

employees to effective representation”, as well as other factors. M.G.L. c. 150E, § 3.⁹

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In the Matter of CITY OF NEWTON
and
NEWTON POLICE ASSOCIATION
Case No. MUP-2849

- 65.2 **concerted activities**
- 67.164 **pre-existing practice**
- 67.8 **unilateral change by employer**

June 29, 2005
Allan W. Drachman, Chairman
Hugh L. Reilly, Commissioner

Joseph P. McConnell, Esq. *Representing City of Newton*
Vida Berkowitz, Esq. *Representing Newton Police Association*

DECISION¹

Statement of the Case

On November 20, 2000, the Newton Police Association (Union) filed a charge of prohibited practice with the Labor Relations Commission (Commission) alleging that the City of Newton (City) had engaged in prohibited practices within the meaning of Sections 10(a)(1), (3), and (5) of M.G.L. c. 150E (the Law). Pursuant to Section 11 of the Law and Section 15.04 of the Commission’s Rules, the Commission investigated the charge and, on December 27, 2001, issued a complaint of prohibited practice alleging that the City had violated: 1) Section 10(a)(3) and, derivatively, Section 10(a)(1) of the Law by discriminating against a bargaining unit member by bypassing him for a promotion from patrol officer to sergeant for engaging in concerted activity protected under Section 2 of the Law; and 2) Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by failing to bargain in good faith by changing the procedure for promotions from patrol officer to sergeant.²

On January 4, 2002, the City filed an answer to the Commission’s complaint.

On March 1, 2002, April 8, 2002, and May 24, 2002, Dianne E. Rosemark, Esq., a duly-designated Commission hearing officer (Hearing Officer), conducted a hearing at which both parties had a

guarding the rights of employees to effective representation.” M.G.L. c. 150E, §6. Moreover, DFR theory, practice, and remedies are riddled with uncertainties.

9. Compare *Sturbridge*, above, with the Constitution and By-Laws of the International Association of Firefighters (IAFF), as amended by the Forty-Sixth Convention in August 2002. Article III, Membership, refers to Article II, Jurisdiction. Article II restricts jurisdiction to “full-time, paid employees engaged in fire fighting, emergency medical or rescue service activities, or related services. . . .” Under Article II exceptions are possible, but only with the “approval of the General President.” (The IAFF’s Constitution and By-Laws are on file with the United States Department of Labor, Employment Standards Administration, Office of Labor-Management Standards, Reference No. 000-317.)

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

2. The parties stipulated that paragraph 26 of the Commission’s complaint referred to the wrong paragraph number, and instead should state: “The Respondent took the action referred to in paragraph 25, above, without giving the Union prior notice and an opportunity to bargain to resolution or impasse.”

full opportunity to be heard, to examine witnesses, and to introduce evidence. The City and the Union filed post-hearing briefs on August 9, 2002, and August 12, 2002, respectively. On October 24, 2002, the Hearing Officer issued Recommended Findings of Fact. On November 4, 2002, both the Union and City filed challenges to the Recommended Findings of Fact. On November 15, 2002, the City filed a response to the Union's challenges to the Recommended Findings of Fact.

Findings of Fact³

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

The Collective Bargaining Agreement

The Union represents a bargaining unit of patrol officers employed in the City's police department (department or police department). The City and the Union were parties to a collective bargaining agreement effective by its terms from July 1, 1997 through June 30, 2000 (Agreement).⁴ Article IV of the Agreement, entitled "Special Leave," provides in relevant part:

4.01 Interpretation - Special leave shall mean that period of time for which an employee shall be entitled to receive compensation during absence from work because of personal sickness or injury; the illness or injury of certain family members of his/her family, certain religious observances, or personal business in accordance with this Article.

4.02 Amount of Time Allowed - After one (1) full year of employment he/she shall be entitled to special leave for a period not exceeding fifteen (15) days in each calendar year; provided, that for the calendar year in which the first full year of his/her employment is completed the total allowable special leave shall not exceed fifteen (15) days.

4.03 Use of Special Leave for Personal Illness - An employee shall be entitled to use special leave to the full extent of his/her accumulation during absence from work because of sickness or injury of the employee in accordance with this Article.

4.04 Injured Employees - Whenever a police officer is incapacitated for duty because of injury sustained in the performance of his/her duty without fault of his/her own, or a police officer assigned to special duty by his/her superior officers, whether or not he/she is paid for such special duty by the City is so incapacitated because of injuries so sustained, he/she shall be granted leave without loss of pay for the period of such incapacity; provided that no such leave shall be granted for any period if such police officer has been retired or pensioned in accordance with law or for any period after the City physician determines that such incapacity no longer exists

4.05 Assignments to limited duty tasks may be changed or terminated at the sole discretion of the Chief

LIMITED DUTY TASKS

The following list of job duties and functions includes the types of work to which assignments will be made:

1. Clerical
2. Answering telephone
3. Dispatching
4. Typing
5. Filing
6. Citizen assistance
7. Teletype operator
8. Fingerprinting
9. Photographing
10. Issue firearm permits
11. Disseminate accident and burglary reports
12. Inspectional services
13. Maintain portable radios
14. Assist in operation identification
15. Assist in property and evidence room
16. Or any similar limited or light duty task that may arise in an unforeseen or emergency situation, in which the Police Department is required to perform tasks beyond its normal functions.

4.09 Unused Special Leave - Unused portions of special leave shall be cumulative and such unused special leave, except during the first year of employment, shall be calculated as of January first of each year⁵

The Agreement does not address shift assignments for patrol officers on light duty. However, Article IV, § 4.04 of the Agreement provides that "[a]ssignments to limited duty tasks may be changed or terminated at the sole discretion of the Chief."

Article XII is the Agreement's management rights clause. That article provides in relevant part:

12.01 Except where such rights, powers, and authority are specifically relinquished, abridged, or limited by the provisions of this Contract, the CITY has and will continue to retain, whether exercised or not, all of the rights, powers and authority heretofore had by it, and except where such rights, powers and authority are specifically relinquished, abridged or limited by the provisions of this Contract, it shall have the sole and unquestioned right, responsibility and prerogative of management of the affairs of the CITY and direction of the working forces, including but not limited to the following:

- A. To determine the care, maintenance and operation of the equipment and property used for and on behalf of the purposes of the CITY.

3. Neither party contests the Commission's jurisdiction in this matter.

4. The original parties to the Agreement were the City and the International Brotherhood of Police Officers, Local 478 (IBPO), the Union's predecessor. The Union became the successor collective bargaining representative of the bargaining unit of patrol officers in May of 2000. The provisions of the Agreement were in effect for the relevant time period in this case.

5. Any unused sick leave is rolled over into the officer's sick leave bank as of January 1st of each year. Any remaining personal leave days are converted to sick leave. The Agreement does not limit the amount of sick leave that can be rolled over from year to year.

B. To establish or continue policies, practices and procedures for the conduct of the CITY business and, from time to time, to change or abolish such policies, practices or procedures.

C. To discontinue processes or operations or discontinue their performance by employees.

D. To select and to determine the number and types of employees required to perform the CITY's operations.

E. To employ, transfer, promote, or demote employees, or to lay-off, terminate or otherwise relieve employees from duty for lack of work or other legitimate reasons when it shall be in the best interests of the CITY or the Department.

F. To prescribe and enforce reasonable rules and regulations for the maintenance of discipline and for the performance of work in accordance with the requirements of the CITY, provided such rules and regulations are made known in a reasonable manner to the employees affected by them.

G. To ensure that related duties connected with Department operations, whether enumerated in job descriptions or not, shall be performed by employees.

H. To establish contracts or sub-contracts for municipal operations, provided that this right shall not be used for the purpose or intention of undermining the UNION or of discrimination of its members.

12.02 All work customarily performed by the employees of the bargaining unit shall be continued to be so performed unless in the sole judgment of the CITY, it can be done more economically or expeditiously otherwise.

12.03 The above rights, responsibilities and prerogatives are inherent in the Mayor and by virtue of statutory and charter provisions are not subject to review or determination in any grievance or arbitration proceeding, but the manner of exercise of such rights may be subject to the Grievance Procedure described in this Contract.

(Emphasis in original).

