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CITY OF BOSTON
and
BOSTON POLICE SUPERIOR OFFICERS FEDERATION

Case No. MUP-2670

54.31 *Impact of management rights decisions*
67.16 *other defenses*
67.165 *bargained to Impasse*
67.8 *unilateral change by employer*
92.49 *other motions*

September 3, 2003¹

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*Representing the Boston Police
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DECISION²

Statement of the Case

On April 20, 2000, the Boston Police Superior Officers Federation (the Federation) 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 January 22, 2001, alleging that the City had violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by implementing a use of less-lethal force rule without giving the Federation an opportunity to bargain to resolution or impasse over the impacts of that rule, including using beanbag shotguns and ammunition on unit members' terms and conditions of employment. The City filed an answer on January 26, 2001.

On June 26, 2001, June 27, 2001, September 27, 2001 and March 7, 2002, Margaret M. Sullivan, Esq., a duly-designated Commission hearing officer, conducted a hearing at which all parties had an opportunity to be heard, to examine witnesses, and to introduce evidence. The City and the Federation submitted post-hearing briefs on May 3, 2002.

1. Chairman Allan W. Drachman has recused himself from participating in this case.

2. 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.

On September 18, 2002, the hearing officer issued her Recommended Findings of Fact. Pursuant to 456 CMR 13.02(2), the City and the Federation filed challenges to the Recommended Findings on December 19, 2002 and December 20, 2002, respectively.³ After reviewing those challenges and the record, we adopt the Hearing Officer's Recommended Findings of Fact, as modified where noted, and summarize the relevant portions below.

Findings of Fact⁴

Police officers employed by the City in its police department (the BPD) who are neither managerial nor confidential employees within the meaning of Section 1 of the Law are members of one of four bargaining units. The Boston Police Patrolman's Association (the Association) is the exclusive collective bargaining representative for patrol officers; the Federation is the exclusive collective bargaining representative for uniformed personnel who hold the rank of sergeant, lieutenant or captain; and the Boston Police Detectives Benevolent Society (the Society) is the exclusive collective bargaining representative for a unit of detectives and a unit of detective superior officers.

The BPD divides the City into five geographic areas, and there are two or three district stations within each area. Uniformed captains serve as the station commanders; uniformed lieutenants serve as the shift commanders; and uniformed sergeants often serve as patrol supervisors responding to major incidents and overseeing patrol officers. The BPD issues the following items to all of its police officers: a .40 caliber Glock semi-automatic pistol, a collapsible baton/nightstick, oleoresin capsicum (OC) pepper spray, and handcuffs.

In 1997, the BPD conducted research on the methods that other police departments used to administer a lesser degree of force than lethal force in certain tactical situations.⁵ In 1998, the BPD ordered the firearms instructors at the police academy to develop lesson plans concerning the deployment of beanbag shotguns and beanbag ammunition as tools to administer lesser force than deadly force. The firearms instructors then contacted the National Tactical Officers Association (the NTOA) for information and training materials. On May 7 and May 8, 1998, a NTOA representative, who was a police captain in St. Louis, trained the firearm instructors in using the beanbag shotgun and beanbag ammunition. The firearm instructors became certified to use the beanbag shotgun on or about the same dates. As of March 1999, the firearm instructors had formulated a training program to educate police officers on using the beanbag shotgun, although they subsequently revised that program.

3. The hearing officer relied upon the eighteen audiotapes that comprise the record of the hearing to draft the Recommended Findings of Fact. Approximately one month after the Recommended Findings of Fact were issued, the City submitted a stenographic transcript of the hearing to the Commission and filed an unopposed motion to have the stenographic transcript designated as the official record in the case. The hearing officer denied the motion, and the City filed an appeal of the hearing officer's ruling. Because all eighteen audiotapes would again need to be reviewed simultaneously with the transcript in order for the audiotapes to replace the transcript as the official record in the case, we affirm the hearing officer's ruling.

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

The beanbag shotguns were Remington shotguns from the BPD weapons inventory that had been altered by removing the wooden stock and fore-end, replacing them with an orange-colored stock and marking the handle with the designation less lethal.⁶ The beanbag shotguns operated in the same manner as a traditional shotgun but were loaded with beanbag ammunition rather than buckshot. The beanbag ammunition consisted of square projectiles containing lead that were covered in a soft material and encased in a 12-gauge shotgun shell. Upon discharge of the shotgun, the projectiles unfolded and traveled at a rate of speed between 95 and 100 miles per hour. The primary target areas for the beanbag shotgun were the lower abdomen and the major muscle groups, especially the thighs and buttocks, whereas the areas to be avoided included the head, chest, neck and groin.⁷

On August 30, 1999, Deputy Superintendent John Ferguson (Ferguson), Director of the BPD's Office of Labor Relations, wrote to Captain William Broderick (Broderick), President of the Federation, enclosing a draft copy of a proposed departmental rule entitled "Use of Less Lethal Force" (the August 1999 draft).⁸ Ferguson in his letter noted that the BPD wanted to implement the rule as soon as possible but not later than October 1, 1999. Ferguson requested that Broderick contact him on or before September 17, 1999 if the Federation had any objections or concerns regarding implementing the rule. The August 1999 draft contained the following terms:

This rule is issued to establish guidelines for the use of less-lethal force by members of this Department in the performance of their duties and to establish appropriate training, reporting and documentation for such use of force.

