

In the Matter of CITY OF BOSTON

and

BOSTON POLICE SUPERIOR OFFICERS FEDERATION

and

BOSTON POLICE DETECTIVES BENEVOLENT SOCIETY

Case No. MUP-08-5253

54.589 *bargaining unit work*
67.14 *management rights*
67.8 *unilateral change by employer*
91.15 *pre-hearing dismissal*

March 9, 2012

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

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CERB DECISION ON APPEAL OF HEARING DECISION

SUMMARY

On September 28, 2011, a Department of Labor Relations Hearing Officer issued a decision [38 MLC 85] concluding that the City of Boston (City) had violated Section 10(a)(5), and, derivatively, Section 10(a)(1) of MGL c. 150E (the Law) by unlawfully transferring the duties of commanding the Boston Police Department's Evidence and Supply Management Division from the captains who were members of the bargaining unit represented by the Boston Police Superior Officers Federation (Union or BPSOF) to a Captain Detective in the bargaining unit represented by the Boston Police Detectives Benevolent Society (BPDBS) without giving the Union prior notice and an opportunity to bargain to resolution or impasse.

The City filed a timely notice of appeal to the Commonwealth Employment Relations Board (Board) pursuant to Section 11 of the Law, 456 CMR 13.02 (1)(j) and 456 CMR 13.15. Both parties filed supplementary statements. On appeal, the City claims that the Hearing Officer's legal conclusions were incorrect and not supported by her findings. For the reasons discussed below, the Board disagrees and affirms the Hearing Officer's decision in its entirety.

FINDINGS OF FACT¹

The Union did not challenge the Hearing Officer's findings. The City challenged two findings. For the reasons stated below, the Board rejects the City's challenges and adopts the Hearing Officer's findings in their entirety, as summarized below.

The Union is the exclusive bargaining representative for superior officers including captains, lieutenants, and sergeants employed by the City.

In the late 1990's, one of the many bureaus, divisions offices and units located within the Boston Police Department (BPD) was known as the Bureau of Administrative Services (BAS). The BAS provided services to support BPD field activities by assisting with BPD management, personnel, fiscal, maintenance communication and procurement functions.

In 1999, then-Police Commissioner Paul Evans established an Evidence Management Division (EMD) within BAS. Both detectives and superior officers worked within the EMD from 1999-2004. The record did not disclose their respective duties. The EMD was responsible for providing: 1) a central evidence depository to secure and protect evidence; 2) a Citywide transportation system to collect and distribute evidence; and 3) a computerized tracking and inventory control system to maintain chain of custody of evidence and property. EMD was also responsible for transporting for analysis all seized drugs to the Commonwealth of Massachusetts Food and Drug Administration.

Separate from the EMD, but still located within BAS, was the Central Supply Division (CSD). Since 1992, the CSD has been located in a warehouse at 155 Hyde Park Avenue in Boston ("the warehouse"). A variety of bargaining unit and non-bargaining unit members worked at CSD from 1999-2005. When the EMD was created in 1999, its central evidence repository was placed in the warehouse.

In October and November of 2005, then-Police Commissioner Kathleen O'Toole transferred civilian employee James Sullivan (Sullivan) back and forth between Human Resources and the Central Supply Division. Sullivan ultimately remained at the Central Supply Division.

In November 2005, BPD Deputy Superintendent Pat Crossen directed Captain John Greland to "take command of the warehouse." The Hearing Officer found, and no party contests, that Deputy Crossen's directive that Captain Greland command the warehouse included both the Evidence and Property Management Division (EPMD), as the EMD was now called, and its subdivisions. These subdivisions included evidence control, property (abandoned, lost, etc.) and Central Supply. The Hearing Officer further found and the City does not dispute that, at that point, Central Supply was no longer a separate division, but rather an EPMD subdivision.²

1. The parties stipulated to a small portion of the record. We incorporate those stipulations into our summary.

2. The parties stipulated that after November 2005, overtime was available to captains assigned to the Evidence and Supplement Management Division.

Captain Greland held this command position until April 2006 and instituted a number of procedural changes consistent with his command responsibilities. During this period, Sullivan was responsible for Central Supply and reported to Captain Greland.

