

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of

TOWN OF STONEHAM

and

STONEHAM POLICE ASSOCIATION

*

*

*

*

*

*

*

*

*

Case No.: MUP-12-2430

Date Issued: July 18, 2014

Hearing Officer:

Kathleen Goodberlet, Esq.

Appearances:

Daniel C. Brown, Esq. - Representing the Town of Stoneham

Susan F. Horwitz, Esq. - Representing the Stoneham Police Association

HEARING OFFICER'S DECISION

SUMMARY

The issue in this case is whether the Town of Stoneham (Town) violated Sections 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law), by transferring the duty to provide medical advice during emergency medical calls from the Stoneham Police Association (Union) to non-unit personnel without giving the Union prior notice and an opportunity to bargain to resolution or impasse about the decision and the impacts of that decision on employees' terms and conditions of employment. For the following reasons, I find that the Town failed to bargain in good faith by implementing its decision to transfer pre-arrival medical

1 advice duties from Desk Officers to non-unit Action Ambulance personnel without
2 providing the Union with prior notice and an opportunity to bargain about the impacts of
3 its decision on employees' terms and conditions of employment.

4 STATEMENT OF THE CASE

5 On November 27, 2012, the Union filed a charge with the Department of Labor
6 Relations (DLR), alleging that the Town had engaged in prohibited practices within the
7 meaning of Sections 10(a)(5) and 10(a)(1) of the Law. Following an investigation, the
8 DLR issued a Complaint of Prohibited Practice (Complaint) on November 8, 2013
9 alleging that the Town violated Sections 10(a)(5) and, derivatively, Section 10(a)(1) of
10 the Law by transferring bargaining unit work to non-unit personnel without giving the
11 Union an opportunity to bargain to resolution or impasse about the decision and the
12 impacts of that decision on employees' terms and conditions of employment. The Town
13 filed an Answer to the Complaint on February 11, 2014. I conducted a hearing on
14 March 31, 2014, at which both parties had the opportunity to be heard, to examine
15 witnesses, and to introduce evidence. The parties filed post-hearing briefs on May 5,
16 2014. Based on the record, which includes witness testimony, my observation of the
17 witnesses' demeanor, stipulations of fact, and documentary exhibits, and in
18 consideration of the parties' arguments, I make the following findings of fact and render
19 the following opinion.

STIPULATED FACTS¹

1. The Town is a public employer within the meaning of Section 1 of the Law.
2. The Union is an employee organization within the meaning of Section 1 of the Law.
3. The Union is the exclusive collective bargaining representative for a bargaining unit of permanently appointed regular patrol officers employed by the Town, excluding the chief, lieutenants, sergeants and civilian employees.
4. The Department currently has a chief, two lieutenants, 7 sergeants, 26 patrol officers, 6 full-time civilian dispatchers and 2 part-time civilian dispatchers.
5. The civilian dispatchers are not part of the patrol officer bargaining unit.
6. There are three shifts in the Police Department. The day shift runs from 7:30 a.m.-3:30 p.m. The "first half" or "early half" shift runs from 3:30 p.m.-11:30 p.m. The "second half" or "late half" shift runs from 11:30 p.m.-7:30 a.m.
7. The 7:30 a.m.-3:30 p.m. day shift, 7 days a week has 2 civilian dispatchers. The first half shift 3:30 p.m.-11:30 p.m. is staffed with one civilian dispatcher and one patrol officer, 7 days a week. The last half shift 11:00 p.m.-7:30 a.m. has one civilian and, if staffing is available, also one patrol officer.
8. Civilians are cross-trained in police and fire dispatching. Police officers are not trained in fire dispatching.
9. The State 911 Department mandated that effective July 1, 2012, a municipality must either have all public safety dispatchers certified in Emergency Medical Dispatch (EMD) or provide EMD through a certified emergency medical dispatcher resource.
10. Rather than training its civilian dispatchers and patrol officers to be certified as EMDs Stoneham decided to contract out the EMD function to Action Ambulance, a certified EMD resource.

¹ I have made minor technical edits for consistency throughout the document.

