

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS
BEFORE THE COMMONWEALTH EMPLOYMENT RELATIONS BOARD

In the Matter of	*	
	*	
CITY OF BOSTON	*	Case No.: MUP-06-4699
	*	
and	*	Date issued: October 30, 2018
	*	
BOSTON POLICE SUPERIOR OFFICERS	*	
FEDERATION	*	
	*	

Board Members Participating:

Marjorie F. Wittner, Chair
Katherine G. Lev, CERB Member
Joan Ackerstein, CERB Member

Appearances:

Robert J. Boyle, Jr., Esq.	-	Representing the City of Boston
Leah Barrault, Esq.	-	Representing the Boston Police Superior
Ian O. Russell, Esq.	-	Officers Federation

CERB DECISION ON APPEAL OF HEARING OFFICER'S COMPLIANCE DECISION

Summary

1 On August 11, 2016, the Boston Police Superior Officers Federation (Union or
2 Federation) filed a petition for enforcement with the Department of Labor Relations
3 (DLR) asserting that the City of Boston (City) had failed to comply with a make-whole
4 order that the Commonwealth Employment Relations Board (CERB) issued in its March
5 30, 2012 decision in the above-captioned matter (Order). The City filed a response to
6 the Union's petition stating that it was in compliance and seeking dismissal of the

1 petition. Pursuant to DLR Rule 16.08, 456 CMR 16.08, the DLR determined that there
2 was a genuine dispute as to compliance and ordered a compliance hearing. The issue
3 before the Hearing Officer was whether the City had complied with the make-whole
4 remedy that the CERB ordered, and if not, to determine the sum of money it was
5 required to pay. The focus of the hearing was a City Hall security position formerly held
6 by Daniel Linskey (Linskey). After two days of hearing, a duly-designated Hearing
7 Officer issued a decision determining that the City had failed to comply with the make-
8 whole portion of the Order and ordering the City to pay:

- 9 a) \$125,618.00 (plus interest as described in the Order), proportionally
10 divided between the individuals who held a sergeant position that was
11 in the Union's bargaining unit from April 12, 2006 to January 22, 2011,
12 and from July 23, 2011 to June 16, 2012, based on their tenure in a
13 sergeant position during those periods; and
14
- 15 b) \$12,628.57 (plus interest as described in the Order), proportionally divided
16 between the individuals who held a sergeant position that was in the
17 Union's bargaining unit between February 29, 2016 and September 24,
18 2016, based on their tenure in a sergeant position during that time
19 period.
20

21 Both the City and the Union appealed aspects of the decision to the CERB. For
22 the reasons set forth below, the CERB affirms that decision.

23 Factual and Procedural Background¹

24 The Union is the exclusive representative of a bargaining unit of superior officers,
25 comprised of non-detective sergeants, lieutenants and captains employed at the City of
26 Boston Police Department (BPD). There is a Special Police Unit (SPU) within the BPD.

¹ These facts are based on the parties' stipulations and the Hearing Officer's findings of fact, which were in part based on the findings she had made in the underlying decision. Although, as discussed below, both parties dispute the conclusions that the Hearing Officer drew from these stipulations and findings, the underlying facts are not in material dispute.

1 From the inception of the SPU in 1994 to September of 2002, it was staffed in
2 succession with three bargaining unit members.

3 In April 2004, the BPD assigned Linskey to the SPU. At the time, Linskey was a
4 sergeant-detective, a non-bargaining unit position. While assigned to the SPU, Linskey
5 performed a number of different duties, including overseeing City Hall security, the
6 duties at issue in this proceeding. In July 2004, the Union filed a charge of prohibited
7 practice with the DLR (MUP-04-4191) alleging that the City had unlawfully transferred
8 bargaining unit work to a non-bargaining unit employee when it assigned Linskey to the
9 SPU. After the DLR issued a complaint of prohibited practice, the Union and
10 representatives of the BPD discussed resolving the charge and two other cases. In
11 2005, they resolved the charge with an agreement (2005 Agreement), which provided
12 as follows:

13 The Parties agree that the assignment, Commander, Special Police Unit,
14 Bureau of Field Services, currently held by Lieutenant Daniel Linskey, in
15 whatever rank or rating he may hold, shall be a (sic) "red-circled" and shall
16 revert to a position exclusive to the Federation bargaining unit upon
17 Lieutenant Linskey's voluntary or involuntary departure from such
18 assignment.
19

20 On April 12, 2006, the BPD promoted Linskey to Deputy Superintendent and
21 transferred him out of the SPU and into the Office of the Police Commissioner. On May
22 24, 2006, the Union filed the instant charge of prohibited practice alleging that the City
23 had violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by
24 repudiating the terms of the 2005 Agreement and by transferring bargaining unit work to
25 non-bargaining unit personnel. Following an investigation, the DLR issued a complaint
26 of prohibited practice on August 6, 2009. On September 12, 2011, the Hearing Officer
27 issued a decision finding that, after Linskey left the SPU, the BPD did not assign any of

1 Linskey's former duties to employees in the Union's bargaining unit. The Hearing
2 Officer found that, by this conduct, the BPD had repudiated the 2005 Agreement, which
3 she found clearly and unambiguously showed the parties' agreement to transfer
4 Linskey's SPU duties to the bargaining unit. As a remedy, the Hearing Officer ordered
5 the City to "adhere to the terms of the 2005 Agreement" and to "make whole any
6 bargaining unit employee who suffered an economic loss" as a result of the City's
7 unlawful conduct.

8 The City appealed the decision and order to the CERB, which summarily affirmed
9 the decision and order on March 30, 2012 on grounds that all of the City's arguments
10 were improperly raised for the first time on review.² The City then appealed the CERB's
11 decision to the Appeals Court, in which it made arguments that it never raised to the
12 CERB. The Appeals Court affirmed the CERB's decision on two grounds: 1) that the
13 CERB properly refused to consider arguments not made to the Hearing Officer; and 2)
14 that the City failed to properly raise either of the arguments that it was now making to
15 the Appeals Court to the CERB. City of Boston v. Commonwealth Employment
16 Relations Board, 87 Mass. App. Ct. 1137 (2015), 2015 WL 4528049 (unpublished
17 disposition).³ Specifically, the Court stated:

18 The city now appeals the [CERB's] decision, arguing as it did before the
19 DLR, but not the [CERB], that the 2005 agreement was unenforceable
20 because it interfered with the city's nondelegable rights relating to
21 deployment of staffing or sworn personnel or, in the alternative, because
22 the 2005 agreement was based on mutual mistake.
23

² The CERB's decision is reported at 38 MLC 233 (2012).

³ We take administrative notice of the fact that the City did not seek further appellate review of the Appeals Court decision.

1 We agree that the [CERB] properly refused to consider arguments not
2 made to the DLR. In addition, because in its challenge before the [CERB]
3 regarding the DLR remedy, the City did not properly raise either of the
4 arguments that it now makes to us – mutual mistake based on incorrect
5 understandings of Linskey’s role or interference with its nondelegable
6 rights – we also decline to consider these arguments on appeal. See
7 Secretary of Admin. & Fin. v. Commonwealth Employment Relations
8 Board, 74 Mass. App. Ct. 91, 95 (2009). See also Albert v. Municipal Ct.
9 of the City of Boston, 388 Mass. 491, 493 (1983) (“A party is not entitled to
10 raise arguments on appeal that he could have raised, but did not raise,
11 before the administrative agency”).

12
13 2015 WL 4528049 at *1.