Patrol Officer Robert Paglia's Injury and Light Duty Shift Assignments

Robert Paglia (Paglia) has been employed by the City in its police department as a patrol officer for 18 years, and is a member of the bargaining unit represented by the Union.⁶ On or about May 28, 2000, while driving his police cruiser on duty, Paglia injured the left side of his neck and left shoulder. Paglia reported the injury to his supervisor and went to the emergency room of Newton-Wellesley Hospital. The emergency room physician who treated Paglia diagnosed him with a muscle strain/tear, gave him prescriptions for pain relievers and muscle relaxers, and advised him not to work for two weeks. Paglia's personal physician, as well as Patricia Schindler (Nurse Schindler), a nurse practitioner from Health at Work,⁷ also advised him to stay out of work for two weeks.

When a patrol officer is injured, the department first places him or her on sick leave. The officer will usually see his or her own physician first, and then visit the Health at Work clinic. At Health at Work, Nurse Schindler or a doctor on staff will determine what type of duty the officer is capable of performing. Nurse Schindler or the doctor notes any medical restrictions, treatment, and length of time the officer should remain on light duty.⁸ The Chief of Police, formerly Frank Gorgone (Chief Gorgone),⁹ and Executive Officer Lieutenant Robert McDonald (Lieutenant McDonald) decide what the light duty shift assignments will be. Either Lieutenant McDonald or Internal Affairs Officer Sergeant Forbes (Sergeant Forbes) will then inform the Night Patrol Captain, John O'Brien (Captain O'Brien),¹⁰ of the officer's assignment. Captain O'Brien communicates the assignments to one of the lieutenants, who oversees the scheduling of the officers' platoons.

The department usually assigns an officer on light duty to an eight-hour shift at the police department headquarters or at an annex building. The officer does not patrol the streets while on light duty. An officer may be restricted to work less than eight hours on light duty. In some cases, the officer's physician or Health at Work will prescribe light duty for a certain period of time, or it may last for an indefinite period of time.

Prior to his injury of May 28, 2000, Paglia worked nights on an alternating last and first half shift. An officer on that shift works from 11:30 p.m. to 7:30 a.m. (the last half shift). The officer is off duty for eight hours, then returns to work at 3:30 p.m. the same day and works until 11:30 p.m. (the first half shift). The officer is then off duty for 24 hours, and returns to duty at 11:30 p.m. to work the last half shift. The officer is off duty for eight hours, and reports at 3:30 p.m. to work the first half shift on the fourth day. The officer then has two days off.

Following his injury, Paglia was evaluated by his personal physician and by Health at Work in a series of appointments throughout June and July 2000. Following an appointment at Health at Work on June 2, 2000, Nurse Schindler recommended in Paglia's discharge instructions that he remain out of work until he was re-evaluated on June 7, 2000. On June 8, 2000, Paglia saw Nurse Schindler for a follow-up appointment. Nurse Schindler noted on Paglia's discharge instructions that he could return to work with the following modifications: "no cruiser work, may do officer/clerical work, limit to 4 [hours per day]."

Paglia returned to work on June 12, 2000 at 3:30 p.m. He reported for duty at that time because he understood that the light duty shift for officers who normally worked an alternating last and first half shift was a straight shift beginning at 3:30 p.m. Paglia's under-

6. Paglia was also a detective with the police department from 1987 to 1993.

7. Health at Work is an occupational medical clinic affiliated with Newton-Wellesley Hospital with which the City has an agreement to perform, among other functions, pre-placement screening for police officers, evaluating work injuries, prescribing medications, recommending physical therapy, diagnostic testing and rehabilitation services, making referrals to specialists, clearing employees to return to work following an injury, and prescribing work restrictions. The clinic has existed since the mid-1980's. Doctors on staff and Nurse Schindler are responsible for evaluating employees of the City.

8. The department may assign an officer to light duty for an injury sustained on or off the job.

9. Chief Gorgone was the Chief of Police for the relevant time period in this case.

10. Captain O'Brien is in charge of both night platoons, comprised of twenty-five officers each, including those patrol officers who work on the first and last half shift. Captain O'Brien remains in charge of the night officers when they are assigned to light duty.

standing as to when he should report to work was based on his experience with a prior injury and from having observed other night officers working light duty. When Paglia reported for work, Captain O'Brien informed him that he would be working a four-hour shift from 7:30 p.m. to 11:30 p.m. Paglia had never heard of anyone being assigned to a four-hour light duty shift beginning at 7:30 p.m.¹¹ However, he did not question the assignment or attempt to change the assignment.

On June 19, 2000, Paglia returned to Health at Work for an appointment. On his patient discharge instructions, Nurse Schindler indicated that Paglia was able to return to duty with no cruiser work from June 19, 2000 through July 3, 2000. Paglia worked from 7:30 p.m. to 11:30 p.m. for approximately two weeks.

In May and June 2000, the department experienced a higher number than usual of officers working light duty.¹² Generally, officers working light duty are stationed at the front desk or are given other assignments like scanning documents or working with microfilm. However, the front desk only allowed enough work for one officer.¹³ Because of the number of officers on light duty, Captain O'Brien approached Chief Gorgone and informed him that there were too many officers in the same area working light duty, and that something needed to be done to disperse them to different work locales.¹⁴ Captain O'Brien suggested to Chief Gorgone that, to alleviate the problem of overcrowding at the front desk, the department should move officers on light duty to other areas, like the Traffic Bureau and Special Services. Captain O'Brien also suggested changing officers' platoons and schedules, including assigning officers to a rotating shift, so the officers on light duty would not be working at the same time. Captain O'Brien recommended that officers who had been working light duty for a long period of time would retain their existing light duty assignments, while officers who had been on light duty for less time would be given other assignments, like working with microfilm.¹⁵ After several meetings, Chief Gorgone followed Captain O'Brien's rec-

ommendations to change the schedules of several officers on light duty and to move their work locations to less crowded areas.

On July 3, 2000, Paglia returned to Health at Work for another appointment. Health at Work restricted him to working eight-hour shifts, with no cruiser work. The department received the July 3rd work restrictions and decided to assign Paglia, as well as fellow patrol officers Clements and Henderson, to work an alternating eight-hour first and last half shift on light duty.¹⁶ The department assigned Paglia to work at the front desk on an alternating shift based on the July 3rd work restrictions from Health at Work indicating that Paglia was capable of working an eight-hour shift. The department did not offer Paglia a light duty day shift.¹⁷ Captain O'Brien switched Officer Clements to a different platoon than Paglia, because they would have been rotating together and working at the front desk at the same time.¹⁸ The department did not reassign Officer Doyle to another work locale because, by that time, she had returned to full duty. The department assigned Officer Rooney to the Traffic Bureau on the day shift. She was not assigned to work a rotating shift because she was working only three-hour shifts, and because she had been on light duty for a longer period of time than the other patrol officers who were on light duty at that time.

Captain O'Brien informed Paglia on or about July 3, 2000 that, upon his return to work after his two days off, he was to work light duty on an alternating last and first half schedule. Paglia responded that the assignment was not acceptable to him. When he questioned Captain O'Brien about why he was assigned to that shift, Captain O'Brien informed him that Chief Gorgone had determined what his assignment would be.¹⁹

In an attempt to change his schedule from an alternating shift to a straight shift, on July 12, 2000, Paglia saw his personal physician, Dr. Vincent Paquette (Dr. Paquette). Dr. Paquette wrote a note restricting Paglia to: "4 hour shifts, 2 shifts/24 hours." Paglia faxed Dr. Paquette's medical restrictions to Chief Gorgone's office. When the department received Dr. Paquette's July 12, 2000 note,

11. The department assigned officers who were medically restricted to working only a four-hour shift to a light duty shift at beginning at 3:30 p.m.

12. During certain shifts in May and June 2000, there were at least four officers who were simultaneously on light duty at any one time. These included Paglia, Rooney, Clements, Doyle, Webb, and Henderson. These officers sustained both on-duty and off-duty injuries.

13. Pursuant to the Union's request, we have modified the Hearing Officer's Recommended Findings of Fact to clarify why the City considered it problematic for several officers to be working at the front desk at the same time.

14. Captain O'Brien believed that officers on light duty should be reassigned because there were other places in the department where they would be more productive.

15. This arrangement was Captain O'Brien's idea and was not made pursuant to a collective bargaining agreement or a department rule governing seniority on light duty.

16. Prior to July 2000, the department did not assign officers to work an alternating last and first half schedule on light duty. For officers who regularly worked an alternating last and first half schedule, light duty assignments generally consisted of a straight 3:30 p.m. to 11:30 p.m. shift. Ten years ago, however, there was one instance in which the department assigned an Officer Gasset to light duty during the day shift.

Officers Clements and Henderson had previously been assigned to a first half shift (3:30 p.m. to 11:30 p.m.) on light duty. All three officers normally worked alternating first and last half schedules. Clements worked an alternating first and last half shift on light duty due to personal reasons.