1 FACTUAL FINDINGS

2 Overview of 911 Emergency Medical Dispatch Services

3 The 911 Department, within the Massachusetts Executive Office of Public Safety
4 and Security, is statutorily required to coordinate, implement, and administer enhanced
5 911 service, and to promulgate rules and regulations for administration of 911 service,
6 including technical and operational standards for the establishment of public safety
7 answering points (PSAPs). M.G.L. c.6A, s.18B. A PSAP is a facility assigned the
8 responsibility of receiving 911 calls and, as appropriate, directly dispatching emergency
9 response services or transferring or relaying emergency 911 calls to other public or
10 private safety agencies or other PSAPs. M.G.L. c.6A, s.18A. Cities and towns are
11 required to comply with 911 Department standards in the design, implementation and
12 operation of PSAPs. M.G.L. c.6A, s.18B(d). The Town is a PSAP.

13 Beginning on July 1, 2012, the Commonwealth required the Town to provide
14 emergency medical dispatch (EMD) through either certified medical dispatchers, or a
15 certified EMD resource, pursuant to M.G.L. c.6A, s.18B and 560 CMR 5.05. EMD is the
16 management of requests for emergency medical assistance by utilizing a system of: (a)
17 tiered response or priority dispatching of emergency medical resources based on the
18 level of medical assistance needed by the victim; and (b) pre-arrival first aid or other
19 medical instructions given by trained personnel responsible for receiving 911 calls and
20 directly dispatching emergency response services. M.G.L. c.6A, s.18A.

21 The 911 Department requires that certified medical dispatchers apply the
22 following steps during medical emergency calls:

1 (a) use a single Department-approved Emergency Medical Dispatch
2 Protocol Reference System [EMDPRS] on every request for medical
3 assistance, unless exigent circumstance prohibit such use;
4

5 (b) have in place policies and procedure for the safe and effective use of
6 the Department-approved EMDPRS;
7

8 (c) provide pre-arrival instructions; and
9

10 (d) provide dispatch life support in compliance with a written text of scripts
11 and other processes within a Department-approved EMDPRS.
12

13 560 CMR 5.05.

14 Desk Officers

15 Patrol officers working in the position of Desk Officer answer incoming calls to
16 the Police Department, including 911 emergency calls.² Desk Officers share office
17 space and the duty to answer 911 emergency calls with Civilian Dispatchers. Desk
18 Officers and Civilian Dispatchers answer 911 emergency calls by stating: "911. This
19 line is recorded. What is your emergency?"³ The Desk Officer or Civilian Dispatcher
20 then ascertains the emergency, verifies caller's name, address, and phone number, and
21 gathers other information about the caller's issue.⁴ After ascertaining the nature of the
22 emergency, the Desk Officer or the Civilian Dispatcher keeps the 911 caller on the
23 phone and dispatches first responders to the scene. The Desk Officer dispatches the

² Desk Officers also perform numerous other duties, such as answering the general business line, offering advice over the phone, resolving conflicts in the lobby, making arrests, and monitoring prisoners.

³ Whether the Desk Officer or Civilian Dispatcher answers a call depends on what the other person is doing.

⁴ At an unidentified point in time, Desk Officers and Civilian Dispatchers enter information into the computer aided dispatch (CAD) system.

1 appropriate police units by radio transmission and the Civilian Dispatcher dispatches
2 the Fire Department. When the Desk Officer answers a 911 call regarding a fire, the
3 Desk Officer transfers the call to the Civilian Dispatcher and remains on the call as the
4 Civilian Dispatcher dispatches the Fire Department. The Desk Officer simultaneously
5 dispatches the Police Department to the fire scene.⁵

6 Processing 911 Emergency Medical Calls Prior to June 29, 2012

7 Prior to June 29, 2012, when a Desk Officer or Civilian Dispatcher determined
8 that a 911 call was a medical emergency, they sought basic information about the
9 gender, age, and medical history of the person experiencing the medical issue and then
10 conference called Action Ambulance. The Desk Officer or Civilian Dispatcher then
11 dispatched Action Ambulance's ambulance directly. The Action Ambulance dispatcher
12 also dispatched the ambulance. After communicating to Action Ambulance the nature
13 of the 911 call and the medical issue, the Desk Officer dispatched the Police
14 Department and the Civilian Dispatcher dispatched the Fire Department to the medical
15 emergency scene.⁶

16 Prior to June 29, 2012, Desk Officers also provided first aid and other medical
17 advice to 911 emergency medical callers after ambulance dispatch and before first
18 responder arrival at the scene (pre-arrival medical advice).⁷ In that window of time,

⁵ In the rare instance where a Civilian Dispatcher is unavailable, a Desk Officer will dispatch the Fire Department.

⁶ The Civilian Dispatcher may also dispatch the Police Department to the scene.

⁷ There is no testimony or other evidence in the hearing record that establishes that Civilian Dispatchers or Action Ambulance personnel provided pre-arrival medical advice to 911 callers prior to June 29, 2012.