Sec. 1 DEFINITIONS:

0.1 Less-Lethal Force Philosophy is a concept of planning and force application that meets operational objectives, with less potential for causing death or serious physical injury than the use of deadly force.

0.2 Reasonableness is moderate and/or fair action within reason, suitable to the confrontation.

0.3 Beanbag Round, also known as a flexible projectile, is fired through a 12-gauge shotgun.

Sec. 2 GENERAL CONSIDERATIONS:

The Department has adopted the less-lethal force philosophy to assist in the de-escalation of potentially violent situations. The less-lethal force philosophy shall not preclude the use of deadly force.

Sec. 3 TRAINING AND QUALIFICATIONS:

5. Lethal force is the degree of force likely to result in death or serious bodily injury.

6. The BPD ceased having its police officers deploy shotguns in the early 1990's.

7. Serious injury or death could result if a beanbag projectile struck an individual in the head or chest.

8. Less-lethal force is a degree of force that has a minimal probability of causing death but can cause death if used under certain circumstances or if used inappropriately. Less than lethal force is a degree of force that cannot cause death regardless of how it is used. We amend the definitions of the phrases less-lethal force and less than lethal force in response to the parties' challenges.

Training shall consist of a Department approved training and qualification program in the use of a 12-gauge shotgun. Supervisors shall be trained and qualify on a semi-annual basis in the proper use of a bean bag shotgun. Supervisors trained in the use of this weapon will be held accountable for proficiency as well as compliance with Department policy in the use of the weapon.

Sec. 4 SECURING OF A BEANBAG SHOTGUN AND AMMUNITION:

Each bean bag shotgun shall be stored in a district gun locker in a safe condition (i.e. safety on, action open, chamber and magazine empty). Beanbag rounds shall be stored and secured along with the weapon in the district gun locker. A colored stock shall identify that the shotgun is used strictly for beanbag rounds. Every Thursday the day tour duty supervisor⁹ shall perform a visual inspection to verify that the shotgun is stored in a safe condition, as well as insure that the requisite number of beanbag rounds are accounted for. This information shall be recorded in a district control log.

During the patrol supervisor's tour of duty, the beanbag shotgun and beanbag rounds shall be secured in a safe condition in a case labeled beanbag shotgun and taken to the police vehicle. While in the police vehicle the beanbag shotgun shall be loaded and secured in the trunk in a locked rack.

Sec.5 AUTHORIZATION AND USE OF LESS LETHAL WEAPONS:

Only patrol supervisors who have completed the Department training and qualification program shall be authorized to use a 12-gauge beanbag shotgun.

If the possibility of the use of less lethal force is determined to be an option the patrol supervisor shall be notified and respond to the scene. If the possibility of the use of less lethal force is determined to be a reasonable option by the patrol supervisor, then the patrol supervisor shall notify the Boston Emergency Medical Services.

The patrol supervisor shall designate an on-scene officer to provide lethal force coverage. The patrol supervisor shall wear his/her bulletproof vest during these incidents.

Upon discharge of the shotgun the district commander and duty supervisor shall be notified. Subjects who are struck by a beanbag shall be transported to a medical facility for examination.

Sec. 6 REPORTING AND INVESTIGATION:

Any discharge of a beanbag shotgun other than training shall be investigated pursuant to Rule 303.

In a September 10, 1999 letter, Lieutenant Thomas Nolan (Nolan), Vice-President of the Federation, responded to Ferguson by noting that the August 1999 draft constituted a significant change in

the working conditions of Federation unit members and that the rule was a mandatory subject of bargaining.¹⁰ Nolan also proposed that the parties present this issue at an upcoming arbitration hearing that the Joint Labor Management Committee (the JLMC) had convened pursuant to St. 1987, c.589. The JLMC convened the arbitration hearing to address certain issues that were in dispute during the parties' negotiations for a successor contract for the period from 1996-1999.¹¹ However, the City's legal representative, Robert Boyle, Jr., Esq. (Boyle), in a September 15, 1999 letter declined to agree to present the issue at the arbitration hearing. The parties then exchanged a series of communications that resulted in the parties agreeing to schedule a meeting on October 25, 1999 to discuss the issue.

October 25, 1999 meeting

Nolan and Attorney Alan McDonald represented the Federation at the October 25, 1999 meeting.¹² Boyle and Ferguson represented the City; and two firearms instructors from the police academy, Sergeant James Gallagher (Gallagher) and Officer Daniel Donahue (Donahue) also attended. At the beginning of the meeting, McDonald announced that an endpoint had not been reached in discussions concerning the August 1999 draft and that the ball was in the City's court. Ferguson responded by stating that the BPD wanted to implement the August 1999 draft right away. Donahue then gave a presentation on the beanbag shotgun and beanbag ammunition including a description of the velocity of the beanbag projectile, the weight of the projectile on impact, the optimal distance to use the beanbag shotgun, and the overall effectiveness of the weapon. He noted that the beanbag shotgun was to be used in those situations where an individual was armed with a sharp-edged instrument and where the use of lethal force also would have been appropriate under the BPD's guidelines. He emphasized that the beanbag shotgun should not be deployed at incidents where individuals have firearms.