17. During this time, the department assigned Officer Webb to Special Services on a day shift from 3:30 p.m. to 11:30 p.m. Captain O'Brien testified that he offered Paglia the day shift assignment to Special Services, but that Paglia turned the assignment down. Paglia, however, testified during the Union's rebuttal case that Captain O'Brien never offered him the assignment. Paglia testified that he would have taken a position on a day shift if had it been offered to him at that time. Paglia further testified that he took a position on the day shift in April 2001, as he was next in line to take the position due to his departmental seniority. Paglia also testified that he accepted the position so he could leave the night shift. The Hearing Officer ultimately credited Paglia's testimony, because Paglia's actions were consistent with his testimony that he would have taken the day shift assignment in July 2000.

18. Officer Clements had less seniority than Paglia.

19. It is not clear from the record what shift Paglia actually worked between July 3rd and July 12, 2000. Although Paglia's un rebutted testimony reflects that on July 3, 2000, Captain O'Brien ordered him to work an alternating schedule when he returned from his scheduled two days off, Union Exhibit 18, a document listing patrol officers' assignments in the second and third platoon from May 28, 2000 through July 28, 2000, reflects that on July 4th, for example, Paglia worked a light duty shift from 7:30 p.m. to 11:30 p.m. instead of working an alternating shift.

Lieutenant McDonald and Sergeant Forbes discussed Paglia's work restrictions. Lieutenant McDonald instructed Sergeant Forbes to inform Paglia that his assignment was a rotating shift of four hours on a first half shift and four hours on a last half shift.

On July 17, 2000, Paglia saw Dr. Joanne Borg-Stein (Dr. Borg-Stein) at Health at Work. Paglia informed Dr. Borg-Stein of Dr. Paquette's restrictions of four-hour alternating shifts. Dr. Borg-Stein recommended that Paglia work eight-hour straight shifts, and that he not be assigned to alternating shifts. Paglia faxed Dr. Borg-Stein's July 17th medical restrictions to Chief Gorgone's office.

On July 18, 2000, Paglia telephoned Captain O'Brien to discuss his shift assignment. Captain O'Brien responded that there was good news and bad news: the good news was that Paglia would be able to work a straight shift, and the bad news was that his shift would begin at midnight.²⁰ Prior to July 2000, no officer had ever worked a straight midnight shift on light duty or regular duty.²¹ Moreover, an assignment to a straight midnight shift would interfere with Paglia's physical therapy schedule. Paglia asked Captain O'Brien if he were joking. Captain O'Brien replied that he was not. On July 19, 2000, Paglia went to Health at Work in an effort to change his shift assignment from a straight midnight shift.²² The July 19, 2000 medical restrictions from Health at Work indicated, "[m]aintain straight shifts (no alternating shifts)."²³ That same day, Paglia telephoned Captain O'Brien to ascertain what his shift assignment would be and learned that his shift had not changed.²⁴

The following day, July 20, 2000, Paglia requested a vacation day and scheduled another appointment at Health at Work. Paglia complained to Nurse Schindler about having to work a midnight shift. In the patient discharge instructions dated July 20, 2000, Nurse Schindler wrote that Paglia should "maintain [eight-hour] shift on 3-11 shift." Paglia did not fax the work restrictions to the

police department, because Nurse Schindler had informed him that she would fax the restrictions. Nurse Schindler testified that she was not aware whether Health at Work faxed Paglia's July 20th work restrictions to the police department. However, it was the practice of Health at Work to give the employee two copies of the discharge instructions, which included work restrictions. One copy was for the employee's record, and the other copy was for the employee to return to his or her employer. Health at Work also faxed work restrictions to the employer directly most of the time.²⁵

At a point between July 17 and July 20, 2000, Lieutenant McDonald spoke to Nurse Schindler to discuss the July 17th work restriction from Health at Work indicating that Paglia should be assigned to eight-hour straight shifts. Specifically, they discussed the fact that Dr. Paquette had restricted Paglia to work four-hour shifts, with not more than two shifts in twenty-four hours. Lieutenant McDonald also spoke with Nurse Schindler about the fact that Captain O'Brien, through the Chief's office, had assigned Paglia to work a rotating shift. Nurse Schindler responded that Paglia should work a straight first half shift (3:30 p.m. to 11:30 p.m.) because of his treatment plan. Lieutenant McDonald agreed during the conversation to assign Paglia to work straight shifts from 3:30 p.m. to 11:30 p.m.

On or about July 20, 2000, Paglia called Captain O'Brien and asked him what time he should report to work. Captain O'Brien informed him that he would be working straight shifts from 3:30 p.m. to 11:30 p.m. Paglia worked straight shifts from 3:30 p.m. to 11:30 p.m. until approximately September 6, 2000.²⁶ At that time, Health at Work cleared Paglia to return to full duty, and Paglia resumed his alternating last and first half shift schedule.

20. Captain O'Brien first testified on direct that he did not recall informing Paglia that he had to work straight midnight shifts. Later in his direct testimony, however, he testified that he did not order Paglia to work straight last half shifts. Captain O'Brien further testified that he did not recall receiving a telephone call from Paglia on or around that date.

Lieutenant McDonald testified that the department would not assign anyone to work a midnight shift. He further testified that he never instructed anyone to order Paglia to work that shift, and that any shift changes would have to be approved by him. However, in evaluating all of the testimony and evidence on whether Captain O'Brien assigned Paglia to a straight midnight shift, the Hearing Officer credited Paglia's testimony for the following reasons. First, the Hearing Officer found Captain O'Brien's testimony to have been evasive and varied when asked on direct and cross-examination if he had made this assignment. Second, because Nurse Schindler testified that she recalled Paglia complaining about having to work midnight shifts during his July 20th office visit, she corroborated Paglia's testimony. Third, Nurse Schindler was a disinterested witness who was not vested in the outcome of the case.

21. The Union requested that the Commission amend the Hearing Officer's Recommended Findings of Fact to exclude a footnote which indicated that some officers had worked a straight last half schedule (beginning at 11:30 p.m.) because it was their choice to work that schedule. Upon reviewing the record, we agree with the Union that the footnote is not supported by the record and have modified the facts accordingly.

22. Paglia spoke to a Union representative about his assignment to work the midnight shift, but he did not file a grievance over that assignment.

23. Nurse Schindler testified that, by her notation of straight shifts on Paglia's medical restrictions, she was recommending that he work a straight shift on either evenings or nights. Although neither Paglia nor Nurse Schindler could specifically recall whether the July 19th medical restrictions were faxed to Chief Gorgone's office, Lieutenant McDonald testified that at some point the department received a copy of Paglia's July 19th work restrictions.

24. At the hearing, the Union introduced a document listing the date, times, and location of calls received by the department dispatch center on July 19, 2000 between 11:00 a.m. and 3:00 p.m. (Union Exhibit 19). The document was created by the City in response to a subpoena from the Union requesting audio tapes of recorded calls coming in to the department for certain days. An officer of the City listened to the incoming calls and created the document to reflect the calls. The document indicates that on July 19, 2000, there was a recording of a police department dispatcher taking a call from an individual identifying himself as Robert Paglia, who requested to speak with Captain O'Brien. The parties stipulated that the dispatcher who received the call gave the caller Captain O'Brien's office number and transferred the call to the extension for Captain O'Brien. The parties also stipulated that once the call was transferred, the telephone call was not recorded further. The parties additionally stipulated that the recording does not reflect if anyone picked up the call or whether Captain O'Brien was present to take the call. Although Captain O'Brien testified that he did not recall receiving a telephone call from Paglia around this date, a reasonable inference can be drawn from the evidence in the record that Paglia did call Captain O'Brien on this date.

25. The Union requested that the Commission make this finding. We find the fact to be supported by the record and have supplemented the findings accordingly.

26. Paglia, therefore, never actually worked straight midnight shifts.

Paglia's Bypass to Sergeant

The frequency of vacant sergeant positions varies in the department. In some years, there may be two vacancies. In other years, there may be no vacant sergeant positions. There are currently twenty-one sergeants in the department.

In approximately October 1998, Paglia took the Civil Service Commission (Civil Service) examination for promotion to sergeant. In approximately March or April 1999, Civil Service certified the list for the sergeant's exam. Shortly thereafter, Paglia learned that he had earned 86%, the top score on the exam. In July or August 1999, Paglia signed the list, indicating that he would accept an appointment to a sergeant position.

