In the Matter of UNITED STEELWORKERS, LOCAL 9360

and

MASSACHUSETTS WATER RESOURCES AUTHORITY

Case No. CAS-10-3748

34.91 accretion
93.61 dismissal of petition

August 6, 2010
Marjorie F. Wittner, Chair
Elizabeth Neumeier, Board Member
Harris Freeman, Board Member

John S. Chinian, Esq.	*Representing the Massachusetts Water Resources Authority*
Terence E. Coles	*Representing the United Steelworkers, Local 9360*

DECISION

Introduction

This unit clarification petition presents the issue of whether the following three positions - Data Resources Manager (DRM), Technical Operations Manager (TOM), and Manager of Purchasing - should be accreted into the bargaining unit of statewide Unit 6 employees represented by the United Steelworkers, Local 9360, (Union or Steelworkers) at the Massachusetts Water Resources Authority (MWRA). The undisputed evidence provided by the parties during the investigation of this matter demonstrates that all three positions existed at the time the MWRA recognized the Union's bargaining unit in 1994 and have not materially changed since that date. The Commonwealth Employment Relations Board (Board) has therefore decided to dismiss the petition.

Statement of the Case

On January 15, 2010, the Union filed this petition with the Division of Labor Relations (Division), seeking to accrete the three positions described above. The Union states on the petition that the DRM and TOM were created in 1993 and that the Manager of Purchasing position was created in the summer of 2007. The Union further states in the petition that the three positions' duties have not changed since they were first created.

The petition was investigated pursuant to 456 CMR 14.08 (2). On February 22, 2010, the parties participated in an informal conference at the Division's office. Both parties provided position statements and documents in support of their positions. Neither party contests the Board's jurisdiction.

Findings

Composition of Bargaining Unit - 1993-1994

From 1991-1993, a number of different employee organizations, including the Union and the National Association of Government Employees (NAGE), filed petitions with the former Labor Relations Commission seeking to represent certain workers at the MWRA. In November 1993, NAGE and the Steelworkers entered into an election agreement (Election Agreement) to serve as the joint representative of employees in statewide Units 1 and 6 in an entity called the "United Steelworkers of America/NAGE, Joint Representative." Among other things, the Election Agreement states:

> 1. [T]he employees eligible to vote and the appropriate Unit for each employee shall be as set forth in Appendix "A". [1]
>
> . . .
>
> 10. .The parties agree that employees marked 'M' or 'C' on Appendix 'A' are managerial or confidential employees and as such are excluded from the bargaining unit.
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> . . .
>
> 12. The parties acknowledge that, as a general rule, but subject to exception based upon job specific factors, in determining the inclusions and exclusions on Appendix A, those positions which are MWRA pay grade 12 and below have been designated as non-managerial. All positions which are MWRA pay grade 15 and above have been designated managerial. Positions in MWRA pay grade 13 and 14 have been included or excluded in accordance with their job duties and responsibilities. . . . The parties hereto agree that as new positions or titles are developed at the MWRA which are functionally related to unit 6 or unit 1 positions, they shall be excluded or included in the bargaining units subject to the following rebuttable presumptions, (a) all positions in MWRA pay grade 12 or below shall be presumed to be included, (b) positions in MWRA pay grade 13 and 14 shall not be subject to any presumption and shall be reviewed on a case to case basis. However, it is anticipated that a majority of the pay grade 13 positions will be included in the bargaining unit and a majority of pay grade 14 positions will be excluded from the bargaining unit. Positions in pay grade 15 or above shall be excluded, without exception.

On December 1, 1993, a majority of employees in Units 1 and 6 voted in favor of union representation.[2] On January 12, 1994, MWRA Executive Director Douglas McDonald set a letter to NAGE and the Steelworkers (Recognition Letter) recognizing them as the joint representatives of "employees in Bargaining Units 1 and 6 as described in the Notice of Election published by the parties in November of 1993." The Notice of Election defined the eligible voters as "all employees employed on the day of the election in any of the following job titles attached to this Notice and whose names appear upon the payroll of the MWRA as of November 18, 1993." The list of employees attached to the Notice of Election did not include the three disputed titles and there is no evidence, nor do the parties contend, that the three positions have

1. The copy of the Election Agreement provided by the MWRA did not include Appendix A. The MWRA later provided a copy of a December 1994 document titled "Revised Appendix A," which is described in greater detail below.

2. The former Labor Relations Commission did not conduct the election or certify the results.

been included in the Steelworker's bargaining unit or any other MWRA bargaining unit since then.