Donahue also described how the patrol supervisors would receive two days of training and would be expected to become certified in using the beanbag shotgun. He opined that patrol supervisors should undergo training and re-certification in using the beanbag shotgun four times per year to ensure that they remained familiar with the weapon. Donahue also gave specific information about the locking device that would be installed in the trunk of the patrol supervisors' police vehicles to secure the beanbag shotgun.

9. The term duty supervisors in the August 1999 draft referred to the uniformed lieutenants assigned to the district station houses (the district lieutenants).

10. The BPD did not have a less lethal force rule prior to the proposed rule contained in the August 1999 draft, nor did the BPD ever use a beanbag shotgun or a similar weapon in the past.

The Federation argues that this fact should have been included in the findings. We find the fact to be supported by the record and therefore have amended the findings.

11. While the parties engaged in successor contract negotiations, the terms and conditions of employment of the prior contract covering the period from 1990 to 1996 continued to remain in effect. The 1990-1996 contract incorporated an award from Arbitrator Arvid Andersen that was issued under the auspices of the JLMC. Article IV, the Management Rights Clause, of that contract stated in pertinent part that:

The Municipal Employer shall not be deemed to be limited in any way by this Agreement in the performance of the regular and customary functions of municipal management, and reserves and retains all powers, authority and prerogatives including, without limitation, the exclusive right of the Police Commissioner to issue reasonable rules and regulations governing the conduct of the Police Department, provided that such rules and regulations are not inconsistent with the express provisions of this Agreement.

12. The City challenges the hearing officer's determination that Sergeant William Walsh (Walsh) and Sergeant Robin DeMarco (DeMarco) also represented the Federation at the October 25, 1999 meeting. Upon review of the record, we agree with the City and have amended the finding.

The Federation had questions about the nature of the training and whether only patrol supervisors would be eligible to receive that training. McDonald inquired whether the City intended to provide situational training for the patrol supervisors.¹³ Boyle replied that the City had not envisioned situational training but only planned to offer training to certify the patrol supervisors in using the weapon. McDonald asked what the consequences would be if a patrol supervisor failed to qualify for certification. McDonald also asked whether there would be circumstantial training. Donahue indicated that all police officers had already been instructed at the academy in the concept of the force continuum, which prescribes the appropriate type of force and degree of force for particular situations.

Nolan inquired whether the district lieutenants would also receive training because the August 1999 draft made them responsible for ensuring that the beanbag shotgun was secured in the district gun locker between tours of duty and for inspecting the beanbag shotgun. Ferguson replied that only patrol supervisors would undergo training. However, the City indicated that it would reconsider whether the district lieutenants should receive training and that it would get back to the Federation on that issue. Nolan also noted that certain district station houses, including his own, did not have gun lockers.

Additionally, the Federation had questions about safety and liability surrounding the use of the beanbag shotgun. Nolan inquired whether the safety of patrol supervisors who deployed the beanbag shotgun would be compromised because they would be unable to utilize their pistols, especially in those situations where individuals who were thought to be armed only with an edged weapon also had a firearm. Donahue stated that when patrol supervisors deployed the beanbag shotgun, they would designate one or more other police officers to be the bearers of lethal force. In the alternative, the patrol supervisors could simply discard the beanbag shotgun and use their pistols. Donahue next pointed out that the beanbag shotgun could cause fatal injury if targeted at certain areas of the body and that there was a 2% mortality rate for individuals struck by a beanbag projectile.¹⁴ Nolan asked whether the City had sought community input before selecting the beanbag shotgun, and Ferguson replied that the BPD had never previously consulted the community about its choice of a firearm. Nolan then inquired whether a patrol supervisor would be liable if the patrol supervisor discharged the beanbag shotgun and an individual was seriously injured.

Nolan next queried why the City intended to investigate a patrol supervisor's discharge of a beanbag shotgun pursuant to Rule 303 of the BPD's internal regulations rather than pursuant to Rule 304. Rule 303 contains the guidelines and regulations governing the use of deadly force by the City's police officers and establishes guidelines for investigating the discharge of firearms by police officers. Rule 303 mandates that: 1) district commanders report to incident scenes where police officers have discharged their fire-

arms on duty; 2) the homicide unit investigating team investigate the matter; and 3) the internal affairs division carry out its own investigation. Further, in those instances where the use of deadly force results in death, the Suffolk County District Attorney's Office assumes control of the investigation. Rule 304 contains the guidelines for the use of non-lethal force by police officers. That rule mandates that patrol supervisors and the police officer's commanding officer investigate when police officers use non-lethal force, including incidents in which police officers strike individuals with objects, use incapacitating agents, or when visible injuries occur during the course of an arrest.

Finally, the Federation asked if other police departments deployed the beanbag shotgun, and the City identified police departments in the western and southern parts of the United States. The City also provided several hundred pages of information about the beanbag shotgun and beanbag ammunition to the Federation and requested that the Federation reduce to writing their concerns about the beanbag shotgun. The Federation then asked to see a test firing of the beanbag shotgun, and the meeting ended. The entire meeting lasted between sixty and ninety minutes.