14 Compliance Proceeding

15 For purposes of the compliance proceeding, the City and the Union entered into
16 stipulations comprised of forty-three “General Stipulations from the Compliance Case,”
17 seven “Excerpted Stipulations from the 2011 decision,” and 156 “Financial Stipulations
18 from the Compliance Case.” Many of the stipulations related to the identity and rank of
19 the police officers who filled the City Hall position between 2006 and 2016, the amount
20 of the stipend each received, what superior officers in various ranks and various levels
21 of education would have earned in base pay, and as a stipend from April 12, 2006 to
22 January 22, 2011 and July 23, 2011 to June 16 2012, and the overtime and detail pay
23 earned by sergeants before they were assigned to the City Hall position. Based upon
24 this information, the Hearing Officer determined when the City Hall position had been
25 filled with a bargaining unit member, when it was filled with a non-bargaining unit
26 member and when it was vacant.

27 Staffing Levels

28 The Hearing Officer made separate findings regarding sergeant-staffing levels
29 between 2011 and 2017. She found that the staffing level for sergeants in the BPD in

1 this period ranged from the high 140's to over 180. She also found that the BPD had a
2 staffing level of between 173-184 sergeants on April 27, 2006, May 1, 2007, January
3 20, 2009 and January 20, 2011. Based on the testimony of Bernard O'Rourke
4 (O'Rourke), former Superintendent Chief of Bureau of Field Services and a 39 year
5 veteran of the BPD, she found that if the City had 173-184 sergeants within its staffing,
6 it would have had the ability to assign a sergeant to the City Hall position.

7 SPU Assignments After Linskey

8 The Hearing Officer also made findings as to the rank of officers assigned to the
9 SPU position and when the City Hall position was vacant during the relevant times. She
10 found that the City did not fill the City Hall position with a bargaining unit member for the
11 following periods after it promoted Linskey out of the position because the position was
12 either unfilled or filled with a non-bargaining unit member:

- 13 • April 12, 2006 to January 22, 2011 (unfilled until May 5, 2007, then staffed until
14 January 22, 2011 by non-bargaining unit members);
- 15 • July 23, 2011 to June 16, 2012 (staffed by non-bargaining unit members);
- 16 • February 29, 2016 to September 24, 2016 (unfilled).
- 17
- 18

19 Compensation Received in the City Hall Position

20
21 Based primarily on the parties' financial stipulations, the Hearing Officer reviewed
22 the compensation of the officers in the City Hall position. She found that the total
23 compensation fluctuated, because there were differing amounts of overtime and details
24 worked in each year, with the officers earning both more and less than they had in other
25 years. She also found that the City Hall position came with a weekly stipend that is
26 included in regular compensation for purposes of retirement but that overtime and detail
27 payments were not included. As to that weekly stipend, she found that while Linskey

1 received a stipend of \$480 per week as both a sergeant and a lieutenant while he held
2 the SPU position, the subsequent sergeants assigned to the position received a stipend
3 of \$425 per week.

4 2016 Bargaining Session

5 At a September 13, 2016 bargaining session, the City advised the Union that it
6 considered the 2005 Agreement to be an unenforceable minimum shift staffing
7 provision, and that the City will not bargain to continue the City's compliance with it
8 beyond the term of the parties' current collective bargaining agreement.

9 Hearing Officer Opinion

10 Based on the stipulations and findings, the Hearing Officer issued a decision on
11 September 28, 2017. Preliminarily, she rejected the City's arguments that the 2005
12 Agreement was unenforceable because it contravened the Boston Police
13 Commissioner's nondelegable rights as codified in St. 1962, c. 322. She noted the
14 City's earlier failure to raise this argument to the CERB in its appeal of her original
15 decision. She also noted that although the City renewed the nondelegability argument
16 when it appealed the CERB decision to the Appeals Court, the Appeals Court declined
17 to consider the merits because it found that the City had waived it by failing to raise it
18 before the CERB. For the same reason, the Hearing Officer held that she could not
19 consider the City's renewed nondelegability arguments in the compliance proceeding
20 because the City had failed to raise them to the CERB in the decision below.