1 Desk Officers gathered additional information about the medical emergency and
2 provided the 911 caller with medical advice, such as how to perform the Heimlich
3 Maneuver or CPR. The specific medical advice that Desk Officers gave to 911 callers
4 depended on the nature of the call and the Desk Officer's knowledge. The Town did not
5 require Desk Officers to provide pre-arrival medical advice, but told Desk Officers to do
6 their best to instruct 911 callers in CPR or the Heimlich Maneuver.⁸

7 Town's June 2012 Appointment of Action Ambulance As The Certified EMD Resource

8 Prior to June 28, 2012, the Town decided to appoint Action Ambulance as the
9 certified EMD resource, and not to train Desk Officers as certified medical dispatchers.
10 The Town did not notify the Union directly prior to June 28, 2012 that it planned to
11 appoint Action Ambulance as the certified EMD resource and that it would transfer pre-
12 arrival medical duties from Desk Officers to Action Ambulance personnel. At
13 unidentified times, Union Secretary Apalakis heard from Civilian Dispatchers, and Union
14 President Joseph Ponzio (Ponzio) heard from unspecified sources, rumors that the Town
15 would appoint Action Ambulance as the certified EMD resource. Ponzio held a meeting
16 with Union leadership on an unidentified date and discussed the rumored changes.
17 Neither Ponzio nor Apalakis asked the Town to confirm or deny the rumors, or otherwise
18 raised the matter with the Town prior to June 28, 2012.

19 On June 28, 2012, Police Lieutenant David Stefanelli (Stefanelli) issued a
20 memorandum to all Desk Officers and Dispatchers stating, in relevant part:

⁸ According to Christopher Apalakis' (Apalakis') undisputed testimony, before June 29, 2012, the Town told him "not to hang up, do your best, don't just get the name, address, and hang up the phone. Ascertain information you can get from the caller, try to walk them through CPR, walk them through Heimlich Maneuver, do the best you can."

1 Starting June 29, 2012 at 0800 hours, all medical aid calls will be
2 processed using the attached "flow chart."
3

4 To comply with regulations regarding Emergency Medical Dispatch (EMD)
5 we will transfer/conference in Action Ambulance, a certified EMD
6 resource.
7

8 Calls will be transferred/conferenced utilizing either the "Action Amb" one
9 button transfer on the 9-1-1 system or the "CONF" (conference) button on
10 the lower left side of the regular black phone, it is above the "HOLD"
11 button.
12

13 Prior to transferring/conferencing you will still need to obtain the basic
14 event information, i.e.: cardiac event, laceration, fracture, etc.
15

16 Once the transfer/conference process is complete, you will stay on the line
17 while Action Ambulance's dispatch gathers additional information. During
18 this time the appropriate response units should be dispatched based on
19 the initial information you received. Action will gather further information
20 and provide pre-arrival instruction when necessary. Any additional
21 necessary information obtained should be communicated to responding
22 units.
23

24 Dispatchers/Desk Officers will stay on the call until: the caller terminates
25 the call, Action terminates the call or directs you to disconnect or you
26 need to answer another 9-1-1 or alternate emergency number
27

28 Processing 911 Emergency Medical Calls After June 29, 2012

29 The Town's decision to designate Action Ambulance as the certified EMD
30 resource had a limited effect on Desk Officers' duties. Effective June 29, 2012, the
31 Town directed Desk Officers to cease providing pre-arrival medical advice to 911 callers
32 because Action Ambulance would perform that duty. No other aspect of the Desk
33 Officers' duties in processing emergency medical calls changed. Desk Officers
34 continue to answer 911 calls and determine whether a medical emergency exists. After
35 verifying a caller's name, address, and phone number, the Desk Officer seeks basic
36 information about the gender, age, and medical history of the person experiencing the
37 medical issue and then conference calls Action Ambulance. The Desk Officer or

1 Civilian Dispatcher then dispatches Action Ambulance's ambulance directly. The Action
2 Ambulance dispatcher also dispatches the ambulance. The Desk Officer subsequently
3 dispatches the Police Department and the Civilian Dispatcher dispatches the Fire
4 Department to the medical emergency scene. Desk Officers remain on the three-way
5 call as Action Ambulance personnel gather additional information and provide pre-
6 arrival medical advice to 911 callers. The length of time Desk Officers spend on
7 emergency medical calls is the same as before June 29, 2012. Since June 29, 2012,
8 Desk Officers have not lost dispatch office overtime.