November 19, 1999 Test Fire

On November 19, 1999, Donahue and Gallagher conducted a demonstration of the beanbag shotgun and beanbag ammunition at the BPD's Firing Range at Moon Island in Quincy. Several rounds of ammunition were fired. McDonald, DeMarco and Sergeant John Tevnan (Tevnan) represented the Federation, and Boyle and Ferguson represented the City. Donahue and Gallagher responded to questions about the range, accuracy and proper use of the weapon. DeMarco took the opportunity to test fire the beanbag shotgun. The demonstration lasted approximately forty-five minutes. At the end of the demonstration, Boyle noted that the Federation had not yet sent him its information request or a written list of its concerns. McDonald indicated that he would make an information request soon.

On November 23, 1999, McDonald wrote to Boyle requesting the following information: 1) a copy of any research, news or magazine articles, literature, reports, surveys, rules or regulations, policies, correspondence, memoranda, statistics, and any other data of any kind gathered by the BPD in connection with its proposed rule; 2) a copy of any correspondence, memoranda, notes, reports, research, surveys, statistics, or any other documentation generated by the BPD in connection with its proposed rule; 3) a copy of all training materials to be used by the BPD in connection with the implementation of its proposed rule; 4) a narrative statement reflecting what, if any, discussion the Department had with community organizations or groups concerning the proposed rule; and 5) a narrative statement explaining why the BPD elected to have only patrol supervisors certified to use the beanbag shotgun under the proposed rule.

13. Situational training places participants in scenarios where they actually decide whether or not to discharge the beanbag shotgun.

14. In response to the parties' challenges, we amend the findings to indicate that there was a 2% mortality rate rather than a 20% mortality rate for individuals struck by a beanbag projectile.

On December 9, 1999, the City sent a facsimile of the cover letter¹⁵ to the response to the information request to the Federation without attachments.¹⁶ On that same date, Boyle wrote to McDonald requesting that the City and the Federation meet on December 14, 1999. McDonald in a December 10, 1999 letter declined to schedule a meeting on December 14, 1999 stating that he had not yet received the City's response to his information request or had an opportunity to review the materials contained in that response.¹⁷ Boyle responded on the same date by offering alternative meeting dates of December 20, 1999 and December 22, 1999. The City and the Federation subsequently exchanged correspondence during January 2000 and the first two weeks of February 2000 that resulted in the parties scheduling a meeting for February 17, 2000.¹⁸

February 17, 2000 Meeting

At the February 17, 2000 meeting, Nolan, DeMarco, Tevnan and McDonald represented the Federation and Boyle, Ferguson, and Deputy Superintendent John Sullivan (Sullivan), Ferguson's successor as the BPD's Director of Labor Relations, represented the City. At the beginning of the meeting, McDonald noted that based upon a review of the information that the City had sent to the Federation the beanbag shotgun issue was more complex than it originally seemed. The parties then engaged in a discussion concerning the difference between less-lethal force and less than lethal force.¹⁹ McDonald noted that the beanbag shotgun could cause fatal injuries, and Boyle concurred. McDonald also commented that the beanbag shotgun had not been deployed by a sufficient number of police departments for an adequate period of time to be fairly evaluated. Boyle responded that, although the City did not have complete statistics from other police departments, the City wanted to implement the weapon. McDonald then remarked that the beanbag shotgun had limited utility. Boyle disagreed and reiterated that the BPD considered the beanbag shotgun to be the perfect weapon to use in situations involving a mentally deranged individual who had an edged weapon. McDonald noted that the Federation was concerned about the safety of the patrol supervisors because the City did not intend to provide them with situational training. He also expressed concern that the City did not intend to train patrol officers on how to cover patrol supervisors while they were deploying the bean bag shotgun. Ferguson replied that patrol officers had already received this training as part of their contact and cover training at the academy. McDonald suggested that the City seek community input about the beanbag shotgun, but the City rejected this suggestion. McDonald next suggested that a

joint committee of labor and management explore alternatives to the beanbag shotgun, including hiring a consultant.

The Federation then handed the City a document entitled "Decisional Bargaining Proposals" that stated in part:

- 1) The Department shall immediately suspend efforts to implement its proposed rule on use of less than lethal force.
- 2) The Department shall refer the issue to a specially convened labor management committee consisting of an equal number of Federation and Department appointed members to study alternatives to lethal force and to pursue a recommendation by consensus of a proposed rule on less than lethal force after such study.
- 3) The Department shall provide release time without loss of compensation or benefits for Federation members to permit a prompt study of multiple alternatives to the use of lethal force. Officers participating in such special committee on days off, or at times other than their regular tours of duty, shall be compensated with a shift off for each meeting held by the special committee on such days off or tours not worked.
- 4) Whether or not consensus is reached, the special committee will present a written report of its findings.
- 5) The parties agree to participate in appropriate collective bargaining should either side request the same before the Department implements any recommendations made by the special committee, or any other proposed rule on less than lethal force.²⁰

The Federation also noted in the document that it reserved the right to argue that the August 1999 draft contravened existing terms of the parties' collective bargaining agreement. The Federation further reserved the right to offer additional decisional and impact proposals.