In particular, the disputed positions were denoted as non-bargaining unit titles in Revised Appendix A, a December 1994 document that classified all MWRA titles by: Department; Title; Grade; Unit, or if no unit was designated, by whether the position was managerial ("M") or confidential ("C"); number of individuals working in the title, and name of incumbent. Revised Appendix A reflects that all three positions worked in the Support Services Department as of 1994, and listed the positions as follows:

Unit	Title	#	Name	Grade
M	Purchasing Manager	1	Graham, Lewis A.	14
M	Data Resource Manager	1	Lipshits, Maxim	14
M	Technical Operations Manager	1	McCabe, Thomas	14

By contrast, Revised Appendix A contained the following listing for the title of Deputy Contract Manager, another Grade 14 position that also worked within the Support Services Department, but unlike the three disputed positions, was included in Unit 6:

Unit	Title	#	Name	Grade
6	Deputy Contract Manager	4	Colbath, Jane I.	14
6		4	Devito, Marie F.	14
6		4	Kolar, Kathleen S.	14
6		4	Navoy, John V.	14

The recognition clause of the parties' 2007-2010 collective bargaining agreement (Agreement) states:

> Pursuant to the provisions of Massachusetts General Laws Chapter 150E and Chapter 372 of the Acts of 2984, the Authority recognizes the Union as the exclusive collective bargaining representative of ... the job titles listed in Appendix A of this Agreement and any other job titles added to Appendix A during the life of this Agreement.

The three disputed titles are not listed in Appendix A to the Agreement.

The MIS Department / IS Custom Support Manager

The MWRA created a Management Information Systems (MIS) department on some unspecified date after 1994. The TOM and DRM currently work in the MIS department.[3] The MIS department also includes the IS[4] Custom Support Manager (CSM). Before 2002, this title was classified as a Grade 13, bargaining unit position. In or around 2002, the incumbent holding the non-unit Grade 14 MIS Applications Development and Support Manager title retired. The MWRA did not fill his vacancy. Instead, without removing the CSM from the bargaining unit, it promoted the CSM to Grade 14 and gave him some additional supervisory duties. The CSM now shares the same reporting level as the TOM and the DRM on the MIS department's organizational chart. All three positions now report directly to the MIS Director and supervise other positions in the MIS department.

Purchasing Manager

This position has existed since at least 1990, and, as noted above, has never been a part of the bargaining unit. The parties provided 1990 and 1999 job descriptions for this title.[5] The "Basic Purpose" of the Purchasing Manager position, as listed on both job descriptions, is:

> Oversees the purchasing functions for materials, supplies and on-professional services in accordance with the Authority's purchasing policies and procedures.

The list of duties and minimum qualifications on both job descriptions are identical. All other aspects of 1990 and 1999 job descriptions are the same, with the following four exceptions:

> 1) Transposed title: The 1990 job description refers to the position as the "Purchasing Manager." In 1999, the position is titled "Manager, Purchasing."
>
> 2) New Number: The 1990 job description did not include a Position Control Register (PCR) number.[6] The 1999 job description includes the PCR number (8810003) as a separate heading under the position title.
>
> 3) Organization Summary: The 1990 job description included a section titled "Organizational Summary," which is omitted in the 1999 job description. [7] The 1990 summary states:
>
> > Reports to the Director of Procurement. Supervises a staff of five (7) [sic] professional and two (4) [sic] clerical employees.[8] Oversees $10-15 million in purchases and a purchasing office budget of $400,000.00.
>
> 4) Supervision Exercised: Under this heading, the 1999 job description states, "Exercises close supervision of the Deputy Purchasing Manager." The 1990 job description does not contain a "Supervision Exercised" heading.

Purchasing Manager - 2004 -2010

Lewis Graham (Graham held the title of Purchasing Manager since at least December 1994 (see Revised Appendix A). In 2004, he took an extended leave of absence. In 2006, the MWRA decided to fill his position, but kept Graham on the payroll through 2009.[9]

As Revised Appendix A reflects, the Purchasing Manager is a "single-occupant" position with a single PCR number assigned to

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3. The Purchasing Manager remains in the Support Services Department.

4. "IS" presumably stands for "Information Systems."

5. The parties stipulated to the accuracy of the job descriptions.

6. According to the MWRA, PCR numbers are an internal bookkeeping tool for tracking the total number of positions in the Authority.

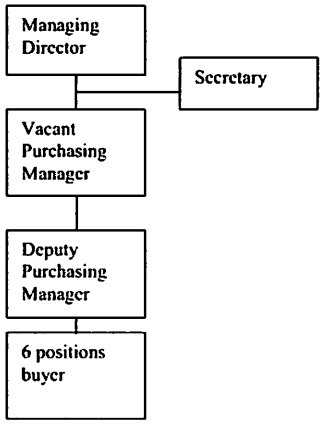
7. The Union provided job descriptions for a number of other positions in the MWRA it claims are representative of its unit. None of those job descriptions, which appear to have been prepared after 1990, contain a section titled "Organizational Summary."

8. The MWRA did not explain why the parenthetical numbers do not match the spelled-out numbers.

9. In May 2009, the Director of the MWRA's Human Resources Department wrote to Graham advising him that it could not keep him on a leave of absence indefinitely and that he was eligible to retire.

the position.[10] When the MWRA decided to hire a new Purchasing Manager during Graham's leave of absence, it changed Graham's PCR number to one it reserves specifically for "holding" or inactive positions, so that it could fill the position associated with Graham's PCR Number.

The October 11, 2007 Purchasing Department's organization chart, reproduced below, reflects a vacancy in the Purchasing Manager position as well as the supervisory structure of the Department.



On October 17, 2007, the MWRA's Board of Directors voted to hire Barbara McNeil (McNeil) as the new Purchasing Manager. Several MWRA documents that were prepared contemporaneous to this hiring, including the Board of Directors' meeting minutes, refer to the position as "Purchasing Manager."