9 Union's July 30, 2012 Letter and Town's August 2, 2012 Response

10 By letter to Town Administrator David Ragucci (Ragucci) dated July 30, 2012,
11 Union President Ponzo stated, in relevant part:

12 It has come to the attention of the Stoneham Police Association,
13 MCOP Local 266 that as of June 29, 2012, the Town has transferred the
14 Emergency Medical Dispatch calls to a private ambulance service. This is
15 a transfer of bargaining unit work and has been done without first
16 bargaining with the Union. As you know, unilaterally transferring
17 bargaining unit work to non unit workers is a violation of M.G.L. c. 150E.

18
19 The Union therefore asks that you immediately rescind the transfer
20 of bargaining unit work to "Action Ambulance" and bargain with the Union
21 over the Emergency Medical Dispatch work and procedures before
22 making any changes.⁹

23
24 By email dated August 2, 2012, Ragucci's secretary, Debbie Pettengill (Pettengill)
25 emailed Ponzo on behalf of Ragucci, stating:

26 I am in receipt of your letter concerning EMD. Since EMD is not just an
27 important health issue, but also a state requirement, the Town needs to
28 continue to provide this essential service. With this in mind, and in light of

⁹ Ponzo initially testified that he sent a cease and desist letter to Ragucci 24-48 hours after Stefanelli issued the June 28, 2012 memorandum. Ponzo later clarified that he did not respond to Stefanelli's memorandum until July 30, 2012.

1 your request to discuss this issue, I suggest we discuss the particulars of
2 this issue when we meet next week. If this is not acceptable, please let
3 me know.¹⁰
4

5 Ragucci and Ponzo subsequently discussed the matter, but there is no further evidence
6 in the record regarding those conversations.¹¹

7 Training and Overtime

8 Police Officers are trained first responders. After attending one post-academy,
9 two-day training to learn about the 911 system, they attend one annual, one-day training
10 in first responder CPR and first aid training. Additionally, for the last two years, Desk
11 Officers have attended enhanced 911 training regarding professional dispatching,
12 suicide prevention, and stress management.¹²

13 In order to provide pre-arrival medical advice during emergency medical calls as
14 of July 1, 2012, Desk Officers must be trained and certified medical dispatchers
15 pursuant to 560 CMR 5.04-5.05. Individuals not employed by a PSAP as a certified
16 enhanced 911 telecommunicator on or before June 24, 2011, such as Desk Officers,
17 must meet the following training requirements:

18 (a) successful completion of a minimum of two days of 911 equipment and
19 basic telecommunicator training offered by the [911] Department; and

¹⁰ Ponzo testified on direct examination that Ragucci did not respond to the Union's July 30, 2012 cease and desist letter for 2-3 months. Ponzo reiterated on cross-examination that the Town never talked to him about the issue, before admitting that Pettengill, on behalf of Ragucci, responded to Ponzo's July 30, 2012 in the August 2, 2012 email.

¹¹ On cross-examination, Ponzo did not deny that he had conversations with Ragucci, only that he could not remember any conversations with Ragucci.

¹² Apalakakis has attended a four-day, 16 hour enhanced 911 training session. His training occurred both during his regular shift and on overtime.

1 (b) successful completion of a minimum of 40 hours of Department-
2 approved basic telecommunicator training, or the equivalent thereof as
3 approved by the Department.

4 In order to maintain certification as an enhanced 911
5 telecommunicator, such person shall successfully complete thereafter
6 a minimum of 16 hours of Department-approved continuing education
7 annually, or the equivalent thereof as approved by the Department.

8 560 CMR 5.04.

9 By email dated April 24, 2013, Ponzo asked Stefanelli for information about the
10 cost for the Town to train bargaining unit members for initial EMD certification and
11 subsequent recertification. In an emailed response on April 26, 2013, Stefanelli stated
12 that he could not provide an approximate cost without specific information about the
13 number of unit members to be trained, the training dates, the frequency of trainings and
14 the amount of time to conclude the training.¹³ Stefanelli noted that he would also
15 consider overtime costs as part of his calculation.

16 The 2010-2013 Agreement

17 The Town and the Union are parties to a collective bargaining agreement for the
18 period July 1, 2010 through June 30, 2013 (Agreement). Article XXVIII of the
19 Agreement, Civilian Dispatching states, in relevant part:

20 The parties have bargained about and acknowledge the Town's right to
21 employ civilian employees for the purpose of public safety (Police, Fire,
22 EMT, etc.) dispatching, including its right to centralize or combine police
23 and fire dispatching and its right to regionalize dispatching by joining
24 together with one or more other Towns.