On or about September 6, 2000, Paglia learned that he was being bypassed for promotion to sergeant in favor of two other patrol officers in the detective bureau, Edward Aucoin (Aucoin) and Hugh Downing (Downing). Both Detectives Aucoin and Downing had received lower scores on the exam than Paglia.²⁷

Paglia was surprised when he heard that he had been bypassed for promotion based upon his knowledge of the department's history of promoting the top scorer on the Civil Service sergeant exam. Union President and patrol officer Jay Babcock (Babcock), who has fifteen years of experience with the department, had never heard of a top-scoring candidate for sergeant being bypassed for promotion. Consequently, Babcock asked the Union's executive board if they had ever heard of a top-scoring candidate on a Civil Service examination being bypassed for promotion to sergeant in favor of a lower scoring candidate. The executive board members, who each had twenty to thirty years of experience in the department, could not recall a similar situation.

In turn, the executive board queried the Union membership to ascertain whether they were aware of any instances in which a patrol officer with the highest score had been bypassed for promotion to sergeant by a lower-scoring candidate. The membership reported that in 1968 and in 1970, two officers with the highest scores on the Civil Service sergeant's exam had been bypassed in favor of lower scoring applicants.

The Newton Police Superior Officers Association (Association) represents all sergeants, lieutenants, and captains in the police department. In September 2000, the Association's executive board learned that the department had bypassed Paglia in favor of two lower-scoring candidates. On September 5, 2000, the Association's executive board members wrote to Chief Gorgone and City

Mayor David Cohen protesting Paglia's bypass.²⁸ The letter provided in relevant part:

It has come to the Association's attention that on September 6, 2000, the appointing authority plans to bypass *twice* the top-scoring candidate on the sergeant's Civil Service promotional list by appointing two individuals to sergeant ahead of this individual, Patrol Officer Robert Paglia. There is no apparent reason for bypassing Officer Paglia, who is clearly qualified for the position.

We are writing to register the Association's vehement objection to the planned by passes [sic]. For over thirty-six (36) years, without exception, Civil Service promotions in the Police Department have been made on a level playing field, offering all members of the Department an equitable opportunity to rise through the ranks. (We hasten to note that it was on this level playing field that our present Chief of Police rose through the ranks). Although other area departments have bypassed higher scoring candidates in favor of candidates lower on the promotional list, Newton police officer candidates have always been able to rely on the exacting standards and integrity of a process that has consistently promoted the top-scoring candidates. We believe that exercising the bypass option, where it has occurred in other departments, has proven to be to the detriment of that department's morale and, therefore, *not* in the best interest of the citizens of Newton.

We believe that bypassing a clearly qualified, top-scoring candidate for promotion will result in a serious negative effect on the morale of the entire Police Department and, in particular, on the morale of the members of the Association. In sum, we are deeply concerned that the contemplated action will cause poor morale across the ranks and suspicion and criticism will be directed toward management personnel in the Department.

In light of the foregoing, we hereby strongly urge that the appointing authority adhere to its thirty-six (36) year practice by first promoting the top scoring candidate, Patrol Officer Paglia, to the position of sergeant on September 6, 2000. This long-standing and well-established practice will ensure that promotional appointments continue to be made fairly and equitably, without any questions of favoritism or politicization. In closing, we would note that the City is presently engaged in collective bargaining over the terms of a successor contract with the Association. Accordingly, any changes to the promotional process would properly be raised by the City as a proposal in the context of contract negotiations.

(Emphasis in original).

The Police Department's Promotional Process

As Executive Officer of the City's police department, Lieutenant McDonald works directly with the Chief of Police to ensure daily operation of the police department and to carry out the Chief's directives and orders.²⁹ Lieutenant McDonald is involved in all police department personnel matters, budget matters, and collective

27. Aucoin and Downing each received a score of 84% on the exam and were rated directly below Paglia on the Civil Service list.

Civil Service allows for the promotion of one of the three top candidates on a certified list if there were one vacancy, or for the promotion of two of the top five candidates if there were two vacancies. M.G.L. c. 31, Section 37 provides that:

Except as provided otherwise by section fifteen, if the administrator certifies from an eligible list the names of three persons who are qualified for and willing to accept appointment, the appointing authority, pursuant to civil service law and rules, may appoint only from among such persons. If such eligible list contains the names of fewer than three such persons, the ap-

pointing authority may appoint from among those persons or may request authorization to make a provisional appointment to sections twelve, thirteen and fourteen.

28. The Association's executive board members wrote the September 5, 2000 letter, in part, because they believed that a bypass of the top-scoring candidate could affect promotions within their bargaining unit as well.

29. Lieutenant McDonald has held the position of Executive Officer since 1997, except for a brief period from August 2001 to February 2002 when he was acting Chief of Police after Chief Gorgone left the department.

bargaining issues. Lieutenant McDonald is also involved in all aspects of the promotional process, including requesting Civil Service lists to fill positions³⁰ and discussing and evaluating individuals on the list. The Chief of Police ultimately decides who will be promoted.

In promotions in which Lieutenant McDonald has been involved, the department has evaluated candidates' suitability for promotion by considering the police officer's entire personnel record, including performance evaluations, sick leave, letters of commendation, and discipline. The police chief has never announced or otherwise made public the criteria used in promoting officers to sergeants.³¹

The department initiates the process of filling vacancies above the rank of officer by informing Civil Service of its intent to promote. Civil Service then sends back a certified list from which the department selects candidates for promotion. The certified list contains names of eligible promotees based upon the number of vacancies to be filled.

There are no Civil Service rules or statutes that require an appointing authority to select the person with the highest score on a Civil Service list. If an appointing authority wishes to bypass a candidate, it must submit reasons for the bypass and the selection of other candidates to the Commonwealth's Department of Personnel Administration (DPA).³² DPA's legal staff reviews the reasons for bypass and sends a response back to the appointing authority. A candidate who is bypassed may file an appeal with Civil Service.

In the promotional process involving Paglia, the City notified Civil Service that it wished to fill two sergeant positions. Civil Service certified a list of candidates for promotion and forwarded to the department five names from which to select two candidates for promotion to sergeant. On or about July 21, 2000, the department received the certified list for the two sergeant positions. After the department received the list, Chief Gorgone instructed Lieutenant McDonald to gather the candidates' performance evaluations, sick leave usage, and discipline, and to discuss the candidates' qualifications with other superior officers.

Patrol officers are evaluated in January for the prior calendar year.³³ Officers are rated in certain areas by a sergeant using the following evaluative criteria: "N/A for Not Applicable,"³⁴ 1 for "Unacceptable," 2 for "Fair," 3 for "Acceptable," 4 for "Very Good," and 5 for "Superior." The evaluations also include a sec-

tion entitled "Remarks" in which an evaluator may write comments about the patrol officer's performance.

For the year 1998, Officers Aucoin, Downing, and Paglia received the following scores on their performance evaluations:

AREA	AUCOIN'S RATINGS	DOWNING'S RATINGS	PAGLIA'S RATINGS
General Appearance	4	5	4
Feedback Acceptance	4	4	3
Attitude/Police Work	4	4	3
Policies and Procedures	4	4	3
Criminal Law	4	4	3
Motor Vehicle Law	N/A	4	3
Driving Skills/General	N/A	4	N/A
Driving Skills/Stress	N/A	4	N/A
Report Writing/Details	4	5	3
Field Performance/General	4	5	3
Field Performance/Stress	4	4	4
Self Initiation	4	4	3
Prisoner/Suspect Safety	4	4	3
Controlling Conflicts	4	4	4
Radio	4	5	3
Relations/Public	4	5	3
Relations/Officers	4	4	4
Courtroom Demeanor	N/A	5	N/A
Vehicle Inspection	N/A	4	3
Use of Force	4	4	3

There are no comments in the Remarks section on Downing's or Aucoin's 1998 evaluations. Paglia's 1998 evaluation, conducted by Sergeant Dowling, contains the comment, "Periodically low on ticket productivity."

For the year 1999, the three candidates' performance evaluations were rated as follows:³⁵

AREA	AUCOIN'S RATINGS	DOWNING'S RATINGS	PAGLIA'S RATINGS
General Appearance	4	5	4
Feedback Acceptance	4	5	3
Attitude/Police Work	4	5	3
Policies and Procedures	4	5	3-4 ³⁶
Criminal Law	5	5	3-4
Motor Vehicle Law	N/A	4	3-4
Report Writing/Details	5	5	3
Field Performance/General	4	5	3
Field Performance/Stress	4	5	3-4
Self Initiation	4	5	3
Prisoner/Suspect Safety	4	5	4
Controlling Conflicts	4	5	3
Radio	4	4	3
Relations/Public	4	5	3
Relations/Officers	4	5	4

30. The department has used Civil Service lists to fill vacancies since approximately 1968.

31. The Union requested the following additional finding: "The police chief has never promulgated any promotional standards or criteria other than receiving the highest score on the civil service list." After considering the Union's proposed supplemental finding, the City's opposition, and the record before us, we have modified the findings to indicate that the police chief has never announced or otherwise made public the criteria used in promoting officers to sergeants.