There is no dispute that McNeil performs the same duties that Graham performed when he was the Purchasing Manager. McNeil's PCR number is the same one that was assigned to Graham while he was actively employed.

Opinion

A unit clarification petition is the appropriate procedural vehicle to determine whether newly-created positions should be included or excluded from a bargaining unit or to determine whether substantial changes in the job duties of existing positions warrant either their inclusion or exclusion from a bargaining unit. *Sheriff of Worcester County*, 30 MLC 132, 136 (2004) (citing *North Andover School Committee*, 10 MLC 1226, 1230 (1983)). In analyzing whether an employee should be accreted into an existing bargaining unit, the Board uses a three-part test. It first determines whether the position was included in the original certification or recognition of the bargaining unit. Absent a material change in job duties and responsibilities, the Board will not accrete a position into a bargaining unit if it existed at the time of the original certification or recognition. *Town of Granby*, 28 MLC 139, 141 (2001). Second, if that examination is inconclusive, the Board will examine the parties' subsequent conduct, including bargaining history, to determine whether the employee classifications were considered by the parties to be included in the unit. Finally, if that inquiry is inconclusive, the Board will examine whether the positions sought to be included in that unit share a community of interest with the existing positions. If the Board determines that the requisite community of interest exists, it will accrete the petitioned-for employee into the existing bargaining unit. *Id.* We turn next to an examination of the three positions under this three-part test.

DRM and TOM

The face of the petition, the 1993 Notice of Election, and the 1994 Recognition Letter establish that these two positions existed at the time of the original recognition/certification and were not included in the bargaining unit the MWRA recognized in 1994. Therefore, unless the positions have materially changed since 1994, the first prong of the accretion test is conclusive and the petition must be dismissed. *Id.*

We start by noting that the Union concedes that the duties of the two positions have not materially changed since the unit was recognized in 1994. Nevertheless, the Union contends that a material change to these two jobs occurred as a result of the MWRA's promotion of the CSM from Grade 13 to 14 while keeping that position in the bargaining unit. The Union argues that because the CSM is now a Grade 14 and on the same reporting level as the DRM and TOM, but remains a bargaining unit member, any justification the MWRA may have once had for excluding the Grade 14 disputed positions in 1994 has been rendered "illogical."

The difficulty with this argument is that it rests on the unsupported assumption that the DRM and TOM were originally excluded from the bargaining unit because of their Grade 14 status. However, under the terms of the parties' Election Agreement, Grade 14 positions were not automatically excluded from the unit; rather, Grade 14 positions were "included or excluded from the unit in accordance with their job duties and responsibilities." Therefore, the fact that the now-Grade 14 CSM remained in the unit after being promoted does not constitute a material change relevant to a reexamination of the DRM and TOM's unit placement because there is no evidence that: 1) the parties originally excluded the DRM and TOM based on their pay grade; or 2) the duties of the two positions have changed since 1993. Accordingly, the first prong of the accretion test set fort in *Town of Granby*, 28 MLC at 141, is conclusive and the petition must be dismissed as to these two titles.[11]

Purchasing Manager

The Union argues that the first two prongs of the accretion test are not conclusive with respect to this title because the Purchasing Manager that was excluded from the unit in 1994 is not the same as the "Manager, Purchasing" position that McNeil filled in 2007.

10. By comparison, a recent Deputy Contract Manager job description shows four different PCR numbers associated with the position. This is consistent with the fact that the Deputy Contract Manager is a four-occupant position. *See* Revised Appendix A, excerpted above.

11. Even if we were to consider the second prong of the accretion test, both Revised Appendix A and the parties' most recent collective bargaining agreement reflects the parties agreement that the DRM and TOM are non-bargaining unit positions, rendering the second prong conclusive as well.

This argument lacks merit because the Union has failed to offer any persuasive evidence that the Purchasing Manager position that existed in 1993 and 1994 and that was excluded from the unit at that time is materially different from the position filled by McNeil in 2007. The purported change in title does not constitute a material change, because when making unit determinations, the Board looks at actual duties, not job titles. *Town of Agawam*, 13 MLC 1364, 1368 (1984). Here, the Union concedes that the job's overall responsibilities have not changed despite the purported title change.

Similarly, the fact that Graham was assigned a different PCR number in 2006 does not show that McNeil's position is different from the one that Graham held. Rather, the facts reflect that Graham received a new PCR number while he was out on a leave of absence, not when he was actively employed as the Purchasing Manager. Once McNeil was hired, she received the same number that Graham had when he was actively employed. This demonstrates that Graham and McNeil held the same Purchasing Manager position, despite having different PCR numbers at one point. The Union disagrees, arguing that if the two positions were identical, the MWRA could have assigned McNeil a different PCR number, in the same way that assigned four different PCR numbers to the same Deputy Contracts Manager position. However, as Revised Appendix A reflects, the Deputy Contracts Manager position is a four-occupant position, associated with four different PCR numbers, while the Purchasing Manager position is only a single occupant position, associated with a single PCR number.