¹³ Stefanelli stated that if he were applying for a grant, he would add the number of officers to the number of training hours, and multiply by \$50 for an overtime rate.

OPINIONOverview

The Complaint alleges that on June 29, 2012, the Town “transferred the processing of Emergency Medical Dispatch (EMD) calls to a private ambulance service” without giving the Union an opportunity to bargain to resolution or impasse over the transfer decision and the impacts of that decision in violation of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law. The Union alleges that the Town subcontracted “the function of EMD” to Action Ambulance without providing prior notice and an opportunity to bargain about the decision and the impacts of that decision. Based on the facts presented at the hearing, I find that the issue is whether on June 29, 2012, the Town transferred medical advice duties from Desk Officers to non-unit Action Ambulance personnel without giving the Union prior notice and an opportunity to bargain to resolution or impasse about the decision and the impacts of that decision on employees’ terms and conditions of employment.

The Union argues that it lost training opportunities and training-related overtime and other compensation. The Town argues that it did not transfer bargaining unit work to non-unit personnel without prior notice and an opportunity to bargain, and that, if it did, neither the bargaining unit, nor its members suffered any adverse impacts. The Town also maintains that the Police Chief’s right to assign personnel is a non-delegable, core managerial right, not subject to bargaining, and that the Union waived by contract any right to bargain over dispatching functions. For the following reasons, I find that the Town violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law.

1 Analysis

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

13 1. The Transferred Work

14 The first issue is whether the Union established that the Town transferred
15 bargaining unit work to non-unit personnel. The Union alleges that effective June 29,
16 2012, the Town prohibited Desk Officers from providing medical phone assistance and
17 support to 911 callers and required Desk Officers to transfer emergency medical calls to
18 Action Ambulance for that assistance. The Town argues that no change occurred after
19 June 29, 2012 because the manner in which Desk Officers processed emergency
20 medical calls remained the same, except that Desk Officers may no longer offer
21 impromptu, voluntary medical advice to 911 callers.

22 The evidence establishes that the Desk Officers' duties in processing 911
23 emergency medical calls before and after June 29, 2012, remained largely the same.

1 Prior to June 29, 2012, upon receiving a 911 call for medical assistance, Desk Officers
2 or Civilian Dispatchers collected basic information from the 911 caller and then
3 conference called Action Ambulance. Desk Officers and the Civilian Dispatchers then
4 dispatched Action Ambulance's ambulance and the Police and Fire Departments. After
5 communicating to Action Ambulance the nature of the 911 call and the medical issue,
6 the Desk Officers remained on the line with the 911 caller until first responders arrived
7 at the scene. None of these duties changed on June 29, 2012. However, prior to June
8 29, 2012, Desk Officers provided first aid and other medical assistance to 911 callers in
9 the window of time after ambulance dispatch and before first responder arrival at the
10 scene, including CPR and Heimlich Maneuver instructions. Desk Officers' pre-arrival
11 medical advice duties ceased effective June 29, 2012, because the Town directed
12 Action Ambulance personnel to provide pre-arrival medical advice to 911 callers.

13 I dismiss the Town's argument that no change in duties occurred because prior
14 to June 29, 2012, the Desk Officers only offered impromptu, voluntary medical advice to
15 911 callers. Although Desk Officers' pre-arrival medical advice to 911 callers was
16 subject to the nature of a call and a Desk Officer's knowledge, the Town had instructed
17 Desk Officers to do their best in providing medical advice whenever possible. Thus, the
18 Desk Officers performed pre-arrival medical advice duties with the Town's knowledge
19 and directives prior to June 29, 2012. Accordingly, I find that the Town transferred Desk
20 Officers' pre-arrival medical advice duties to non-unit Action Ambulance personnel
21 effective June 29, 2012.

2. Adverse Impact

The second issue is whether the Union established that the Town's transfer of the pre-arrival medical advice duties from Desk Officers to non-unit Action Ambulance personnel had an adverse impact on individual employees or the unit. The Union argues that the Town's transfer of bargaining unit work deprived bargaining unit members of the opportunity to be trained as certified medical dispatchers pursuant to 560 CMR 5.04. The Union contends that a portion of the required EMD training would have occurred on an overtime basis, and that the loss of the opportunity to perform future work on an overtime basis constitutes a sufficient detriment to the unit to trigger a bargaining obligation. In contrast, the Town argues that the Union failed to establish that the bargaining unit or its members suffered any adverse impacts because the bargaining unit suffered no layoffs, missed shifts, or reduced workload. The Town also maintains that the Union's claims of lost training money are speculative.