After receiving the Federation's proposal, the City's representatives left the room to meet. When they returned, Boyle stated that he was scheduled to meet with Police Commissioner Paul F. Evans (the Police Commissioner) on February 23, 2002, that he would apprise the Police Commissioner of the Federation's proposal, and that the City would then decide if it would make a counterproposal. The parties scheduled another meeting for March 6, 2000.

Boyle, Sullivan and Ferguson met with the Police Commissioner on February 23, 2000. The Police Commissioner had recently attended a meeting of police chiefs where they had discussed using super-sock ammunition instead of beanbag ammunition²¹ in the beanbag shotgun because it was purported to be less likely to cause

15. The Federation argues that this fact should have been included in the findings. We find this fact to be supported by the record and have amended the findings accordingly.

16. The Federation received the original letter with attachments several days later.

17. After receiving the City's response to the information request, Nolan distributed copies to members of the Federation's labor/management committee.

18. At some point prior to the February 17, 2000 meeting, the City began to install racks to mount the beanbag shotguns in the trunks of the patrol supervisors' police vehicles. When Nolan inquired why the City had begun installing the racks, he was informed that the City had to install the racks as each vehicle was at the police garage for regular maintenance work.

19. In response to the Federation's challenge, we amend the findings to indicate that the parties engaged in a discussion concerning the difference between less-lethal force and less than lethal force rather than engaging in a discussion concerning the difference between lethal force and less than lethal force.

20. The Federation's labor/management committee had agreed to present this proposal to the City after meeting two to three times in the period between December 11, 1999 and February 16, 2000. During these meetings, members of the labor/management committee raised certain concerns about the beanbag shotgun that McDonald reiterated to the City at the February 17, 2000 meeting, including the efficacy of the weapon, the type of training that patrol supervisors would receive and the need for community input.

21. As of this date, the City had already purchased \$20,000 worth of beanbag ammunition.

bodily injury due to its design.²² For this reason, the City decided to arrange a test fire of the supersock ammunition for the next day.²³ The Police Commissioner, Boyle, Ferguson and Sullivan also discussed the terms of the counterproposal that the City would make to the Federation at the March 6, 2000 meeting.

In a February 28, 2000 letter to McDonald, Boyle stated that: the BPD had test fired the super-sock ammunition on February 24, 2000; the BPD was satisfied with the results; and the City was inviting McDonald to attend a test firing of the super-sock ammunition before the March 6, 2000 meeting. On that same date, Boyle and McDonald had a telephone conversation during which Boyle for the first time mentioned to McDonald that the City might use the super-sock ammunition instead of the beanbag ammunition in the beanbag shotgun. McDonald requested information about the super-sock ammunition. Boyle responded to McDonald's request for information on February 29, 2000 by sending him a two-page document.

March 6, 2000 Meeting

On March 6, 2000, the Federation and the City met again. McDonald, Broderick and Walsh represented the Federation, and Boyle and Sullivan represented the City. During the meeting, Boyle acknowledged that previous meetings with the Federation had been fruitful and helpful to the City. Boyle also noted that, because an individual had died after being struck by a beanbag projectile in another community, the City proposed using super-sock ammunition rather than beanbag ammunition. Walsh inquired whether the super-sock ammunition was truly the best possible choice, especially considering that the City had previously assured the Federation that the beanbag ammunition was the best choice for its needs. McDonald again proposed that the parties hire a consultant to study alternatives, but Boyle replied that the Federation should have studied alternatives five months ago. Boyle made the following counterproposal: 1) the patrol supervisors would attend training on the beanbag shotgun four times per year; 2) the patrol supervisors would receive situational training; and 3) the super-sock ammunition would be used instead of the beanbag ammunition. McDonald requested that the City focus instead on responding to the Federation's proposal, but Boyle replied that the City preferred to focus on its counterproposal. McDonald asked for a response to the Federation's proposal, and Boyle rejected the proposal. McDonald commented that the Federation wanted to test fire the super-sock ammunition and to bargain further about what type of weapon and ammunition should be used.²⁴ McDonald replied that the parties would not impact bargain until they bargained about the decision, but he also requested impact bargaining.²⁵ Boyle then

announced that: bargaining was at an endpoint, and the Federation would receive a confirmatory letter.

On March 7, 2000, Boyle wrote to McDonald noting in pertinent part that:

This is a letter to follow up on our meetings regarding the Department's desire to institute a rule for the use of a shotgun with less-than-lethal ammunition. As indicated, the Department now intends to implement the rule proposed on or about August 30, 1999 using the super-sock ammunition that we discussed.

The Department does not share the Federation's belief that it is necessary or appropriate to hire a consultant to form a committee that would later render a recommendation at an unspecified date. This is the only proposal that the Federation has articulated in the six-months that the Department and the Federation have been looking at this issue together. The Department feels that our meetings and discussions have reached an end result.

Along with training and qualification in the use of a 12-gauge shotgun, the patrol procedures taught at the Academy, including such concepts as the "force continuum" and "contact and cover," are sufficient to prepare officers for the use of this weapon. Nevertheless, there is no objection to the Federation's request for situational training ("shoot/don't shoot") training and, therefore, the Department intends to implement training of that type, in accordance with the operational needs of the Department, as part of its less-than-lethal force program.