Furthermore, even if the MWRA did create a second Purchasing Manager position, the Union has provided no evidence that the duties and responsibilities of the position held by McNeil differ materially from Graham's. The purported changes to the degree of supervision are not dispositive since every one of the listed duties and responsibilities contained in the 1990 and 1999 job descriptions are identical. Indeed, the Union admits that the two positions perform the same duties. In any event, as the 2007 organization chart reflects, the Purchasing Manager is second in command in the department, overseeing seven employees. This is roughly consistent with the overall organization structure described in the 1990 job description.

In sum, the evidence reflects that the Purchasing Manager position has been excluded from the Union's bargaining unit since recognition and has not materially changed since that time. For this reason, the first prong of the accretion test is conclusive and a CAS petition is not the appropriate vehicle to accrete this position to the Union's bargaining unit.

Conclusion

For the above-stated reasons, we decline to accrete the positions of 1) Technical Operations, Manager; 2) Data Resources Manager and 3) Purchasing Manager, also known as "Manager, Purchasing," to the Union's existing bargaining unit and dismiss this petition.

SO ORDERED.

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In the Matter of CITY OF NEWTON

and

NEWTON FIRE FIGHTERS ASSOCIATION, LOCAL 863, IAFF

Case No. MUP-08-5369

52.64	*past practices*
54.3	*management rights*
54.55	*past practices*
54.583	*work rules and regulations*
54.62	*other fringe benefits*
54.8	*mandatory subjects*
67.14	*management rights*
67.15	*union waiver of bargaining rights*
67.8	*unilateral change by employer*

August 10, 2010
Ann T. Moriarty, Esq.

James M. Pender, Esq.	*Representing the City of Newton*
Leah Marie Barrault, Esq.	*Representing the Newton Fire Fighters Association, Local 863, IAFF*

HEARING OFFICER'S DECISION AND ORDER

Summary

The issues are whether the City of Newton (City) violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of M.G.L. c.150E (the Law) by banning the use of certain exercise equipment in its fire stations without giving the Newton Fire Fighters Association, Local 863, IAFF (Union) prior notice and an opportunity to bargain to resolution or impasse over its decision to ban the equipment and the impacts of that decision. Based on the record and for the reasons explained below, I conclude that the City altered the workplace benefit of a physical fitness workout area by banning the fire fighters' use of the free weight exercise equipment without first providing the Union with notice and an opportunity to bargaining to resolution or impasse over the use of the free weight exercise equipment in violation of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law.

Statement of the Case

The Union filed a charge with the Division of Labor Relations (Division) on December 22, 2008, alleging that the City had engaged in prohibited practices within the meaning of Sections 10(a)(5) and (1) of the Law. Following an investigation, Michael A. Byrnes, Esq., a duly-designated Division Investigator, issued a complaint of prohibited practice on May 15, 2009, alleging that the City had violated Section 10(a)(5) and, derivatively, Section 10(a)(1) by banning the use of certain exercise equipment in the fire stations without giving the Union prior notice and an opportunity to bargain to resolution or impasse over its decision to ban the

equipment and the impacts of that decision. The City filed its answer to the Division's complaint on May 27, 2009.

On January 7, 2010, I conducted a hearing during which both parties had an opportunity to be heard, to examine witnesses, and to introduce evidence. Both parties filed post-hearing briefs with the Division on February 8, 2010. After considering all of the evidence and the legal arguments advanced by the parties, I make the following findings of fact and conclusions of law.

Findings of Fact[1]

The Union is the exclusive representative for all uniformed fire fighters employed by the City, excluding the Fire Chief and the Administrative Assistant to the Chief. The City employs 181 fire fighters who are commanded by the Fire Chief. There are six fire stations: Newton Corner, Newtonville, West Newton, Newton Highlands, Newton Centre, and Oak Hill. The fire fighters work a twenty-four hour shift starting at 8:00 A.M. one day and ending at 8:00 A.M. the following day. Fire fighters are required to remain at the fire stations for their twenty-four hour shifts, unless they are responding to a call or otherwise performing assigned duties.

For at least ten years prior to December 8, 2010, all of the City's fire stations had exercise equipment that the fire fighters used during their twenty-four hour shift. Some of the six fire stations had a more extensive exercise equipment selection in the work-out area or room, but generally all the fire stations had treadmills, stationary bicycles, nautilus equipment, free weights, chin-up bars, and pull-up bars. Some of the equipment was donated by residents, other equipment was brought in by the fire fighters, and, some equipment was brought from the high school gym. At all times, the City knew that the exercise equipment was in all six fire stations and that the fire fighters used this equipment, including free weights, during their free time, which was generally outside the hours of 8:00 A.M. to 5:00 P.M. and when they were not responding to a call. Prior to September 24, 2007, no on-duty fire fighter was injured while using the exercise equipment, including the free weights.

On November 19, 2008, an arbitrator issued an award (Award) that found the City violated Article IVB of the Agreement[2] when it denied injured on duty status to a fire fighter who was injured on September 24, 2007 while lifting free weights at a fire station. In reaching his decision on the issue presented, the arbitrator did not interpret and apply Article VI, the management rights provision of the Agreement, nor is this provision expressly cited in any part of the Award. In the last paragraph of the Award, the arbitrator included the following section:

> Concerns About Exposure. The City's fear of potential liability is understandable and not unreasonable. Unlike the physical activities done as part of the training academy or fire site drills, which happen under the direct supervision of superior officers, firefighters are left to work out on their own. The City would be within its rights to evaluate its risk and to set reasonable policies governing the use of the workout facilities. Further, Article IVB provides its own limitations on the right to recover for an injury, even one incurred in a work-related setting. Injuries which are the fault of the firefighter are not covered. The City did not introduce evidence which would have supported a finding that Davis' use of a sixty-five pound dumbbell, or his performance of triceps extensions without a spotter, was negligent or imprudent.