The CERB has held consistently that a transfer of bargaining unit work, even if accompanied by no apparent reduction in bargaining unit positions, constitutes a detriment to the bargaining unit because it could result in an eventual elimination of the bargaining unit through gradual erosion of bargaining unit duties. City of Holyoke, 26 MLC 97, 99, MUP-1801 (January 14, 2000) (citing Commonwealth of Massachusetts, 24 MLC 116, 119, SUP-4050 (June 10, 1998)). Similarly, the CERB has held that losing the opportunity to perform unit work in the future is a sufficient detriment to the unit to trigger a bargaining obligation. Town of Saugus, 29 MLC 208, 210, MUP-2621 (May 14, 2003).

1 Here, the Town's transfer of pre-arrival medical advice duties from Desk Officers
2 to Action Ambulance personnel did not result in bargaining unit layoffs or missed shifts.
3 Nor did the transfer impact the duration of time that Desk Officers are on the telephone
4 for a 911 medical call. However, by transferring pre-arrival medical advice duties to
5 Action Ambulance personnel, the Town reduced the role of Desk Officers during
6 medical emergency calls. Further, the Town's decision to transfer pre-arrival medical
7 advice duties to Action Ambulance personnel deprived bargaining unit members of the
8 statutorily mandated training required for them to provide medical advice to 911 callers.
9 These factors constitute sufficient detriment to the bargaining unit and individual
10 bargaining unit members to trigger the bargaining obligation.

11 3. Managerial Authority

12 Before considering whether the Town gave the Union prior notice and an
13 opportunity to bargain, I will address the parties' arguments regarding the Town's
14 decisional bargaining obligations. The Union maintains that the Town's decision to
15 transfer Desk Officers' pre-arrival medical advice duties to non-unit Action Ambulance
16 personnel is a mandatory subject of bargaining. The Union cites numerous cases in
17 support of its position, including City of Boston, 26 MLC 144, MUP-1085 (March 10,
18 2000); Town of Norwell, 13 MLC 1200, MUP-5655 (October 15, 1986); and City of
19 Boston, 6 MLC 117 (1979). Conversely, the Town contends that the Chief is not
20 required to bargain about patrol officer assignments and, specifically, the decision not to
21 assign patrol officers as EMDs pursuant to M.G.L. c.6A, s.18B and 560 CMR 5.05. In
22 support of its position, the Town also cites numerous cases, including City of Boston v.
23 Boston Police Patrolmen's Association, 403 Mass. 680 (1989), Town of Andover v.

1 Andover Patrolmen's Union, 45 Mass. App. Ct. 167 (1998) and City of Taunton v.
2 Taunton Branch of the Massachusetts Police Association, 10 Mass. App. Ct. 237
3 (1980).

4 The CERB has consistently recognized that certain decisions are so fundamental
5 to the management of the public enterprise that they are not considered to be
6 mandatory subjects of bargaining. Town of Danvers, 3 MLC 1559, 1577, MUP-2292,
7 MUP-2299 (April 6, 1977). In deciding which matters are outside the scope of
8 mandatory bargaining, the CERB balances a public employer's legitimate interests in
9 maintaining its managerial prerogative to effectively govern against the impact on
10 employees' terms and conditions of employment. Id. at 1577. The CERB applies the
11 balancing test on a case-by-case basis and traditionally considers such factors as
12 whether the topic has a direct impact on terms and conditions of employment, whether
13 the issue involves a core governmental decision, or whether it is far removed from terms
14 and conditions of employment. Id.

15 It is well-established that a public employer may exercise its core managerial
16 prerogative concerning the nature and level of its services without first bargaining over
17 the decision. Town of Dennis, 12 MLC 1027, 1030, MUP-5247 (June 21, 1985) (citing
18 Newton School Committee v. Labor Relations Commission, 388 Mass. 557 (1983)). In
19 City of Boston, 6 MLC 1117, 1120-1121, MUP-2863 (June 4, 1979) the CERB held that
20 the employer's decision to increase the number of officers in field services by
21 reassigning officers from other areas of the department was a basic policy decision
22 regarding the level of public services reserved to management. Likewise, in Town of
23 Dennis, 12 MLC 1027, 1031, the CERB determined that the employer's decision to

1 discontinue providing private police details at liquor service establishments was a level
2 of service decision within the exclusive prerogative of management and not a
3 mandatory subject of bargaining.