32. M. G. L. c. 32, Section 27 provides in relevant part:

If an appointing authority makes an original or promotional appointment from a certification of any qualified person other than the qualified person whose name appears highest, and the person whose name is highest is willing to accept such appointment, the appointing authority shall immediately

file with the administrator a written statement of his reasons for appointing the person whose name was not highest. Such an appointment of a person whose name was not highest shall be effective only when such statement of reasons has been received by the administrator. . . .

33. The department keeps performance evaluations for three years and destroys performance evaluations older than three years.

34. "N/A" means that the supervisor did not observe the patrol officer performing that particular job function or duty.

35. The categories "Driving Skills/General," "Driving Skills/Stress," and "Courtroom Demeanor" are not listed as criteria in performance evaluations for 1999.

36. Criteria marked with two numbers indicate a score in between those numbers.

Vehicle Inspection	N/A	5	3
Use of Force	4	5	N/A

Association president Sergeant Mark Gromada (Sergeant Gromada) supervised Paglia on a part-time basis in 1999, approximately two days per week. Sergeant Gromada began evaluating patrol officers in 1999.³⁷ He considered his evaluating style to be “in the middle” between strict and lenient. On Paglia’s 1999 performance review, Sergeant Gromada hand wrote in the remarks section, “Officer Paglia does an adequate job when I have observed him. Sometimes needs to be reminded about ticket requirements.”³⁸

On Downing’s 1999 evaluation, his supervisor remarked that, “Det. Downing’s appearance and performance are exceptional and he is a (illegible) to the Newton Police and the Det. Bureau. Motivated and capable.” There are no comments written on Aucoin’s 1999 evaluation.

Chief Gorgone and Lieutenant McDonald considered the performance evaluations of Paglia, Downing, and Aucoin in making their promotional decisions. Lieutenant McDonald considered Downing’s and Aucoin’s performance evaluations for the years 1998 and 1999 to be above average and exceptional based on their scores. Lieutenant McDonald characterized Paglia’s 1997 evaluation as acceptable. However, he recognized that because Paglia had been out injured for most of the year, many categories on the evaluation were marked as not applicable. Lieutenant McDonald considered Paglia’s 1998 evaluation as acceptable based on his scores for that year, but noted that the evaluation indicated that Paglia’s ticket productivity had been low. He considered Paglia’s 1999 evaluation as acceptable or adequate, noting again that the evaluation stated that Paglia needed to be reminded about ticket requirements.

Of the three candidates for promotion to sergeant, only Paglia had been disciplined. His discipline consisted of a letter of reprimand dated May 18, 2000 for derogatory and unprofessional remarks that Paglia had transmitted on or about April 12, 2000 over the Mobile Data Terminal (MDT)³⁹ from his police cruiser to other police officers in their cruisers.⁴⁰

Paglia’s comments were of a crude and sexual nature. After completing an investigation into the incident, the department gave four other police officers either letters of reprimand or suspensions for making inappropriate remarks over the MDT. The department did not discipline two of the officers involved in the incident. The department made its decision to discipline an officer based on the nature of the police officer’s comments and the number of total transmissions that he or she made.

Paglia’s letter of reprimand was drafted approximately three months before the department made the decision to bypass him for promotion.⁴¹ Initially, however, the department believed that another patrol officer in the police department by the name of Richard Paglia had made the inappropriate comments over the MDT, and it sent the written reprimand to him.⁴² When Richard Paglia informed the department of the mistake, the department apologized to him and sent the written reprimand to Robert Paglia. Chief Gorgone and Lieutenant McDonald considered Paglia’s May 18, 2000 reprimand as part of their decision to bypass him.

Paglia had also received notices regarding excessive sick leave usage prior to his bypass for promotion. On or about August 13, 1999, Paglia received a “Notice of Excessive Non-Scheduled Absenteeism” (Notice)⁴³ from Chief Gorgone. The Notice stated as follows:

This is to inform you that your personnel records show that for the period beginning 1/1/99 to 8/11/99 you have used 8 days. Your use of unscheduled leave is excessive and unacceptable.

According to Article IV, Section 4.07 of the Collective Bargaining Agreement between the City of Newton and the Newton Police Officers Association (IBPO, Local 478) states: No salary or wages shall accrue to any employee under paragraph 4.03 or paragraph 4.06 of this Article unless the City physician shall find that the absence of such employee from duty is justified by reason of sickness or injury.

You are hereby notified that if this pattern of abuse continues you will be required to obtain approval of the City physician that the absence from duty was justified.

On or about March 2, 2000, Paglia received another “Notice of Excessive Non-Scheduled Absenteeism.” In relevant part, the Notice provided that, “your personnel records show that for the period be-

37. The department provided no formal training to patrol supervisors on how to perform employee evaluations, but it did provide a pamphlet that explained the evaluation’s rating system.

38. There is no written policy in the department concerning ticket writing, however it expects officers to write a certain amount of citations for moving violations and for parking. Sergeant Gromada also had to be reminded about ticket requirements prior to his promotion to sergeant.

39. The MDT is a computer located in police cruisers over which police officers can communicate from their cruiser to other cruisers or to the police station, where they can be printed out.

40. This reprimand was Paglia’s only discipline in his eighteen-year career with the police department.

41. Paglia’s reprimand was not grievable because, as of April 2000, the parties’ Agreement did not contain a just cause provision. At that time, disciplinary actions were appealable only through Civil Service. As an alternative, an officer could appeal a letter of reprimand by asking that the Chief rescind the letter. If the Chief

chose not to rescind the letter, the officer could file a response to the reprimand that would remain in his personnel file.

42. A sergeant who investigated the April 12, 2000 incident reviewed the assignment worksheets to ascertain who had been on duty in particular cruisers and believed that the worksheet notation, “Paglia” was a reference to Richard Paglia, and not Robert Paglia. Both officers worked the night shift but were assigned to different platoons.

43. In 1997, the Union filed a grievance over the Notices because they contained a reference to the fact that an officer could receive further disciplinary action. In 1998 or 1999, the City and the Union settled the grievance. Pursuant to that settlement, the City could send out the Notices to remind officers that they had taken a certain number of sick days, and that they might be ordered to see the City physician. The Union does not consider the Notices to constitute discipline, but instead views them as a reminder that officers are using a certain number of sick days beyond the average number of sick days taken by fellow police officers.

gining 1/1/99 to 12/31/99 you have used 16 days.⁴⁴ Your use of unscheduled leave appears to be excessive and unacceptable. Records also show that your use of special leave for calendar years 1997 and 1998 was also excessive.” Chief Gorgone and Lieutenant McDonald considered Paglia’s use of sick leave in making the decision to bypass him.

In evaluating a promotional candidate’s use of sick time, the department considers any reasons for their use of sick time, including situations involving consecutive time off, long term illness, surgery or parental leave, which is documented in the officer’s personnel file.⁴⁵ The department may consider frequent individual sick days, sick days taken on weekends or next to other scheduled days off as an indication of sick leave abuse. The department considered Paglia’s sick leave in 1999 to indicate sick leave abuse, because he used eight individual sick days during the period January 1 to August 11, 1999, and because he exceeded the department’s average for officers’ use of sick leave.⁴⁶ However, Paglia had not used sick days in excess of his accrued sick leave balance.

Frank Eldridge (Eldridge) was promoted to sergeant in 1999. For the four years⁴⁷ prior to his promotion, he used the following sick time:

CALENDAR YEAR	SICK DAYS	SIF DAYS	TOTAL
1996	5	1	6
1997 ⁴⁸	10.5	1	11.5
1998	6	1	7
1999	4	3	7 ⁴⁹

Sergeant Matthew Cummings (Cummings) was promoted to sergeant in 1991. In the five years preceding his promotion, he used the following sick leave:

CALENDAR YEAR	SICK DAYS	SIF DAYS	TOTAL
1987	16	4	20
1988	28	2	30
1989	14	2	16
1990	1	0	1
1991	2	0	2

Glenn Chisholm (Chisholm) was promoted to sergeant in 2001. Prior to his promotion, he used the following sick time:

CALENDAR YEAR	SICK DAYS	SIF DAYS	TOTAL
1997	12	0	9[sic]
1998	8	0	8

44. Paglia’s attendance record for 1999 indicates that he took 15 sick days and one SIF (Sickness in Family) day.

45. Moreover, if an officer takes off in excess of three consecutive days of sick time, he or she has to produce a letter from his or her doctor, the City physician, or Health at Work, to be cleared to return to work.