The American Arbitration Association sent the Award to both parties on November 24, 2008 and Fire Chief Joseph E. LaCroix (Fire Chief)[3] received the Award shortly after November 24, 2008. The Award was not appealed to the Superior Court or any other legal forum. According to the City's Human Resource Director, the City has incurred a financial liability of about $22,000 to comply with the Award.

For at least ten years prior to December 8, 2008, the City did not have any rules and regulations regarding the type of exercise equipment available for the fire fighter's use in the workout rooms in the fire stations nor any rules and regulations governing the fire fighters' use of the exercise equipment while on-duty. On Wednesday, December 3, 2008, Lieutenant Thomas Lopez (Union President),[4] the Union's President since January of 2008, received the following letter from the Fire Chief:

> December 3, 2008
>
> Dear President Lopez:
>
> I am writing regarding the recent Arbitration Award issued by Arbitrator Mark Irvings that awarded injury-on-duty pay to Firefighter Lamont Davis for an injury that resulted from Firefighter Davis' use of free weights while exercising in Station One.
>
> In the Award, Arbitrator Irvings recognized the City's legitimate concern about potential liability resulting from unsupervised use of free weight exercise equipment. Specifically, on page 17 of the Award, Arbitrator Irvings stated, "The City would be within its rights to evaluate its risk and to set reasonable policies governing the use of workout facilities." As such, the City intends to develop and implement such policies. In the interim, because of the risks involved, I plan to order that all free weight exercise equipment in the stations cease to be used by any firefighter until such policies can be developed. I intend to issue this order on Monday, December 8, 2008.
>
> Please contact me if you have any questions. Of course the city will discuss this review and the effects of this review with you and answer any questions you may have. Please contact me to set up a meeting for the beginning of next week.
>
> On December 8, 2008, the Fire Chief issued the following notice to all personnel:

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1. Neither party contests the Division's jurisdiction in this matter. The parties stipulated to certain facts and they are included in the findings.

2. Article IVB, *Injured Leave - Limited Duty/Limit on Annual Compensation* of the Agreement, in relevant part and as cited by the arbitrator, provides:

> 4B.01 *Injured Employees* - Whenever a firefighter is incapacitated for duty because of injury sustained in the performance of his duty without fault of his own ... he shall be granted leave without loss of compensation or benefits in accordance with present practice for the period of such incapacity ....

3. LaCroix has been employed as a fire fighter with the City since January of 1972 and has served as the City's Fire Chief since July of 2003.

4. Lopez has been employed as a fire fighter with the City since July of 1997 and has held the rank of lieutenant since July of 2003.

> All free weight exercise equipment in the stations shall cease to be used by any firefighter until such time that a policy can be developed between the city and the union. The policy will address the legitimate concern about potential liability resulting from unsupervised use of free weight exercise equipment. Attached is a copy of the letter sent to Union President Lopez.

As stated, the City's ban covers only the firefighters' use of the free weight exercise equipment, all non-free weight exercise equipment continued to be available for use in the fire stations' workout rooms.

During a meeting in the Fire Chief's office held a day or two before December 3, 2008 to discuss other issues, not the use of free weights, the Fire Chief showed the Union President a draft of the December 3, 2008 letter and told him that he would issue a ban on the fire fighters' use of free weights on December 8, 2008. In response, the Union President told the Fire Chief that the Union was always open to discussions, but that the ban on the free weight exercise equipment was retaliatory. During their brief discussion on this issue, the Fire Chief cited his concern for the City's financial exposure to claims. In response, the Union President emphasized the absence of any fire fighter injuries on the exercise equipment over the Fire Chief's thirty-year tenure with the City, except the one that was the subject of the Award. The discussion ended with the Fire Chief stating that he would issue the letter on December 3, 2008 and the Union President stating that the Union would have to exercise its legal rights.

At some point between the end of November of 2008 and December 8, 2008, the Fire Chief and the Union President discussed the City's ban on the free weight exercise equipment while walking to their cars after a meeting at City Hall with City officials on other issues. The Fire Chief raised the issue and told the Union President that he was going to implement the ban on free weights. The Union President asked the Fire Chief not to issue the ban. The Fire Chief told the Union President that he had to ban the use of free weights because of the liability issues, but that he wanted to work with the Union to develop a policy. The Union President again asked the Fire Chief not to implement the ban. The Fire Chief considered this request, but he decided to issue the ban on the fire fighters' use of free weights in the fire station workout rooms on December 8, 2008. At no time before December 8, 2008 did the City provide the Union with any proposals regarding the use of the exercise equipment nor offer to bargain prior to the ban's implementation.