1 Regarding the make-whole remedy, the Hearing Officer rejected the City's
2 various arguments that it owed no backpay at all.⁴ However, the Hearing Officer also
3 rejected the Union's claim that its members were owed a full-make whole remedy, i.e.,
4 all of the money (base wages plus stipend plus overtime) they would have made had
5 they been assigned to the City Hall position during the period the City was not in
6 compliance with the Order. Rather, because she found that the City had shown that it
7 could have assigned an existing bargaining unit member to the City Hall position rather
8 than adding another position to the bargaining unit to fill that assignment, the Hearing
9 Officer concluded that backpay amounts would only consist of the additional,
10 pensionable stipend that bargaining unit members did not receive when the City either
11 left the position vacant or assigned it to a non-bargaining unit members.

12 The Hearing Officer further based her backpay calculations on a stipend rate of
13 \$425, rather than the \$480 rate that Linskey had received. She reasoned that \$425 was
14 what the City paid the sergeants when it assigned them to the position. She was not
15 persuaded by the Union's claim that the rate should be the \$480 rate that Linskey
16 received when he held the position because she found that Linskey had previously
17 received preferential treatment.

18 Appeals of the Decision on Compliance

19 Both parties appealed from the September 28, 2017 decision on compliance.

20 Union's Appeal

⁴ The City offered several reasons for this argument, including that the Union had failed to identify a specific individual who had suffered a financial loss and that no employee could have lost pay by not being assigned to the SPU position because employees who held the position made less money in that assignment than they made in other assignments.

1 The Union contends that the Hearing Officer erred in failing to award any
2 backpay (at straight or overtime rates) other than the stipend. The Union argues that
3 the Hearing Officer improperly concluded that the City proved that it had sufficient staff
4 to place a bargaining unit member in the City Hall position without having to add another
5 person to the bargaining unit or to pay overtime.

6 The Union also contends that Hearing Officer erred by considering the City's
7 evidence of staffing levels to conclude that the City owed no back base wages. The
8 Union claims that the City submitted evidence of its staffing levels only to prove that a
9 back pay remedy should be paid at a straight time rate rather than at an overtime rate.
10 The Union further claims that this argument constitutes an admission by the City that it
11 owed the Union back pay at a straight time rate during the violation periods. In a related
12 argument, the Union claims that the City's selection of Sergeant Detectives to fill the
13 position, some of whom dropped the detective rating to take the position, demonstrates
14 that there were not sufficient sergeants to fill the position without adding personnel.

15 The Union finally contends that the Hearing Officer erred when she determined
16 that the stipend the City is obligated to pay is \$425 per week, rather than \$480 per
17 week, arguing that Linskey received a stipend of \$480 per week when the parties
18 reached the 2005 Agreement until he vacated the position and thus, the \$480 per week
19 stipend should continue. As the Union states in its supplementary statement:

20 Although the parties did not expressly include the stipend rate in the 2005
21 Agreement, it is reasonable that, unless otherwise stated in the
22 agreement, the stipend just as all other conditions associated with the
23 position – would remain the same when the position reverted back to the
24 Federation.
25

1 (Union Supplementary Statement at 5). The Union did not, however, challenge the
2 \$425 stipend rate paid to bargaining unit members when Union members filled the SPU
3 position.

4 City's Appeal

5 The City contends that it had the right to leave the position vacant temporarily
6 and that the parties never interpreted the 2005 Agreement as containing a minimum
7 staffing agreement. It notes that the parties stipulated that the City did not backfill the
8 position with overtime when the incumbent took time off. However, the City's primary
9 argument on appeal is that the Hearing Officer erred in finding that it had waived its right
10 to argue in this compliance proceeding that the 2005 Agreement was unenforceable. It
11 reiterates the claim, made to the Hearing Officer and the Appeals Court in the
12 underlying case, but never before to the CERB, that the 2005 Agreement impermissibly
13 infringed upon the Boston Police Commissioner's nondelegable rights as codified in the
14 Boston Police Commissioner statutes, St. 1962, Chapter 322.