4 Additionally, an employer's priorities for the deployment of law enforcement
5 resources are purely a matter of policy, and not a mandatory subject of bargaining. City
6 of Worcester, 438 Mass. 177, 182 (2002). Thus, in City of Worcester, 438 Mass. at
7 178, the court held that an employer was not required to bargain over its decision to
8 assign truancy enforcement duties to police officers because the employer's decision
9 about how to enforce the law mandating school attendance was a policy decision.
10 Similarly, in City of Boston, 31 MLC 25, 31, MUP-1758 (August 2, 2004), the CERB
11 determined that a decision to prioritize law enforcement details directly implicates the
12 employer's ability to set its law enforcement priorities and is not a mandatory subject of
13 bargaining.

14 The CERB addressed an employer's decisional bargaining obligations in the
15 context of a transfer of bargaining unit work in City of Boston, 32 MLC 4, 12, MUP-2749,
16 MUP-01-2892 (June 24, 2005). Applying the Danvers balancing test, the CERB held
17 that the police commissioner's decision to assign riot control work to all police
18 personnel, including non-unit detectives, was a level of services policy decision. The
19 determinative factor was that the commissioner's public safety concerns formed the
20 basis of the transfer bargaining unit work, and the CERB determined that requiring the
21 commissioner to negotiate about that transfer of bargaining unit work would "seriously
22 abridge" his ability to set public safety priorities for police officer deployment. Id. The
23 CERB distinguished its decision from transfer of bargaining unit work cases that lacked

1 heightened direct public safety implications, such as Town of Saugus, 29 MLC at 210-
2 211 (employer's decision to transfer the duties of the police mechanic to a non-unit
3 civilian employee not a level of services decision), and other cases where the employer
4 made an economically motivated decision to transfer work out of the bargaining unit,
5 such as City of Boston, 26 MLC at 148 (employer's decision to transfer policing work in
6 the housing developments was a decision about which city law enforcement personnel
7 would perform the work as less cost to the city and not a level of services decision) aff'd
8 sub nom. City of Boston v. Labor Relations Commission, 58 Mass. App. Ct. 1102
9 (2003). See also, City of Boston, 6 MLC at 1121 (employer's decision to replace police
10 officers who performed clerical duties with less expensive civilian employees was not a
11 level of services decision).

12 Here, applying the CERB's balancing test, I find the Town's decision to designate
13 Action Ambulance as the certified EMD resource, which included transferring pre-arrival
14 medical duties, to be outside the scope of collective bargaining for two reasons. First,
15 the Commonwealth required, pursuant to M.G.L. c.6A, s.18B and 560 CMR 5.05, that
16 by July 1, 2012, the Town provide EMD through either certified medical dispatchers, or
17 a certified EMD resource. In accordance with 560 CMR 5.05, certified medical
18 dispatchers are required to follow a 911 Department approved Emergency Medical
19 Dispatch Protocol Reference System, provide callers with pre-arrival instructions, and
20 dispatch life support in compliance with a written text of scripts and other approved
21 processes.

22 Based on the statutory and regulatory requirements, the Town could not separate
23 its decision to designate Action Ambulance as the certified EMD resource from its

1 decision to transfer pre-arrival medical advice duties from Desk Officers to Action
2 Ambulance personnel. The Town had no option to designate Action Ambulance as the
3 certified EMD resource and not transfer pre-arrival medical advice duties to Action
4 Ambulance personnel. Consequently, a requirement that the Town bargain about its
5 decision to transfer pre-arrival medical advice duties from Desk Officers to non-unit
6 Action Ambulance personnel is equivalent to a requirement that the Town to bargain
7 about its decision to designate Action Ambulance as the certified EMD resource.

8 The Town's decision to appoint Action Ambulance as the certified EMD resource
9 is a public safety policy decision that is outside the scope of collective bargaining. The
10 Town's decision to provide EMD by designating a certified EMD resource instead of
11 training and certifying police officers as EMDs is a public safety policy decision
12 concerning police officer deployment akin to the non-bargainable decision in City of
13 Worcester, 438 Mass. 177 to assign truancy enforcement duties to police officers. The
14 Town has an inherent managerial prerogative to set public safety priorities for the
15 deployment of police officers. Therefore, the Town's decision to either provide EMD by
16 training and certifying police officers as EMDs, or by designating a certified EMD
17 resource is the type of managerial decision reserved to the Town's sole discretion,
18 notwithstanding the fact that its decision transferred pre-arrival medical advice duties
19 from Desk Officers to Action Ambulance personnel. Accordingly, I do not find that Town
20 had an obligation to bargain about its decision to transfer pre-arrival medical advice
21 duties from Desk Officers to non-unit Action Ambulance personnel.