Finally, as I mentioned at yesterday's meeting, we previously extended invitations to the Federation to attend a test firing of the super-sock ammunition and have no intention of withdrawing that invitation now that our discussions have concluded. Please feel free to telephone Deputy Sullivan or me to arrange a convenient time.

Thereafter, the City installed the beanbag shotguns in the station houses and assigned the patrol supervisors and the district lieutenants to the firing range for two days of training. After the patrol supervisors and the district lieutenants became certified in using the beanbag shotgun, the beanbag shotgun and five rounds of super-sock ammunition were distributed to the patrol supervisors at the start of each tour of duty. The patrol supervisors stored the beanbag shotgun in the locked gun rack in the trunk of their police vehicles.

On June 22, 2000, the Police Commissioner issued Rule 303-A, Use of Less Lethal Force accompanied by a letter stating that the rule was to be promulgated immediately, posted on the bulletin boards in each station house, and copies distributed to all police officers. That rule provided:

This rule is issued to establish guidelines for the use of less-lethal force by members of this Department in the performance of their

22. The super-sock ammunition consists of a flexible sock containing lead that is encased in a plastic shotgun shell. Unlike the beanbag ammunition, the super-sock ammunition does not need to unfold after being discharged from the beanbag shotgun and leaves the weapon already formed in the shape that strikes the target. In Ottawa, Canada, a beanbag projectile failed to unfold after being fired from a beanbag shotgun resulting in serious injury.

23. The Police Commissioner left a telephone message for Broderick inviting him to attend the test firing of the super-sock ammunition. Broderick ultimately was not able to attend the test firing.

24. The Federation objects to the hearing officer's determination that Boyle had responded to McDonald by stating that the parties were discussing the impacts of the beanbag shotgun. After reviewing the record, we agree with the Federation and amend the findings accordingly.

25. In response to the Federation's challenge, we have amended this finding to more accurately reflect the record evidence that McDonald also requested impact bargaining.

duties, and to establish appropriate training, reporting and documentation for such use of force.

Sec. 1 DEFINITIONS:

1.1 Less-Lethal Force Philosophy is a concept of planning and force application that meets operational objectives, with less potential for causing death or serious physical injury than the use of deadly force.

1.2 Reasonableness is moderate and/or fair action within reason, suitable to the confrontation.

1.3 Super-Sock Round, also known as flexible projectile, is fired through a 12-gauge shotgun.

Sec. 2 GENERAL CONSIDERATIONS:

The Department has adopted the less-lethal force philosophy to assist in the de-escalation of potentially violent situations. The less-lethal force philosophy shall not preclude the use of deadly force.

Sec. 3 TRAINING AND QUALIFICATION:

Training shall consist of a Department approved training and qualification program in the use of a 12-gauge shotgun. Supervisors shall be trained and qualify four times per year in the proper use of a less-lethal shotgun. Supervisors trained in the use of this weapon will be held accountable for proficiency as well as compliance with Department policy in the use of such weapon.

Sec. 4 SECURING OF LESS-LETHAL SHOTGUN AND AMMUNITION:

Each less-lethal shotgun shall be stored in a district gun locker in a safe condition (i.e. safety on, action open, chamber and magazine empty). Flexible projectile rounds shall be stored and secured along with the weapon in the district gun locker. The less-lethal shotgun will have an *orange colored stock*. The words "less lethal" will be noted on the stock to identify that the less-lethal shotgun is used strictly for flexible projectile rounds. Every Thursday the day tour duty supervisor shall perform a visual inspection to verify that the shotgun is stored in a safe condition, as well as insure that the requisite number of flexible projectile rounds are accounted for. This information shall be recorded in a district control log.

During the patrol supervisor's tour of duty, the less-lethal shotgun shall be loaded with four flexible projectile rounds in the magazine, with an empty chamber, with safety lock on, and secured in the locking device located in the truck of the patrol supervisor's vehicle.

Sec.5 AUTHORIZATION AND USE OF LESS LETHAL WEAPON:

Only supervisors who have completed the Department training and qualification program shall be authorized to use a 12-gauge less-lethal shotgun.

If the possibility of the use of less-lethal force is determined to be an option, the patrol supervisor shall be notified and respond to the scene. If the possibility of the use of less-lethal force is determined to be a reasonable option by the patrol supervisor, then the patrol supervisor shall notify the Boston Emergency Medical Services to respond.

The patrol supervisor shall designate an on-scene officer to provide lethal force coverage, and, if deemed appropriate shall designate two or more officers for suspect take down.

Upon discharge of the shotgun, the district commander and duty supervisor shall be notified. Subjects who are struck by a flexible projectile round shall be transported to a medical facility for examination.

Sec.6 REPORTING AND INVESTIGATION:

Any discharge of a less-lethal shotgun other than training shall be investigated pursuant to Rule 303.