By letter dated December 8, 2008 transmitted to the Fire Chief by facsimile transmission and first class mail, the Union protested the ban on the fire fighters' use of free weights, requested that the Fire Chief rescind the ban and then bargain with the Union over rules governing the use of free weights. The Union notified the Fire Chief that it would "not engage in 'fait accompli' bargaining." In a responsive letter dated December 11, 2008, the City explained that the Fire Chief's ban on free weights until policies are developed for their safe use was in response to the Award and the City's financial liabilities for fire fighter injuries. The City stated that it intended "to move expeditiously in establishing policies for the use of free weights and wants and expects the Union's consultation and input." The City did not rescind the ban on the fire fighters' use of free weights in the workout rooms in the fire stations and the Union filed this charge of prohibited practice.

Collective Bargaining Agreement - Management Rights Provision

The City and the Union are parties to a collective bargaining agreement (Agreement) that was in effect at all times material to the issues in this case. Article VI, Management Rights of the Agreement, in part, provides:

> Article VI
>
> Management Rights
>
> 6.01 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 rights, 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.
>
> 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 select and to determine the number and types of employees required to perform the CITY's operations.
>
> D. 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.
>
> E. To insure that related duties connected with departmental operations, whether enumerated in job descriptions or not, shall be performed by employees.
>
> F. To establish, continue and/or change policies and/or regulations pertaining to standards for hiring and enforcement thereof.
>
> The foregoing is not to be regarded as a waiver by the Association of its rights under M.G.L. c. 150E.

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 prior notice and an opportunity to bargain to resolution or lawful 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); *City of Holyoke*, 13 MLC 1336, 1343 (1986). A public employer's duty to bargain includes working conditions established through custom and practice as well as those governed by the provisions of a col-

lective bargaining agreement. *City of Boston*, 16 MLC at 1434 (1989); *Town of Wilmington*, 9 MLC 1694, 1699 (1983).

The Board balances a public employer's legitimate interests in maintaining its managerial prerogative to effectively govern against the impact on employees' terms and conditions of employment when deciding whether a subject properly falls within the scope of bargaining. *Town of Danvers*, 3 MLC 1559, 1570-1573 (1977). This balancing test is applied on a case by case basis considering such factors as the degree to which the subject has direct impact on terms and conditions of employment, whether the subject involves a core governmental decision, or whether it is far removed from employees' terms and conditions of employment. *Id.* at 1577. Applying this balancing test, the Board has decided that a decision to prioritize law enforcement details directly implicates the employer's ability to set its law enforcement priorities and, therefore, it does not constitute a mandatory subject of bargaining. *City of Boston*, 31 MLC 25, 31 (2004). *See also*, *Town of Dennis*, 12 MLC 1027 (1985) (decision to discontinue providing certain private police details is a level of services decision that lies within management's exclusive prerogative).

The Board has also decided that certain benefits at the workplace are conditions of employment and, therefore, constitute mandatory subjects of bargaining. *See, e.g. Commonwealth of Massachusetts*, 27 MLC 11 (2000) (free employee parking); *City of Boston*, 15 MLC 1209 (H.O. 1988), *aff'd* 16 MLC 1086 (1989) (choice and amount of food available to correction officers who are required to stay at the workplace during their meal time); *City of Boston*, 9 MLC 1021 (1982) (availability of the medical library to interns and residents); *County of Middlesex*, 6 MLC 2056 (1980) (summer day care program). Further, in *Town of Shrewsbury*, 28 MLC 44 (2001), the Board decided that the availability of lockers to police officers and the manner in which those lockers may be used, including what may be stored in the locker, is a mandatory subject of bargaining. Applying the balancing test in this case, the availability of a physical fitness workout area to fire fighters who work a twenty-four hour shift and who are required to remain at the fire station unless otherwise directed, or responding to a call for assistance, is a workplace benefit and a condition of employment that constitutes a mandatory subject of bargaining. Further, the Fire Chief's ban on the use of free weights, which the fire fighters had used in the workout areas of all six fire stations for about ten years prior to the ban, constitutes a change in that workplace benefit sufficient to trigger the statutory bargaining obligation. To find otherwise would permit an employer to incrementally alter an employment benefit until it is effectively eliminated. Although the Fire Chief explained that his decision to ban the fire fighters' use of free weights was to prevent future on-duty injuries for which the City would be financially liable, this rationale does not rise to the level of an identifiable core managerial concern, like public safety and other level of services decisions, that outweighs the Union's interest in negotiating over this subject matter.

The facts demonstrate that, for at least ten years prior to December 8, 2008, the fire fighters enjoyed the on-site workplace benefit of free access to an exercise workout area, without restrictions on the type of exercise equipment available for use or any rules or policies governing the use of the exercise equipment. The facts also establish that the City banned the use of the free weight exercise equipment on December 8, 2008, pending negotiations with the Union over a policy regarding the use of the exercise equipment. Although the Fire Chief had shown the Union President a draft of his December 3, 2008 letter formally notifying the Union of his decision to ban the free weight equipment and inviting the Union to provide input regarding the implementation of a policy governing the use of the exercise equipment during the week following the ban's implementation, both the plain language of the letter and the verbal exchanges between the Union President and the Fire Chief between late November of 2008 and December 8, 2008 evidence that the City had decided to first ban the use of the free weight equipment and then negotiate with the Union over a policy governing the use of the exercise equipment with the ban in effect.

