1997). Because the City ordered Gows to undergo recruit training, there is no doubt that the training was compulsory. The City's July 1995 order to Gows also affected another mandatory subject of bargaining because the City required Gows to attend the recruit academy program as a condition of her return to active duty status. The Commission has previously ruled that other kinds of continuing conditions of employment are mandatory subjects of bargaining. *See e.g.*, *Boston School Committee*, 3 MLC 1603 (1977); *City of Pittsfield*, 4 MLC 1905 (1978); *City of Haverhill*, 16 MLC 1077, 1082 (1989) (H.O. 1989), *aff'd*, *City of Haverhill*, 17 MLC 1215 (1990).

The City insists that the decision about whether Gows should be required to attend the recruit academy program is not a mandatory subject for bargaining because the decision to order the training rested with a third party, the Council, not with the City. We have determined that a public employer has no duty to bargain if a third party exercised its authority to make a decision. *See e.g.*

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16. In the *Woburn Teachers Association* case, the Commission ruled that all of the facts necessary to support a complaint must be proven on the record and that a respondent may present the affirmative defense of timeliness at the hearing, even though the Commission has previously found probable cause to issue a complaint. *Woburn Teachers Association*, 12 MLC 1767, 1772 (1986).

17. The Association insists that Prosnitz only informed Jacobson of the possibility that Gows would need to attend recruit training. Because Jacobson did not testify, the Commission must rely upon Prosnitz's recollection of the conversation.

Massachususetts Correction Officers Federated Union v. *Labor Relations Commission*, 417 Mass. 7, 8-9 (1994); *City of Somerville*, 19 MLC 1795 (1993); *Board of Regents of Higher Education*, 19 MLC 1248, 1272 (1992). Here, the City has taken the position that the Council had the statutory authority to require Gows to attend the recruit academy program. However, on June 3, 1997, Judge Cratsley rejected the City's position on this point.[18] *See Gows* v. *City of Boston et al.*, Suffolk Superior Court No. 92-5652, slip op. at 11 (June 3, 1997). The court found that there was no statutory or regulatory requirement that Gows attend the recruit academy program again before she returned to active duty status. *Id.* at 8. Judge Cratsley determined that the provisions of 550 CMR 3.02(9) did not apply to Gows because her interruption in service had been for over three years and had been for cause. *Id.* at 10. Because Judge Cratsley found that the Council had no authority to require Gows to attend the recruit academy program again, the City cannot now use the Council's decision of March 22, 1995 to insist that the employer only had to impact bargain. Even the City's good faith belief about the Council's authority in March 1995 will not act as a defense to the charge that the City made a unilateral change in a mandatory subject of bargaining. The Commission has previously ruled that a unilateral change in a mandatory subject of bargaining is a per se violation and that the employer's good faith is not relevant. *City of Malden*, 7 MLC 1188, 1190 (H.O. 1980), *aff'd*, *City of Malden*, 7 MLC 1518 (1980).

Waiver by Inaction

Once an exclusive bargaining representative is on notice that an employer contemplates a unilateral change in a mandatory subject of bargaining, the bargaining representative must make a prompt and effective demand for bargaining or be found to have waived the right to negotiate over the proposed change. *See Boston School Committee*, 4 MLC 1912, 1914 (1978). Only a finding of *fait accompli* will relieve the bargaining representative of its obligation to request bargaining. *Boston Water & Sewer Commission*, 12 MLC 1250, 1255 (1986). Faced with a *fait accompli*, a bargaining representative need only protest the unilateral change. *Id.* The Commission has defined a *fait accompli* as occurring when "... under all attendant circumstances, it can be said that the employer's conduct has progressed to a point that a demand to bargain would be fruitless." *Scituate School Committee*, 9 MLC 1010, 1012 (1982). Here, the City asserts the affirmative defense that the Union waived its right to seek bargaining because the Union did not seek to negotiate after the City ordered Gows to re-attend recruiting training in July 1995. *See Boston School Committee* at 1914. To show a waiver by inaction, the City must establish that the Association had actual knowledge and a reasonable opportunity to negotiate over the proposed change, but inexplicably failed to bargain or to request to bargain. *Holliston School Committee*, 23 MLC 211, 213 (1997). We have determined previously that the Association had no notice that the City would require Gows to undergo recruit training until the City issued the July 25, 1995 letter. After that date, the City provided the Union with no reasonable opportunity to bargain because Gows was ordered to prepare immediately for the recruit academy program that was scheduled to begin in September 1995. Because the City had gone ahead and actually implemented the change by ordering Gows to attend the recruit academy program, the Association was faced with a *fait accompli* that would have rendered any demand to bargain by the Association futile.