When Captain Greland left in April 2006, the BPD replaced him with Captain Frank Armstrong (Captain Armstrong). Captain Armstrong worked with a BPDBS sergeant detective, and two Union sergeants. There is no evidence about the duties the sergeant detective and two sergeants performed at this time. Captain Armstrong stayed at EPMD until December 2006, when the BPD replaced him with Captain Michael Broderick. Captain Broderick commanded the EPMD until May 2008.

In 2008, the EPMD was known as the Evidence and Supply Management Division (ESMD). In May 2008, the Police Commissioner transferred Captain Broderick out of ESMD and transferred Captain Detective Thomas Dowd into Captain Broderick's position. Captain Detective Dowd is a member of the detectives' bargaining unit and performs the same assignment that Captains Broderick and Armstrong, both members of the Union's bargaining unit, performed prior to Captain Detective Dowd's assignment. The Union demanded to bargain over the assignment, the City failed to respond and the Union filed this charge.

OPINION³

The Law requires a public employer to give the exclusive collective bargaining representative of its employees prior notice and an opportunity to bargain before transferring bargaining unit work to non-bargaining unit personnel. *Commonwealth of Massachusetts v. Labor Relations Commission*, 60 Mass. App. Ct. 831 (2004). To determine whether an employer has unlawfully transferred bargaining unit work, the Board considers the following factors: 1) whether the employer transferred bargaining unit work to non-unit personnel; 2) whether the transfer of unit work to non-unit employees has an adverse impact on individual employees or the unit itself; and 3) whether the employer gave the bargaining representative prior notice and an opportunity to bargain over the decision to transfer the work. *Id.* at 833.

Applying the Law in this case, the Hearing Officer first defined the scope of the alleged bargaining work at issue by assessing the nature of the work performed. She concluded that when the formerly separate Central Supply and EMD divisions merged in 2005, the City assigned Captain Greland to command the newly-merged division and, therefore, his duties consisted of commanding the combined evidence, property and central supply management functions lodged in the EPMD/ESMD. She further found that these duties were different from the duties previously performed by EMD supervisors.

The Hearing Officer also found that the City had a two and one-half year practice of exclusively assigning these duties to captains in the Union's bargaining unit and concluded that, until the

2008 assignment to Captain Detective Dowd, the work of commanding the combined supply and evidence department had been exclusively performed by captains. In reaching this conclusion, she rejected the City's arguments that superior officers and detectives had always shared work in the EMD and CSD because, until Captain Greland was first assigned to "command the warehouse" with its combined CSD and EMD functions, the CSD and ESD were stand-alone departments.

The Hearing Officer also rejected the City's claim that its two and one-half years of assigning captains to command the EPMD/ESMD did not constitute a binding practice because of the constant variations in BPD deployments. In so holding, the Hearing Officer correctly distinguished the decision upon which the City relies, *Boston Superior Officers Federation*, 20 MLC 1603, 1609 (1994) on grounds that it was not a transfer of bargaining unit work case.

The Hearing Officer finally rejected the City's claims that the City's choice of commander for this division was an exclusive managerial prerogative. Applying relevant precedent, the Hearing Officer weighed the City's interests in maintaining its managerial prerogative to effectively govern against the impact of its decision on terms and conditions of employment. Noting that the decision did not implicate either level of services or public safety considerations, but did implicate the bargaining unit's promotion and overtime opportunities, she concluded that the Union's interest in bargaining over terms and conditions of employment outweighed the City's interests.

On appeal, the City reiterates many of the arguments it made to the Hearing Officer. We reject those arguments for the reasons stated in the Hearing Officer's decision and summarily affirm this aspect of her decision. The City also raises new arguments, both factual and legal, which we address below.

Factually, the City argues that the Hearing Officer erroneously found that a certain organization code, 32000, that the City used in transfer orders was, in the City's words, "conclusive proof that Captain Francis Armstrong had a unique role." The Hearing Officer made no such finding, however. Rather, in footnotes 5 and 8 of her decision, she rejected both the Union's and the City's claims that payroll code 32000 had any bearing on whether the captains in this case exclusively served as commanders.⁴ The Hearing Officer ultimately concluded that code 32000 was the organization code for all of ESMD, which did not pertain to a particular position, but rather to a variety of positions, ranks and ratings, including police officer, sergeant, sergeant detective and lieutenant detective. Because the City also argues that code 32000 pertains to multiple positions and the finding is otherwise supported by the record, the challenge is denied.