15 Opinion⁵

16 Nondelegability

17 We agree that the Hearing Officer properly rejected the nondelegability argument
18 as having been waived when, notwithstanding the Appeal Court's determination, as
19 quoted above, the City attempted to resurrect it in the compliance proceeding. Pursuant
20 to the DLR's rules, the purpose of a compliance hearing is to determine whether
21 "compliance [with a DLR order] has occurred." 456 CMR 16.08 (5). A compliance
22 hearing therefore does not provide a second chance to the party alleged to be in non-

⁵ The CERB's jurisdiction is not contested.

1 compliance to raise previously-raised arguments, that it failed to properly appeal, either
2 to the CERB or to the Appeals Court, or even beyond. City of Fitchburg, 16 MLC 1567,
3 MUP-5896 (February 12, 1990)(declining to entertain arguments regarding the propriety
4 of the notice requirements where the City failed to appeal the CERB's underlying
5 decision and order). See generally Anderson v. Commonwealth Employment Relations
6 Bd., 73 Mass. App. Ct 908, 909 n.7 (2009) (citing McCormick v. Labor Relations
7 Commn., 412 Mass. 164, 170 (1992)) (CERB properly rejected arguments raised for the
8 first time on appeal). This is particularly so here, where the Appeals Court declined to
9 consider the nondelegability arguments and the City did not seek further appellate
10 review of the decision. For these reasons, we decline to consider the City's
11 nondelegability arguments for the first time on compliance.

12 The Hearing Officer Properly Decided That A Back Pay Award that Included Base
13 Wages Was Not Required

14 For the reasons stated in the Hearing Officer's decision, we agree that the make-
15 whole remedy in this matter does not include any back base wages. On appeal, the
16 Union disputes that the City had enough sergeants available to fill the City Hall position,
17 arguing, among other things, that the number of sergeants were decreasing over time.
18 It offers no evidence, however, to refute O'Rourke's testimony that the City had
19 sufficient sergeants during the relevant period to staff the City Hall position without
20 adding sergeants. Further, while the Union speculates that the City must have been
21 shorthanded because in some instances it chose sergeant detectives to fill the position,
22 that evidence without more does not establish that the reason for selection was that

1 there were no sergeants available.⁶ We therefore find no basis to disturb the Hearing
2 Officer's conclusion that bargaining unit members were not owed back base wages for
3 the periods above.

4 The Stipend

5 The Hearing Officer nevertheless found that bargaining unit members had
6 suffered an economic loss by losing the opportunity to earn the stipend that is attached
7 to the City Hall position. She thus determined that the City should be obligated to pay a
8 stipend of \$425 per day, the amount paid to every individual who held the City Hall
9 position after Linskey, for each day during the period the position was not filled with a
10 bargaining unit member.

11 On appeal, the Union also argued that the stipend should be \$480 per week,
12 which is what Linskey earned when he filled the position both as a Sergeant-Detective
13 and after his promotion to Lieutenant-Detective.⁷ The Union concedes both that the
14 2005 Agreement did not address the stipend and that the sergeants who held the
15 position after Linskey were all paid a stipend of \$425. It nevertheless claims that it was
16 reasonable for it to believe that, unless otherwise stated in the agreement, the stipend,
17 just as all other conditions associated with the position, would remain the same when

⁶ Although the City may have relied on O'Rourke's testimony only to argue that any back base wages should be paid at a straight time wage rate, not an overtime rate, we disagree that this somehow precluded the Hearing Officer from relying on this testimony to conclude that the sergeants were not owed any base back wages at all. The City had previously argued that it owed no backpay because the Union had failed to demonstrate that any specific bargaining unit member had suffered an economic loss as a result of its failure to assign bargaining unit members to the City Hall position. Relying on O'Rourke's testimony, the Hearing Officer agreed, at least with respect to back base wages.

⁷ The City made no arguments regarding the stipend amount.