Conclusion

Based on the record for the reasons stated above, we conclude that the City violated Sections 10(a)(5) and (1) by unilaterally requiring Gows to attend the recruit academy program without providing the Union with an opportunity to bargain to resolution or impasse.

ORDER

WHEREFORE, based upon the foregoing, IT IS HEREBY ORDERED that the City of Boston shall:

1. Cease and desist from:

a. failing or refusing to bargain in good faith to resolution or impasse with the Association over the decision to require a unit member who was absent from active duty as a police officer for an extended period of time to attend the recruit academy program after the police officer was reinstated to full duty.

b. requiring Gows, Williams, Gibson Anderson or any other unit member who was reinstated to active duty as a police officer after an extended absence from the job to attend the full recruit academy prior to the occurrence of one of the following conditions:

1. an agreement with the Association on compulsory training for unit members who return to active duty as police officers after an extended absence;

2. a bona fide impasse in the bargaining;

3. the subsequent failure of the Association to bargain in good faith.

c. in any like or related manner, interfering with, restraining or coercing any employee in the exercise of his/her rights guaranteed under the Law.

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

a. upon demand, negotiate in good faith with the Association over the decision to require unit members who were absent from active duty as a police officer for an extended period of time to attend mandatory training and the impacts of any mandatory training on wages, hours and conditions of employment.

b. make Gows whole for any loss of earnings she sustained as a result of the City's requirement that the unit member attend the recruit academy program as a condition for restoring her to active duty.

c. pay interest on all sums owed at the rate specified in M.G.L.c.23, §6B up to the date the City complies with this Order;

d. post in all conspicuous places where its employees represented by the Association usually congregate, or where notices are usually

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18. The Commission hereby takes administrative notice of Judge Cratsley's June 3, 1997 decision in Suffolk Superior Court No. 92-5652. See *Woods Hole, Martha's Vineyard and Nantucket Steamship Authority*, 14 MLC 1518, 1519-20 (Footnote #1) (1988).

posted, and display for a period of thirty (30) days thereafter, signed copies of the attached Notice to Employees.

e. notify the Commission in writing of the steps taken to comply with this Decision within ten (10) days after receipt of the Decision.

NOTICE TO EMPLOYEES

The Labor Relations Commission has found that the City of Boston has violated Sections 10(a)(5) and (1) of Massachusetts General Laws, Chapter 150E by unilaterally requiring Sandra Gows to attend the recruit academy program without providing the Union with an opportunity to bargain to resolution or impasse.

WE WILL NOT fail or refuse to bargain collectively in good faith with said Union over the decision to require a unit member who was absent from active duty as a police officer for an extended period of time to attend the recruit academy program.

WE WILL NOT change our past practice and require a unit member who was reinstated to active duty as a police officer after an extended interruption of service to attend the full recruit academy prior to the occurrence of one of the following conditions: an agreement between the parties, a bona fide impasse in bargaining or the subsequent failure of the Association to bargain in good faith.

WE WILL NOT in any like or similar manner interfere with, restrain and coerce our employees in the exercise of their rights protected under the Law.

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

Make Gows whole for any loss of earnings she sustained as a result of the City's requirement that the unit member attend the recruit academy as a condition for restoring her to active duty status.

To pay interest on all sums owed at the rate specified in M.G.L.c.23, §B up to the date the City complies with this order.

[signed]
CITY OF BOSTON

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