Opinion

A public employer violates Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law when it unilaterally changes an existing condition of employment or implements a new condition of employment involving a mandatory subject of bargaining without first affording its employees' exclusive collective bargaining representative notice and an opportunity to bargain to resolution or impasse. *Commonwealth of Massachusetts v. Labor Relations Commission*, 404 Mass. 124, 127 (1989); *School Committee of Newton v. Labor Relations Commission*, 388 Mass. 557, 572 (1983); *City of Boston*, 16 MLC 1429, 1434 (1989). To determine whether a matter is a mandatory subject of bargaining, the Commission balances the public employer's interest in maintaining its prerogative to effectively govern against the employees' interest in bargaining about subjects that directly affect terms and conditions of employment. *Commonwealth of Massachusetts*, 25 MLC 201, 205 (1999); *Town of Fairhaven*, 20 MLC 1343, 1346 (1992); *Town of Ayer*, 9 MLC 1376, 1383 (1982); *aff'd sub. nom., Local 346, Int'l Brotherhood of Police Officers v. Labor Relations Commission*, 391 Mass. 429 (1984); *Town of Danvers*, 3 MLC 1559, 1577 (1977). Decisions about the nature and level of services that a public employer provides lie within the exclusive prerogative of management, and are not mandatory subjects of bargaining. *Commonwealth of Massachusetts*, 25 MLC at 205 (1999); *citing, Town of Danvers*, 3 MLC 1559 (1977).

The City's decision to implement a less lethal force policy requiring certain unit members to use beanbag shotguns and super-sock ammunition was clearly a managerial prerogative because it implicated the nature of the services that the City's Police Department provided, including how the City chose to deploy its law enforcement resources. *See City of Worcester*, 438 Mass. 177, 181 (2002) (employer was not obligated to bargain over its decision to assign truancy enforcement duties to its police officers because the decision implicated the city's ability to set its law enforcement priorities). Here, the City made the policy decision that in certain situations involving individuals that were armed with an edged weapon, its police officers should have the option of using a weapon and ammunition that administered a type of force that fell somewhere between lethal force and non-lethal force on the force continuum. Although the City's decision to have certain unit members use the specialized shotguns and ammunition as part of the less lethal force policy was excepted from the statutory bargaining obligation, the City is nevertheless required to negotiate over the impacts of that core governmental decision on mandatory subjects of bargaining prior to implementation. *School Committee of Newton v. Labor Relations Commission*, 388 Mass. at 564.

The issue then is whether the City failed to bargain in good faith by requiring certain unit members to use beanbag shotguns and supersock ammunition as part of a less-lethal force policy without giving the Federation an opportunity to bargain to resolution or impasse over the impacts of that decision on the terms and condi-

tions of employment of unit members. The Commission has previously decided that an increase or change in employees' job duties, *Peabody Municipal Light Department*, 28 MLC 88, 89 (2001), compulsory training, *City of Boston*, 26 MLC 177, 181 (2000), and workload, *Commonwealth of Massachusetts*, 27 MLC 70, 72 (2000), are mandatory subjects of bargaining. Here, as a result of the City's decision to deploy the beanbag shotgun and supersock rounds as part of a less lethal force policy, the City required patrol supervisors, who were bargaining unit members, to undergo mandatory training four times per year. Further, the patrol supervisor's job duties had changed because they were now responsible for deciding whether the beanbag shotgun should be deployed at a particular incident scene and for actually firing the weapon. Finally, the workload of the district lieutenants who were also bargaining unit members increased because the district lieutenants became responsible for securing the weapon between the shifts and conducting weekly inspections of the weapons and the ammunition. Having decided that the City had an obligation to bargain with the Federation over the impacts of the specialized shotgun and ammunition on the terms and conditions of employment of unit members, we turn now to the issue of whether the parties bargained to impasse.

It is well established that impasse in negotiations occurs only when "both parties have negotiated in good faith on all bargainable issues to the point where it is clear that further negotiations would be fruitless because the parties are deadlocked." *Town of Plymouth*, 26 MLC 222, 223 (2000); *Commonwealth of Massachusetts*, 25 MLC 201, 205 (1999). See also *School Committee of Newton v. Labor Relations Commission*, 338 Mass. at 574 (impasse is a question of fact requiring a consideration of the totality of the circumstances to decide whether despite their good faith, the parties are simply deadlocked.) To determine whether impasse has been reached, we consider the following factors: bargaining history, the good faith of the parties, the length of negotiations, the importance of the issues to which there is disagreement, and the contemporaneous understanding of the parties concerning the state of the negotiations. *Id.*

Although we have considered an employee organization's unilateral expression of desire to continue bargaining as evidence that the parties may not have bargained to impasse, see e.g. *Commonwealth of Massachusetts*, 25 MLC 201 (1999); *City of Boston*, 21 MLC 1350 (1994), the ultimate test remains whether there is a "likelihood of further movement by either side" and whether the parties have "exhausted all possibility of compromise." *Taunton School Committee*, 28 MLC 378, 391 (2002); *Commonwealth of Massachusetts*, 25 MLC at 205. Here, the parties met on October 25, 1999, February 17, 2000 and March 6, 2000 to discuss issues surrounding the use of the beanbag shotgun and the specialized ammunition. Further, the parties met for a test firing of the beanbag shotgun on November 19, 1999. Upon review of the record, we conclude that under the totality of the circumstances that the parties had not reached impasse on March 6, 2000 when the City ceased to bargain.