46. The department may order a patrol officer to see the City physician if it suspects that he or she is abusing his or her sick leave. However, the department did not require that Paglia see the City physician for alleged sick leave abuse.

47. Although the record reflects similarly-situated officers’ sick leave usage for five years prior to their promotion to sergeant, the record contained only four years of Eldridge’s sick leave usage prior to his promotion to sergeant. The department

1999	15	0	15
2000	7	1	8
2001	3	0	3

Dennis Dowling (Dowling), who was promoted to sergeant in 1997, used the following sick leave in the five years prior to his promotion:

CALENDAR YEAR	SICK DAYS	SIF DAYS	TOTAL
1993	4	1	5
1994	6	0	6
1995 ⁵⁰	8	8	16
1996	1	5	6
1997	2	3	5

Prior to Dowling’s promotion to sergeant in 1997, the department considered him for a specialty assignment on the City’s drug task force in 1996. However, several sergeants and lieutenants who had worked with Dowling wrote to Chief Gorgone and to Captain O’Brien and expressed their strong disapproval of Dowling’s appointment.⁵¹ These letters contained references to Dowling’s inability to control his anger, his resistance to taking orders, his inappropriate behavior towards prisoners, his volatile personality and aversion to supervisory direction. Two of the letters referenced Dowling’s poor ticket production. The department did not ultimately select Dowling for the assignment to the drug task force.

Chief Gorgone and Lieutenant McDonald reviewed these letters during their consideration of Dowling for promotion to sergeant in 1997. Despite the letters criticizing Dowling’s work performance, Chief Gorgone believed that he had experienced a turnaround from 1996 to 1997, as demonstrated by his performance evaluations. Chief Gorgone believed that Dowling was worthy of a promotion to sergeant based on conversations with him and his supervisors, his sick leave record, and the absence of any discipline. Prior to Dowling’s promotion, Captain O’Brien spoke to him on several occasions about his behavior on the job and informed him that he had to change if he expected to advance in the department. Captain O’Brien saw Dowling’s work performance improve after this counseling. In the two years prior to his promotion to sergeant, Dowling was rated on his performance evaluations as follows:

AREA	DOWLING’S RATINGS- 1995	DOWLING’S RATINGS-1996
General Appearance	3	3
Feedback Acceptance	3	3
Attitude/Police Work	4	4
Policies and Procedures	3	4

considered Paglia’s sick leave usage for the five years prior to his bypass for promotion.

48. Eldridge took 3.5 consecutive sick days in March of 1997.

49. Eldridge was promoted to sergeant on April 9, 1999. Prior to that date, Eldridge had taken two sick days in 1999. Eldridge took five additional sick days for the remainder of 1999, following his promotion.

50. Dowling took 7 consecutive days sick in May 1995 and 2 consecutive sick days in December 1995.

51. The authors of the letters were Lieutenant Charles MacLean III, Sergeant Gerard Mahoney, Sergeant B. M. Apotheker, Lieutenant J. Bartinelli, Jr., and Sergeant Christopher Marzilli.

Criminal Law	4	4
Motor Vehicle Law	4	4
Driving Skills/General	4	N/A
Driving Skills/Stress	N/A	N/A
Report Writing/Details	4	4
Field Performance/General	4	4
Field Performance/Stress	3	3
Self Initiation	4	4
Prisoner/Suspect Safety	4	5
Controlling Conflicts	3	3
Radio	4	4/5
Relations/Public	4	4
Relations/Officers	4	4
Courtroom Demeanor	N/A	N/A
Vehicle Inspection	N/A	4/5
Use of Force	3	4

The name of the person who rated Dowling for calendar year 1995 is illegible on the 1995 performance evaluation. The rater's supervisor listed on the evaluation is Lieutenant J. Bartinelli, Jr. (Bartinelli). Dowling's 1995 evaluation did not contain any comments. On his 1996 evaluation, Dowling was evaluated by Sergeant B. Apotheker (Apotheker) and another sergeant whose name is illegible. Dowling's evaluators commented that, "Officer Dowling over this rating period has improved his performance over the previous rating period." The evaluators' supervisor on the 1996 evaluation is Bartinelli. Both Apotheker and Bartinelli had written letters to Chief Gorgone in 1996 protesting Dowling's appointment to the police drug task force.

Lieutenant McDonald and Chief Gorgone engaged in a lengthy discussion concerning the three candidates' eligibility for promotion. Chief Gorgone believed that Downing and Aucoin were superior candidates, and that Paglia was an average candidate, based on the patrol officers' performance evaluations, sick time usage, reprimands, discussions with other superior officers, and overall records.

On or about August 30, 2000, Lieutenant McDonald drafted for Chief Gorgone's signature a letter addressed to the Commonwealth's DPA detailing the department's reasons for bypassing Paglia. The letter provided,

I am writing to inform you, that in accordance with Chapter 31, section 27 of Massachusetts General Laws, I am bypassing the [sic] Newton Police Officer Robert Paglia, whose name appears highest on the promotional certification for police sergeant.

The reasons for this bypass are as follows:

In reviewing Officer Paglia's performance evaluations for 1998, 1999 and 2000, his supervisors rated his performance as only acceptable in categories such as Attitude in Police Work, Report Writing, Field Performance and Policies and Procedures. Comments include "he only does an adequate job" and "he has to be reminded of duties."

Officer Paglia recently received a letter of reprimand in May of 2000 for violation of Newton Police General Order 510 regarding radio procedures and derogatory and unprofessional messages that he sent over our Mobile Data Terminals.

Officer Paglia's attendance cards were also reviewed. For the years 1996, 1997, 1998, 1999, and 2000, Officer Paglia has used far above the department's average of sick days. Officer Paglia received a notice of excessive non-scheduled absenteeism in 1999 and 2000.

Detective Downing was born in Newton, Massachusetts, and graduated from the Newton Public School System. He was serving in the law enforcement field in the military and as a security coordinator and special police officer in a civilian capacity before joining the Newton Police Department in May of 1984. Hugh recently celebrated his sixteenth anniversary with the police department and his twenty-fifth anniversary as a member of the Massachusetts Air National Guard.

Detective Downing has held a variety of positions while assigned to the Newton Police Department. From May of 1984 to March of 1990, he served as a patrol officer in the Patrol Bureau and was a member of the Newton Police Honor Guard. Hugh became one of our police department's first certified field-training officers by the Massachusetts Criminal Justice Training Council (MCJTC). In addition to his patrol duties, he was responsible for providing orientation training and direct supervision of recruit officers assigned to him under the Field Training and Evaluation Program.

From March of 1990 to June of 1994, Detective Downing served as a night youth officer in the Community Services Bureau. He specialized in child and elder abuse investigations, youth crime prevention, drug and gang intervention, youth-centered court diversion programs, and he was a police department liaison to the local school systems, public and private. Hugh was an associate advisor for the Newton Police Explorer Post and an advisory board member of the Newton Youth Commission during that period.

From June of 1994 to November of 1997, Detective Downing served as a community liaison officer and became one of the first bicycle officers assigned to patrol duties in the Newton Police Department. He is a certified crime prevention officer and certified instructor by the MCJTC. Hugh has conducted numerous security and safety-related lectures at neighborhood meetings and at businesses citywide. He has received sound and video production training from Crimson Technical Institute and the Newton Cable Access Corporation. Hugh was a member of the production crew for several public service video productions, including the police department's locally award-winning domestic violence video entitled, "You Are Not Alone."

In November of 1997, Detective Downing was assigned to his present position in the Detective Bureau. He specializes in criminal and sexual assault investigations, and he has successfully completed an arson investigation course taught at the Massachusetts Firefighting Academy in Hudson. Hugh is a secondhand dealer enforcement officer, and as part of his ancillary duties, he conducts background investigations on both secondhand dealer applicants and candidates seeking employment with the Newton Police Department.

Detective Downing has instructed at the Newton Citizen's Police Academy and he is currently an instructor and liaison officer for the Newton Auxiliary Police Department. Hugh has been instructing in the military for many years on the principles of personal security and explosives and weapons safety. He is also a basic first aid and cardiopulmonary resuscitation instructor with the American Heart Association.