1 the position reverted back to the Union. However, the record does not reflect that the
2 Union ever protested, either to the City or the DLR, the City's payment of a \$425 to
3 bargaining unit members during the periods of time when it assigned bargaining unit
4 members to the City Hall position. To now order the City to pay that amount would result
5 in the anomalous situation of the sergeants being paid one rate when the City did
6 actually assign them to the City Hall position but another rate as backpay for when it did
7 not. Under these circumstances, and for the reasons stated in the Hearing Officer's
8 decision, we agree that the stipend should be calculated at the \$425 weekly rate.

9 Vacancy Periods

10 The City argues on appeal that the Hearing Officer erred in awarding damages
11 for the periods of time when the City Hall Security position was vacant, asserting that it
12 "has the right to leave a position vacant temporarily." However, for the reasons stated
13 in the decision, we agree with the Hearing Officer that the 2005 Agreement required the
14 City Hall Security position to revert to the Union after "Linskey's voluntary or involuntary
15 departure," thus demonstrating the intention that the position should become a
16 Federation position as soon as Linskey left it. To the extent the City's contention that it
17 could leave the position open relies on its argument about nondelegability, for the
18 reasons set forth above, we agree that the nondelegability issue is not properly raised in
19 this proceeding.

20 Conclusion

21 For the reasons explained above, the CERB affirms the Hearing Officer Decision and
22 Order of September 28, 2017 and issues the following Order:

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ORDER

WHEREFORE, based upon the foregoing, it is hereby ordered that the City of Boston shall:

- 1) Pay \$125,618.00 plus interest at the rate specified in M.G.L. c. 231, §6I, compounded quarterly, proportionately dividing it between all of the individuals who held a sergeant position that was in the Federation’s bargaining unit at any point in time between April 12, 2006 and January 22, 2011, and July 23, 2011 to June 16, 2012, based on their tenure in the sergeant position during those time periods; and
- 2) Pay \$12,628.57 plus interest at the rate specified in M.G.L. c. 231, §6I, compounded quarterly, proportionately dividing it between all of the individuals who held a sergeant position that was in the Federation’s bargaining unit at any point in time between February 29, 2016 and September 24, 2016 based on their tenure in the sergeant position during that time period; and
- 3) 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; and
- 4) Notify the DLR within ten days of this decision of the steps taken to comply herewith.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD

Marjorie F. Wittner

MARJORIE F. WITTNER, CHAIR

Katherine G. Lev

KATHERINE G. LEV, CERB MEMBER

Joan Ackerman

JOAN ACKERSTEIN, CERB MEMBER

APPEAL RIGHTS

Pursuant to M.G.L. c. 150E, Section 11, decisions of the Commonwealth Employment Relations Board are appealable to the Appeals Court of the Commonwealth of Massachusetts. To obtain 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
BEFORE THE COMMONWEALTH EMPLOYMENT RELATIONS BOARD

NOTICE TO EMPLOYEES

**POSTED BY ORDER OF THE COMMONWEALTH EMPLOYMENT
RELATIONS BOARD
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS**

The Commonwealth Employment Relations Board (CERB) has held that the City of Boston has failed to comply with a 2012 decision and order of the Commonwealth Employment Relations Board in Case No. MUP-06-4699. The City of Boston posts this Notice to Employees to comply with the CERB's compliance order.

WE WILL COMPLY with the CERB's decision in Case No. MUP-06-4699 by paying:

- 1) \$125,618.00 plus interest at the rate specified in M.G.L. c. 231, §6I, compounded quarterly, to the individuals who held a sergeant position that was in the Federation's bargaining unit at any point between April 12, 2006 and January 22, 2011, and July 23, 2011 to June 16, 2012; proportionately dividing that amount between individuals based on their tenure in a sergeant position during those time periods; and
- 2) \$12,628.57 plus interest at the rate specified in M.G.L. c. 231, §6I, compounded quarterly, to the individuals who held a sergeant position that was in the Federation's bargaining unit at any point between February 29, 2016 and September 24, 2016, proportionately dividing that amount between individuals based on their tenure in a sergeant position during that period of time.

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).