The Union promptly protested the ban each time the City raised the subject during late November of 2008 and December 8, 2008. At no time before December 8, 2008 did the City provide the Union with any proposals regarding the use of the exercise equipment nor offer to bargain prior to the ban's implementation. Further, this short period of time, no more than ten days between the date the Fire Chief told the Union President of his decision to ban the free weights and the effective date of the ban, is insufficient to afford the Union a meaningful opportunity to bargain. *City of Everett*, 2 MLC 1473, 1476 (1976). By letter dated December 8, 2008, the Union again protested the ban on the fire fighters' use of free weights and requested that the Fire Chief rescind the ban and then bargain with the Union over rules governing the use of free weights. By banning the use of the free weight equipment, the City unilaterally altered a condition of employment that constitutes a mandatory subject of bargaining without first satisfying its bargaining obligations. Absent evidence that circumstances beyond the City's control required immediate action, such as external, exigent time constraints not present here, post-implementation bargaining does not satisfy the statutory requirements. *City of Newton*, 35 MLC 296, 298 (2009), citing, *Boston School Committee*, 4 MLC 1912 (1978).

The City defends its conduct by asserting that it has the contractual managerial right to temporarily prohibit or otherwise regulate the use of free weights in the fire stations without bargaining with the Union. Specifically, the City argues that because the Agreement does not contain a past practices clause and does not expressly address the firefighters' use of the free weight exercise equipment, the Fire Chief's ban of this equipment was permissible because Article VI, *Management Rights* of the Agreement establishes that, unless "specifically relinquished, abridged or limited by the provisions of this contract," the City maintains "the sole rights, responsibility and prerogative of management of the affairs of the City and direction of the working forces...." The City also argues that the Fire Chief's ban of the free weights until reasonable policies could be implemented governing their safe use is contractually permissible because Article VI of the Agreement expressly provides that the City has the right "to determine the care, maintenance and operation of the equipment and property used for and on behalf of the purposes of the City" and the City, through its Fire Chief, has the express right to "establish or continue policies, prac-

tices and procedures for the conduct of the City business and, from time to time, to change or abolish such policies, practices or procedures."

Where an employer raises the affirmative defense of waiver by contract, it bears the burden of proving that the parties consciously considered the situation that has arisen and that the union knowingly and unequivocally waived its bargaining rights. *Massachusetts Port Authority*, 36 MLC 5, 12 (2009) and cases cited. A union's waiver of its statutory right to bargain before an employer changes an existing term or condition of employment, or implements a new condition of employment is not lightly inferred. *Town of Andover*, 4 MLC 1086, 1089 (1977). Rather, it "must be shown clearly, unmistakably, and unequivocably and cannot be found on the basis of a broad, but general, management rights clause." *School Committee of Newton* v. *Labor Relations Commission*, 388 Mass. at 569 (1983)[5] and cases cited; *City of Boston* v. *Labor Relations Commission*, 48 Mass. App. Ct. 169, 175 (1999). To determine the existence of waiver, the Commission examines the contractual language. *Massachusetts Board of Regents*, 15 MLC 1265, 1269 (1988), citing, *Town of Marblehead*, 12 MLC 1667, 1670 (1986). If the language "clearly, unequivocally, and specifically" permits the public employer to make the change, no further inquiry is necessary. *City of Worcester*, 16 MLC 1327, 1333 (1989), citing, *Town of Marblehead*, 12 MLC 1667 (1986); *Commonwealth of Massachusetts, Chief Administrative Justice of the Trial Court*, 11 MLC 1440 (1985); *Town of Andover*, 4 MLC 1086 (1977). However, if the language is ambiguous, the Board reviews bargaining history to ascertain the parties' intent. *Town of Marblehead*, 12 MLC at 1670.

In *City of Newton*, 16 MLC 1036 (1989), the Board examined the identical language in the management rights clause in the contract between the City and the Union that is at issue in this case and rejected the City's argument that the Union had waived its statutory right to bargain to resolution or impasse over the effects of increasing a fire inspection program prior to implementation.[6] *Id.* at 1044. In reaching this conclusion, the Board specifically noted that the management rights clause in the contract expressly provides that its provisions are not to be regarded as a waiver of the Union's rights under the Law. *Id.* at 1044, fn. 13. Similarly, applying the Board's well-established case law here, I am not persuaded that the language of the management rights clause in the Agreement conferred on the City the right to ban the fire fighters' use of the free weight equipment pending negotiations between the City and the Union over the rules governing the use of the equipment. Further, I decline to ignore or fail to give effect to the bargained-for language that expressly states that none of the provisions of the management rights clause are to be regarded as a waiver by the Union of its rights under the Law.[7] The fact that the arbitrator included in his Award certain language that the City would be within its rights to evaluate its risk and to set reasonable policies governing the use of workout facilities does not require a contrary result. The record establishes that the arbitrator decided only that the City was liable for on-duty injury pay for a fire fighter who was injured while lifting free weights and that its denial of this injury pay violated Article IVB, *Injured Leave - Limited Duty/Limit on Annual Compensation* provision of the

Agreement. The arbitrator did not interpret and apply Article VI, the management rights provision of the Agreement, in his decision nor expressly reference that provision of the Agreement anywhere in the Award. Therefore, I decline to infer or speculate that the arbitrator's one sentence statement in his decision that the "The City would be within its rights to evaluate its risk and to set reasonable policies governing the use of workout facilities" constitutes the arbitrator's decision that the management rights clause of the Agreement permits the City to ban the use of the free weight equipment and set reasonable policies governing the use of the workout facilities.[8] Accordingly, absent evidence of bargaining history to support the City's waiver defense, which is not present here, I find that Article VI *Management Rights* does not require a determination that the Union knowingly, clearly, and unmistakably waived its statutory right to bargain.