Detective Edward J. Aucoin is a 20-year veteran of the Newton Police Department. He was appointed to the Newton Police in 1980 and attended the Boston Police Department Basic Recruit Academy. He was elected by his peers to be president of his academy class after recognizing his leadership qualities.

Prior to his appointment to the Newton Police, he graduated from Boston College University [sic] with a Bachelor of Science degree in Management. He has since obtained his Master's Degree in Criminal Justice from Anna Maria College.

After successful completion of the Boston Police Academy, he was assigned to the patrol bureau. His duties included both cruiser and motorcycle assignments. In 1985, he volunteered, and was selected, to become a member of the Newton Police Civil Disorder Unit. This Unit was comprised of officers who volunteered to encounter the most serious threat situations the department might encounter. This includes barricaded suspects as well as hostage-taking crises. His service to this unit culminated in Governor Michael Dukakis awarding him and other members of the unit the “Governor’s Citation for Bravery” for the successful resolution of a hostage-taking crisis in 1989. He still serves as a volunteer on this unit as a member of the entry team, rifle marksman, trained hostage/crisis negotiator and chemical munitions instructor. He has received specialized training from the Department of the Army. He received excellent evaluations by his supervisors while in the patrol bureau.

In 1986, his outstanding performance in the patrol bureau was recognized with his appointment as a detective. He was trained exclusively while in the detective [sic] in numerous disciplines including: Certified Rape Investigation, Homicide Investigation, Police Photography, Fingerprint Classification & Recovery, Computer Composite Sketching, Computer Crime Investigation, Scientific Interrogation Techniques, Certified Chemical Munitions Instruction, Firearms Legal Updates, Officer Survival & Post Critical Incident Trauma and others. While in the detective bureau, Detective Aucoin worked on numerous cases of a serious nature. He is a member of the sexual assault unit working closely with the Middlesex District Attorney’s Office and the Department of Social Services on child abuse cases. He has also worked on many homicide cases bringing them to successful conclusions. He has also been given the responsibility of assisting Internal Affairs in investigations as well as sensitive internal City of Newton investigations. He has conducted numerous Recruit Background Investigations, Emergency Dispatcher Recruit Backgrounds and Firearms Applicant Backgrounds (including dealers). During his tenure in the detective bureau, his supervisors have consistently recognized his performance as outstanding.

In 1988, Detective Aucoin was selected to serve as the Supervisor of Licensing Enforcement for over 220 licensed alcohol, common victualler and entertainment establishments throughout the City of Newton. Detective Aucoin still serves in this capacity. This position, previously held by sergeants, requires Detective Aucoin to enforce all regulations of the Alcoholic Beverage Control Commission (ABCC) as well as the City of Newton Board of License Commissioners Regulations. He works closely with the Board of License Commissioners as an agent of the Board. The only other agents of the Licensing Board within the police department are ranking officers. No other patrolman holds this position. In this capacity, he is required to assign both patrolmen and ranking officers to appear before the local board as well as the ABCC. His position is to provide legal briefs as well as direct and cross-examination of witnesses before the local board, ABCC, Superior Court, Court of Appeals, etc., as well as coordinating and supervising alcohol stings. Both the local board and the department have recognized him for his dedication and superior performance.

In 1990, Detective Aucoin was again recognized for his outstanding performance and was selected to attend the prestigious Federal Bureau of Investigation National Academy. This academy is an intense 3-month program located at the FBI Academy in Quantico, VA and is accredited through the University of Virginia. This academy provides instruction in the fields of firearms, constitutional and criminal law, sexual predators and other fields. The FBINA only selects 1/2 of 1% of all police officers worldwide for this instruction. Detective Aucoin is one (1) of only six (6) officers in the history of the Newton Police Department who has attended this academy. He graduated from the 161st session.

Detective Aucoin has also volunteered to instruct at the Newton Police Citizens Academy. He has instructed at each academy in the fields of High Technology Crimes and Computer Crimes. He has also been Selected to serve as the Accreditation Manager for the Detective Bureau, coordinating the documentation of standards for successful accreditation through the Commission on Accreditation for Law Enforcement Agencies, Inc. He has been recognized for his assistance in the successful accreditation of the Newton Police Department. He has also volunteered and been selected to serve on the Newton Police Department Technology Committee. This Committee, under the direction of Chief Gorgone, is charged with formulating goals, policies and plans to enhance the technology of the Newton Police Department.

Detective Aucoin has also been recognized over the years for his dedication to duty and superior attendance record. He has received departmental letters recognizing his superior attendance record and lack of sick time use.

In summation, Detective Aucoin has been an outstanding and positive asset to the Newton Police Department.

When reviewing Officer Edward Aucoin’s and Officer Hugh Downing’s sick leave, it was noted that both officers were recognized for excellent attendance for the same years.

I am enclosing information to support my decision to select Officer Hugh Downing and Officer Edward Aucoin for the position of Police Sergeant. They are by far the best qualified for this position. I know they will continue to support the Newton Police’s mission to strive for the deliverance of total quality police service.

/s/ Frank R. Gorgone

Chief of Police

The DPA accepted the department’s reasons for the bypass of Paglia. Prior to the department’s bypass of Paglia for promotion to sergeant, the City did not provide the Union with notice and an opportunity to bargain over its decision to bypass Paglia for promotion in favor of two lower-scoring candidates on the Civil Service sergeant’s exam.

Opinion

Count I - 10(a)(3) Allegation

Our initial inquiry under Count I of the complaint is whether the City violated Sections 10(a)(3) and, derivatively, (1) of the Law by bypassing Paglia and promoting two other candidates to sergeant. When considering an alleged violation of Section 10(a)(3) of the Law, we first determine whether the charging party has established a *prima facie* case of discrimination based on protected activities by producing evidence to support each of the following four elements: 1) the employee engaged in activity protected by Section 2 of the Law; 2) the employer knew of the protected activity; 3) the employer took adverse action against the employee; and 4) the employer’s conduct was motivated by a desire to penalize or discourage the protected activity. *Town of Brookfield*, 28 MLC 320, 327 (2002), *aff’d sub nom. Town of Brookfield v. Labor Relations Commission*, 443 Mass. 315 (2005).

With respect to the first element of a charging party’s *prima facie* case of discrimination, the Commission has decided that an employee’s activity is protected if it focuses on generally applicable terms and conditions of employment that impact the collective

bargaining unit as a whole. *City of Boston*, 8 MLC 1872, 1875 (1982); *Town of Shrewsbury*, 5 MLC 1519, 1523 (1978). To be concerted, the evidence must demonstrate that the employee is acting with other employees, or on the authority of other employees, rather than acting out of self-interest. *Town of Southborough*, 21 MLC 1242, 1249 (1994), citing *Meyers Industries*, 268 NLRB 493, 115 LRRM 1025 (1984). Compare *Commonwealth of Massachusetts*, 14 MLC 1743, 1747 (1988) (probationary employee's complaints with other employees about unhealthy working conditions constituted concerted activity) with *Town of Athol*, 25 MLC 208, 211 (1999) (employee's safety and work break complaints did not constitute concerted activity, because the employee was acting alone and without the authority of other employees); *Higher Education Coordinating Council*, 24 MLC 97, 102 (1998) (without evidence that the employee was acting with other employees or acting on their authority, the filing of a sexual harassment complaint is not concerted activity).

Further, it is well settled that the filing and processing of a grievance by an employee constitutes concerted, protected activity, because the employee is seeking to enforce the provisions of a collectively-bargained agreement, even if the employee is acting in his or her own self-interest. *Boston City Hospital*, 11 MLC 1065, 1072 (1984), citing *Interboro Contractors, Inc.*, 157 NLRB 1295, 61 LRRM 1573 (1966), *enfd* 399 F.2d 495, 67 LRRM 2083 (2d Cir. 1967). By analogy to the grievance-arbitration process, the Commission has decided that an individual employee's exercise of rights grounded in the collective bargaining agreement, like a contract-based civil service classification appeal, constitutes concerted, protected activity. *Commonwealth of Massachusetts*, 24 MLC 116, 118 (1998), citing *NLRB v. City Disposal*, 465 U.S. 822, 115 LRRM 3193 (1984) (invocation of a right grounded in the collective bargaining agreement constitutes concerted activity); *Town of Winthrop*, 9 MLC 1884, 1886 (1983).