First, the fact that there was movement on certain issues during bargaining rebuts the City's contention that the parties were dead-

locked. See *City of Boston*, 29 MLC 6, 9 (2002) (impasse was found when there was no movement by either side during the parties' four negotiating sessions); *City of Boston*, 28 MLC 175, 185 (2001) (impasse was found where the parties had become more entrenched at each bargaining session); *Woods Hole, Martha's Vineyard and Nantucket Steamship Authority*, 14 MLC 1518, 1528-1529 (1988) (parties were not at impasse because they had agreed upon some compromises during bargaining although certain significant issues remained in dispute). For instance, between the October 25, 1999 meeting and the March 6, 2000 meeting, the City agreed to increase the number of times per year that patrol supervisors attended training and to provide them with situational training. Further, after the March 6, 2000 meeting, the City also provided training for the district lieutenants, whom the City had declined to offer training to at the October 25, 1999 meeting.

Additionally, the City asks us to conclude that because Federation requested to bargain over the decision to use the beanbag shotgun and the specialized ammunition, the Federation had created an insurmountable roadblock to bargaining over the impacts of that decision on unit members' terms and conditions of employment. However, because the record reveals that the parties discussed how the use of the beanbag shotgun and beanbag ammunition would impact unit members' job duties, safety, workload and additional training, we conclude that the parties treated the Federation's request to bargain as a broad request that also encompassed the impacts of the City's decision to deploy the beanbag shotgun. Even the City acknowledged at the March 6, 2000 meeting that the parties' prior discussions had been fruitful and helpful. Moreover, the Federation expressly requested to bargain over both the decision and the impacts of the decision in the written proposal that it presented at the February 17, 2000 meeting.

Finally, we recognize that collective bargaining is a dynamic process that is influenced by many factors. See *City of Boston*, 28 MLC at 184. Changing circumstances, coupled with an employee organization's express desire to continue bargaining, could improve the likelihood of further compromise. See *Id.* at 184-185; citing, *Woods Hole, Martha's Vineyard and Nantucket Steamship Authority*, 14 MLC at 1988. Here, a change in circumstances took place when the City announced at the March 6, 2000 meeting that it intended to use supersock ammunition in the beanbag shotgun, even though the parties had only discussed the use of beanbag ammunition at their prior meetings. Although the City provided the Federation with two pages of information about the supersock ammunition on February 29, 2000, the record contains no information showing that the City and the Federation had any discussions about possible differences between the beanbag ammunition and the supersock ammunition and how those differences could impact unit members' terms and conditions of employment. Moreover, the Federation requested further bargaining over the impacts of the decision to use the supersock ammunition. Therefore, because the parties had not exhausted all possibility of compromise, we conclude that the parties had not reached an impasse in their negotiations.

Conclusion

Based on the record and for the reasons stated above, the City has violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by failing to bargain to resolution or impasse with the Federation over the impacts of the decision to deploy a beanbag shotgun and supersock ammunition as part of a Less-Lethal Force Rule on employees' terms and conditions of employment.

Order

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

Boston shall:

1. Cease and desist from:

- a) Failing to bargain in good faith with the Boston Police Superior Officers Federation to resolution or impasse over the impacts of the decision to deploy beanbag shotguns and supersock ammunition as part of a Less-Lethal Force Rule on employees' terms and conditions of employment.
- b) In any like or related manner, interfering with, restraining or coercing employees in the exercise of their rights under the Law.

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

- a) Within five (5) days from the date of receipt of this decision, offer to bargain in good faith with the Federation to resolution or impasse over the impact of its decision to deploy beanbag shotguns and supersock ammunition as part of a Less-Lethal Force Rule on employees' terms and conditions of employment by proposing to meet at a reasonable time and place.
- b) Sign and post immediately in all conspicuous places where employees represented by the Federation usually congregate, or where notices are usually posted, and display for a period of thirty (30) days thereafter, copies of the attached Notice to Employees and take reasonable steps to ensure that these notices are not altered, defaced or covered by any other material.
- c) Notify the Commission within ten (30) days of receipt of this decision and order of the steps taken to comply with this order.

SO ORDERED.

NOTICE TO EMPLOYEES

The Massachusetts Labor Relations Commission has held that the City of Boston (the City) has violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by failing to bargain to resolution or impasse with the Boston Police Superior Officers Federation (the Federation) over the impacts of the decision to deploy beanbag shotguns and supersock ammunition as part of a Less-Lethal Force Rule on employees' terms and conditions of employment.

WE WILL NOT fail or refuse to bargain in good faith with the Federation to resolution or impasse over the impacts of the decision to deploy a beanbag shotgun and supersock ammunition as part of a Less-Lethal Force rule on employees' terms and conditions of employment.

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

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

Within five (5) days of receipt of this decision, offer to bargain in good faith with the Federation to resolution or impasse over the impacts of the decision to deploy beanbag shotguns and supersock ammunition as part of a Less-Lethal Force Rule on employees' terms and conditions of employment by proposing to meet at a reasonable time and place.

[signed]

For the City of Boston

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