Conclusion

Based on this record and for the reasons stated above, I conclude that the City altered the workplace benefit of a physical fitness workout area by banning the fire fighters' use of the free weight exercise equipment without first providing the Union with notice and an opportunity to bargaining to resolution or impasse over the use of the free weight exercise equipment in violation of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law.

Order

WHEREFORE, IT IS HEREBY ORDERED that the City shall:

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5. The management rights clause at issue in this decision provided that "[e]xcept as specifically abridged, delegated, granted or modified by this Agreement, or any supplementary agreements that may hereafter be made, all of the rights, powers, and authority the employer had prior to the signing of this Agreement are retained by the employer, and remain exclusively and without limitation within the rights of management." *School Committee of Newton* v. *Labor Relations Commission*, 388 Mass. at 569, fn.7.

6. The Board distinguished the City's decision to increase the level of fire inspections, which is a level of services decision over which the City had no duty to bargain under the Law, from the method of implementing that decision that must be negotiated with the Union to resolution or impasse prior to implementation. *City of Newton*, 16 MLC at 1042.

7. The City asserts that the management rights clause in the police officers' contract with the City is virtually identical to the management rights clause in the fire fighters' contract and, therefore, the Board's decision in *City of Newton*, 29 MLC 135 (2003) that the management rights clause permitted the City to take actions in furtherance of maintaining department discipline without first bargaining with the employees' exclusive bargaining representative is analogous to the facts here. However, there is no evidence in that reported case, nor does the City state that the police officers' contract with the City also contains the identical last sentence in the fire fighters' management rights clause.

8. If the arbitrator had interpreted and applied Article VI, *Management Rights* of the Agreement, I would have considered deferring to that interpretation. *See. Town of Brookline*, 20 MLC 1570, 1593-1594 (1994) (Board defers to an arbitrator's finding about the terms of the parties' contract and then considers further issues under the Law).

1.Cease and desist from:

a) Banning the fire fighters' use of the free weight exercise equipment in the fire stations without first providing the Union with notice and an opportunity to bargain to resolution or impasse over the use of the equipment.

b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights guaranteed under Section 2 of the Law.

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

a) Immediately rescind the December 8, 2008 ban on the fire fighters' use of the free weight exercise equipment in the fire stations.

b) Upon request, bargain in good faith with the Union to resolution and impasse over the fire fighters' use of the free weight exercise equipment in the fire stations.

c) Post in conspicuous places where employees represented by the Union usually congregate, or where notices are usually posted, including electronically, if the City customarily communicates with bargaining unit members via intranet or email, and display for a period of thirty consecutive days thereafter, signed copies of the attached Notice to Employees.

d) Notify the Division within ten days of receipt of this Decision and Order of the steps taken to comply with it.

SO ORDERED.

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. c. 150E, Section 11, 456 CMR 13.02(1)(j), and 456 CMR 13.15, to request a review of this decision by the Commonwealth Employment Relations Board by filing a Notice of Appeal with the Executive Secretary of the Division of Labor Relations not later than ten days after receiving notice of this decision. If a Notice of Appeal is not filed within the ten days, this decision shall become final and binding on the parties.

THE COMMONWEALTH OF MASSACHUSETTS
DIVISON OF LABOR RELATIONS

NOTICE TO EMPLOYEES

POSTED BY ORDER OF A HEARING OFFICER OF THE MASSACHUSETTS DIVISION OF LABOR RELATIONS

AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

A Hearing Officer of the Massachusetts Division of Labor Relations has held that the City of Newton (City) altered the workplace benefit of a physical fitness workout area by banning the fire fighters' use of the free weight exercise equipment without first providing the Newton Fire Fighters Association, Local 863, IAFF (Union) with notice and an opportunity to bargain to resolution or impasse over the use of the free weight exercise equipment in violation of Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E.

The City posts this Notice to Employees in compliance with the Hearing Officer's order.

Chapter 150E gives public employees the following rights:

- To form, join or assist a union;
- To participate in proceedings at the Division of Labor Relations;
- To act together with other employees for the purposes of collective bargaining or other mutual aid or protection;
- To choose not to engage in any of these protected activities.

WE WILL NOT fail to bargain in good faith by banning the fire fighters' use of the free weight exercise equipment in the fire stations without first providing the Union with notice and an opportunity to bargain to resolution over the use of the equipment.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce employees in the exercise of their rights guaranteed under Section 2 of Chapter 150E.

WE WILL immediately rescind the December 8, 2008 ban on the fire fighters' use of the free weight exercise equipment in the fire stations.

WE WILL, upon request, bargain in good faith with the Union to resolution and impasse over the fire fighters' use of the free weight exercise equipment in the fire stations.

[signed]
For the City of Newton

[dated]

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

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

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