The City next argues that during the hearing, the Union "stipulated" that being the Commander or Director of the Warehouse was not captain's work. The City relies on this statement to argue

3. The Board's jurisdiction is not contested.

4. The Union argued it did - the City, by pointing to non-captains who also held this code, argued it did not.

that if the work at issue is not captain's work, then the Hearing Officer erred when she ruled that the City could not assign detectives to the ESMD unless there was a captain in charge. This argument is flawed for two reasons. First, the Union never conceded that the work belonged outside the bargaining unit.⁵ Second, the Hearing Officer did not rule that the City could not assign detectives to work in ESMD. Rather, she ruled that if the City wanted to assign a non-bargaining unit member to command this division, it must first satisfy its bargaining obligation. There was no legal or factual error in this conclusion.

The City finally contests the Hearing Officer's factual conclusion that "there [was] no evidence that an employee from any other bargaining unit ever had command responsibility for the overall warehouse including Central Supply." However, the portions of the hearing transcript the City relies on for this proposition do not support a contrary conclusion. The fact that non-bargaining unit members worked at the warehouse over the years or were in charge of separate warehouse divisions at various times before 2005 does not undercut the Hearing Officer's conclusion: commanding the warehouse, with its combined property, evidence, and supply functions, was exclusively bargaining unit work from 2005-2008.⁶

With respect to the Law, the City relies on two Board rulings affirming the dismissal of charges relating to bargaining unit assignments to support its argument that the Hearing Officer's legal analysis was flawed.⁷ However, as we recently noted, dismissal letters have no precedential value. See *City of Taunton*, 38 MLC 96, 98-99, n. 7 (2011). Just as issuance of a complaint reflects only the Department's determination that there is probable cause to believe that the alleged conduct *could* violate the Law and not that the alleged conduct *does* violate the Law, the Department's dismissal of a charge reflects only that the evidence presented at the investigation was insufficient to establish probable cause to believe the Law had been violated. *Id.* (citing *Quincy City Employees Union, H.L.P.E.*, 15 MLC 1340, 1368, n. 54 (1989) *aff'd sub nom Pattison v. Labor Relations Commission*, 309 Mass. App. Ct. 9, (1991), further *rev. den'd*, 409 Mass. 1104 (1991)).

In any event, the City's reliance on the legal analysis in these two dismissals is misplaced. In *City of Boston/Boston Police Superior Officers Federation*, Case No. MUP-06-4777, (January 29, 2009), the Board upheld an investigator's dismissal of a charge alleging that City had unlawfully changed a ten-month past practice of assigning a captain to the position of "Federal Department of Homeland Security/Executive Officer of Special Operations," when the City assigned a lieutenant to fill the stand-alone title of "Liaison to Federal Department of Homeland Security." The City inaccurately claims that this dismissal demonstrates that a prior short-term practice of assigning bargaining unit members to a par-

ticular position does not preclude it from varying assignments between bargaining units in the future. The Board's affirmation of the Investigator's dismissal of that charge, however, had nothing to do with the fact that a captain had held the Homeland Security/Special Operations title for only ten months - rather, it focused on the scope and nature of the assignment alleged to be the past practice. The Board determined that, because there had never been a practice of assigning a captain to the stand-alone liaison title, the Union had failed to establish that the City had changed this practice.

In this case, carefully employing the same analysis of the scope and nature of the work alleged to be the practice, the Hearing Officer concluded that the City had varied that practice by assigning a detective to perform the same EPMD work that the captains had previously performed. As such, rather than demonstrating the Hearing Officer's analysis was flawed, the dismissal of Case No. MUP-06-4777 actually supports the analysis utilized here.

The City also relies on our affirmation of a dismissal of a transfer of bargaining unit work charge, *City of Boston/BPSOF*, MUP-10-5964 (September 8, 2011) to argue that the Board has previously recognized that "commanding" cannot be the exclusive work of a police union. In that case, although the Investigator provided other grounds for dismissing the charge, the Board upheld the dismissal on the narrow grounds that the alleged transfer of bargaining unit work had resulted in no ascertainable or calculated displacement of bargaining unit work. The City's reliance on this decision for its argument is therefore without merit.