In this case, Paglia's efforts to secure a certain shift during his light duty service do not constitute concerted, protected activity, because Paglia acted exclusively on his own behalf. The record reflects that other officers, including Clements and Henderson, were affected by changes in light duty shift assignments. However, the record is devoid of any evidence indicating that Paglia acted in conjunction with Clements and Henderson—or on their behalf—when challenging the light duty shift assignments. Moreover, the record indicates that the parties' collective bargaining agreement does not address the subject of shift assignments while an officer is on light duty. Accordingly, we do not find the record to support a conclusion that Paglia engaged in any type of concerted, protected activity.

The Union also failed to satisfy its evidentiary burden to prove the final element of its prima facie case. Specifically the Union did not show that the City was unlawfully motivated in bypassing Paglia for promotion to sergeant. Unlawful motive may be inferred from direct evidence and from circumstantial factors like the timing of the adverse action in relation to the protected activity, evidence of employer hostility toward the exercise of protected rights, and shifting reasons for imposing discipline. *Commonwealth of Massachusetts*, 14 MLC at 1747; *Boston City Hospital*, 11 MLC at

1072. Here, the Union concedes that there is no direct evidence of unlawful motivation, and that it must rely upon circumstantial evidence to prove unlawful motive.

The Union contends that evidence of discriminatory animus can be inferred from the timing of Paglia's bypass, because the department must have requested the certified Civil Service list for two sergeants' positions at or before the time Paglia was dealing with his work schedule. However, the Commission has long held that timing alone is insufficient to establish unlawful employer motivation. *Bristol County*, 26 MLC 105, 110 (2000); *Watuppa Oil Co.*, 1 MLC 1032 (1974). Therefore, we are not persuaded by the Union's argument.

Absent any other evidence of discriminatory motivation, we decline to infer that bypassing Paglia for promotion to sergeant was influenced in whole or in part by illegal considerations. As a result, the Union failed to establish a *prima facie* showing of discrimination. Accordingly, we dismiss Count I of the complaint alleging a violation of Section 10(a)(3) of the Law.

Count II - 10(a)(5) Allegation

Next, we must determine whether the City violated Sections 10(a)(5) and, derivatively, (1) of the Law by unilaterally changing the procedure that it used to promote unit members to sergeant when it promoted two other officers instead of Paglia, who held the highest score on the Civil Service exam. A public employer violates Sections 10(a)(5) and, derivatively, (1) of the Law when it unilaterally changes wages, hours, or other terms and conditions of employment without first bargaining to resolution or impasse with the employees' exclusive bargaining representative. *School Committee of Newton v. Labor Relations Commission*, 388 Mass. 557 (1983); *Town of Arlington*, 21 MLC 1125 (1994). To establish a unilateral change violation, a charging party must show that: 1) the respondent has changed an existing practice or instituted a new one; 2) the change affected employee wages, hours, or working conditions and thus implicated a mandatory subject of bargaining; and 3) the change was implemented without prior notice or 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. at 572; *City of Boston*, 20 MLC 1603, 1607 (1994).

Here, the Union contends that the City unilaterally changed its past practice of promoting the highest scoring candidate to sergeant. In contrast, the City contends that it acted consistent with its past practice in reviewing the candidates' exam scores, as well as their performance evaluations, sick leave usage, discipline, and overall records, in making its promotional decision.

The Union bears the burden to demonstrate by a preponderance of the evidence that the City has unilaterally changed a condition of employment embodied in a binding past practice. See *City of Westfield*, 25 MLC 163, 165 (1999). Based on the record before us, we find that the Union has failed to meet its burden.

To determine whether a binding past practice exists, the Commission "analyzes the combination of facts upon which the alleged

practice is predicated, including whether the practice has occurred with regularity over a sufficient period of time so that it is reasonable to expect that the practice will continue.” *Commonwealth of Massachusetts*, 23 MLC 171, 172 (1997), citing *Town of Chat-ham*, 21 MLC 1526, 1531 (1995). While the Commission “inquires whether employees in the unit have a reasonable expectation that the practice in question will continue,” *City of Westfield*, 22 MLC 1394, 1404 (H.O. 1996), *aff’d* 25 MLC 163 (1999), the Commission focuses on the fact that “[a] past practice is a practice which is unequivocal, has existed substantially unvaried for a reasonable period of time and is known and accepted by both parties.” *Town of Dedham School Committee*, 5 MLC 1836, 1839 (1978). “The definition of ‘practice’ necessarily involves the Commission’s policy judgment as to what combination of circumstances establishes the contours of a past practice for purposes of applying the law prohibiting unilateral changes.” *Bristol County*, 23 MLC 114, 116 (1996), citing *City of Lynn*, 19 MLC 1599, 1602 (1992).

The record indicates that, for approximately thirty years, the City has most often promoted the top-scoring candidate to sergeant. However, that history is not un-wavering. Between 1968 and 1970, two officers, Cooper and Fitzsimmons, were each separately bypassed on the Civil Service list for promotion to sergeant, despite being the highest scoring candidates on that list. The record further reflects that, in choosing candidates for promotion to sergeant, Chief Gorgone and Lieutenant McDonald have reviewed the candidates’ performance evaluations, sick leave usage, discipline, overall records, and have discussed the candidates’ qualifications with other superior officers. Lieutenant McDonald, in fact, specifically testified that he has “never not reviewed” candidates’ personnel files and other documents when determining which officers were to be promoted to sergeant. Rather, Lieutenant McDonald testified that he always reviewed the candidates’ personnel files and other documents, including potential discipline, when making promotion decisions. Therefore, the evidence does not show that the promotion of the top scoring candidate is a binding past practice that “is unequivocal, has existed substantially unvaried for a reasonable period of time and is known and accepted by both parties.” See *Town of Dedham School Committee*, 5 MLC at 1839.

Likewise, evidence that the promotion decision-makers in the Police Department regularly reviewed the personnel records of the candidates establishes that the highest Civil Service test score was not, in itself, determinative of selection. The Union concedes that the Supreme Judicial Court has recognized that the appointing authority “retains some discretion . . . and need not automatically promote the highest ranking candidate,” *Goldblatt v. Corporation Counsel of Boston*, 360 Mass. 660, 666 (1971), and “the candidate ranked first is not necessarily entitled to the promotion.” *Bielawski*

v. Personnel Administrator, 422 Mass. 459, 466 (1996). Consistent with those cases, the City took other factors into account here.

We next consider the Union’s argument that *Goldblatt* and *Bielawski* do not apply in this case, because the Court in those cases did not have before them an appointing authority which had bound itself contractually to appoint the candidate ranked first. However, the parties’ collective bargaining agreement does not specify the criteria to be considered by the City when an officer is eligible for promotion to sergeant. Accordingly, the Union’s argument cannot be sustained.

The Union additionally posits that the City’s decision to bypass Paglia should be reversed, because at least two of the reasons relied upon by the City were not “reasonably objective” criteria. First, the Union argues that the City’s consideration of Paglia’s sick leave use is a punitive response to Paglia having availed himself of collectively-bargained economic rights. Second, the Union argues that the City relied on a reprimand for improper MDT usage that was demonstrably arbitrary. However, the Union’s arguments here are misplaced, because those arguments relate to elements of a retaliation allegation (i.e., adverse action and unlawful motivation) rather than to a unilateral change allegation. Therefore, we do not need to consider the Union’s arguments under Section 10(a)(5) of the Law.⁵²

The Union further contends that the City improperly relied on performance evaluations, because it had not complied with M.G.L. c. 31, § 6B.⁵³ However, whether the City complied with that Civil Service statute is not relevant to our analysis here. Rather, our focus when considering the first element of a unilateral change case is whether employees’ working conditions are governed by the terms of a collective bargaining agreement or by past practice. See *City of Gloucester*, 26 MLC 138, 129 (2000); *City of Everett*, 19 MLC 1304 (1992). Consequently, we do not find the Union’s argument on this point to be persuasive.

After examining the totality of the evidence in this case, we find that the City did not unilaterally change a condition of employment embodied in a binding past practice when it bypassed Paglia for promotion to sergeant. Thus, we conclude that the City did not violate Section 10(a)(5) of the Law.

Conclusion

Based on the record before us and for the reasons set forth above, we conclude that the City did not violate Sections 10(a)(1), (3), or (5) of the Law by bypassing Robert Paglia for promotion to sergeant. Accordingly, we dismiss the complaint of prohibited practice in its entirety.

SO ORDERED.

52. Even if we were to consider the Union’s arguments under Section 10(a)(3) of the Law, they are unavailing due to the Union’s failure to establish the first element of its *prima facie* case. *Supra*, pp. 38-39.

53. The statute provides, in relevant part:

The weight given to performance evaluation in promotional decisions for civil service positions shall be determined by the administrator in conjunction with representatives of collective bargaining units containing the titles to be tested.