The City raises no other issues on appeal that the Hearing Officer did not address in her decision. We therefore summarily affirm the decision with respect to those arguments and affirm her decision based on the foregoing and for the reasons stated in the Hearing Officer's decision. Accordingly, we issue the following Order.

ORDER

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

1. Cease and desist from:

- a) Failing to bargain in good faith by unlawfully transferring bargaining unit work to employees outside of the Union's bargaining unit;
- b) In any like or related manner, interfering with, restraining or coercing employees in the exercise of their rights guaranteed under the Law.

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

5. As to this point, the official transcript reflects that during its opening statement, City counsel argued, "There's no such thing as Captain's work, because the Captains are not in a separate bargaining unit unto themselves." In response, Union counsel stated that the Union is "not contending this is 'Captain's work,' [it's] merely contending that it is our bargaining unit work, and we will not be making arguments . . . that go beyond that. So if that can streamline our presentation today, . . . we will stipulate that for the record."

6. Indeed, on p. 5 of its brief, the City acknowledges that the six functions currently performed by the warehouse previously were dispersed.

7. Pursuant to the Section 11 of the Law and Department Rule 15.03, 456 CMR 15.03, charging parties may obtain review of a Department investigator's dismissal of a charge of prohibited practice by filing a request with the Board.

- a) Restore the status quo ante by returning the duties of commanding the Evidence and Supply Management Division to the Union's bargaining unit until the City satisfies its obligation to bargain over the decision to transfer those duties to non-unit employees and the impact of that decision;
- b) Upon request, bargain in good faith with the Union to resolution or impasse over the decision to transfer the duties of commanding the Evidence and Supply Management Division to non-unit employees and the impact of that decision;
- c) Make whole any bargaining unit employee who suffered an economic loss as the result of the City's unlawful conduct, plus interest on any sums owing at the rate specified in MGL c.321, s.6I compounded quarterly;
- d) Post immediately in all conspicuous places where members of the Union's bargaining unit usually congregate and where notices to these employees are usually posted, including electronically, if the Employer customarily communicates to its employees via intranet or email, and maintain for a period of thirty (30) consecutive days thereafter, signed copies of the attached Notice to Employees.

SO ORDERED.

APPEAL RIGHTS

Pursuant to the Supreme Judicial Court's decision in *Quincy City Hospital v. Labor Relations Commission*, 400 Mass. 745 (1987), this determination is a final order within the meaning of MGL c. 150E, § 11. Any party aggrieved by a final order of the Board may institute proceedings for judicial review in the Appeals Court pursuant to MGL c.150E, §11. **To claim such an appeal, the appealing party must file a Notice of Appeal with the Commonwealth Employment Relations Board within thirty (30) days of receipt of this decision.** No Notice of Appeal need be filed with the Appeals Court.

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

COMMONWEALTH EMPLOYMENT RELATIONS BOARD

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS COMMONWEALTH
EMPLOYMENT RELATIONS BOARD

AN AGENCY OF THE COMMONWEALTH OF
MASSACHUSETTS

The Commonwealth Employment Relations Board (Board) has upheld a Hearing Officer's determination that the City of Boston has violated Section 10(a)(5) and, derivatively Section 10(a)(1) of Massachusetts General Laws, Chapter 150E by unlawfully transferring bargaining unit work from the Boston Police Superior Officers' Federation (Federation) to the Boston Police Detectives' Benevolent Society. The City of Boston posts this Notice to Employees in compliance with this order.

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

- to engage in self-organization; to form, join or assist any union;

- to bargain collectively through representatives of their own choosing;
- to act together for the purpose of collective bargaining or other mutual aid
- or protection; and
- to refrain from all of the above.

WE WILL NOT fail to bargain in good faith by unlawfully transferring bargaining unit work to non-bargaining unit personnel.

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

- Make whole any bargaining unit employees who suffered any economic loss from the City's unlawful conduct.
- Restore the duties of commanding the Evidence and Supply Management Division to the Federation's bargaining unit until the City satisfies its bargaining obligation.

[signed]
City of Boston

Date

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

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

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