22 Second, standing alone, the Town's decision to transfer pre-arrival medical
23 advice duties is outside the scope of bargaining because it concerns the nature and

1 level of services that the Town provides to 911 callers. Prior to July 29, 2012, Desk
2 Officers on the 3:30 p.m.-11:30 p.m. shift and 11:00 p.m.-7:30 a.m. shift provided pre-
3 arrival medical advice based on the nature of the medical emergency and the Desk
4 Officer's knowledge. Desk Officers did not provide pre-arrival medical advice on the
5 7:30 a.m.-3:30 p.m. day shift because they did not work that shift. Effective July 29,
6 2012, at the Town's direction, Action Ambulance personnel provided 911 callers with
7 pre-arrival medical advice 24 hours a day based on the written text of scripts. 560 CMR
8 5.05. The nature of the pre-arrival medical advice that Action Ambulance personnel
9 offer during emergency medical calls is fundamentally different from the pre-arrival
10 medical advice that Desk Officers offered prior to June 29, 2012. After June 29, 2012,
11 the Town offered expanded availability, and improved quality and consistency of pre-
12 arrival medical advice for 911 callers. The Town may exercise its core managerial
13 prerogative concerning the nature and level of its 911 services without first bargaining
14 over it decision. Accordingly, I do not find that the Town had an obligation to bargain
15 about its decision to transfer pre-arrival medical advice duties from Desk Officers to
16 non-unit Action Ambulance personnel.

17 The case at issue is distinguishable from the cases that the Union cites in
18 support of its position that the City had an obligation to bargain about its decision to
19 transfer pre-arrival medical advice duties to non-unit Action Ambulance personnel. In
20 City of Boston, 26 MLC 144, and City of Boston, 6 MLC 117, the employers' decisions
21 to transfer work out of the unit were not level of services decisions. Additionally, in
22 Town of Norwell, 13 MLC 1200, the CERB detached the town's core governmental
23 decision to expand the level of fire services from the town's decision to assign

1 bargaining unit work to non-unit employees. Here, for reasons discussed above, the
2 Town's decision to appoint Action Ambulance as the certified EMD provider cannot be
3 separated from the Town's transfer of pre-arrival medical advice duties.

4 A public employer's ability to act unilaterally regarding certain subjects or
5 decisions does not relieve that employer of all attendant bargaining obligations. City of
6 Boston, 31 MLC 25, 31, MUP-1758 (August 2, 2004). Rather, in cases where an
7 employer is excused from the obligation to bargain over a core governmental decision,
8 that employer may still be required to bargain with the union representing its employees
9 over the manner in which to implement the decision as well as the impacts of the
10 decision on mandatory subjects of bargaining, before it implements the decision. Id.
11 (citations omitted). Therefore, although the Town's decision to transfer pre-arrival
12 medical advice duties to non-unit Action Ambulance personnel is outside the scope of
13 negotiations, the Law requires the Town to negotiate with the Union over the impacts of
14 that decision on employees' terms and conditions of employment.

15 4. Notice and an Opportunity to Bargain

16 I next consider whether the Town satisfied its bargaining obligation to give the
17 Union prior notice and an opportunity to bargain before implementing its decision. The
18 Union alleges that the Town failed to give the Union actual notice or an opportunity to
19 bargain prior to the transfer of bargaining unit work and argues that the Union is not
20 obligated to track down rumors and demand to bargain. The Town argues that the
21 Union knew about the June 29, 2012 changes well before the Town issued the June 28,
22 2012 memorandum. The Town emphasizes that Apalakakis and Ponzo heard about the
23 changes before June 28, 2012, and that Ponzo held a meeting regarding the changes

1 with Union leadership. The Town also maintains that it gave the Union an opportunity to
2 bargain about the matter within a few days of the Union's first demand to bargain and
3 that the parties discussed the matter on several occasions.

4 I dismiss the Town's arguments. An employer asserting the affirmative defense
5 of waiver by inaction must establish by a preponderance of the evidence that the Union
6 had actual knowledge of a proposed action, a reasonable opportunity to bargain about
7 the issue, and unreasonably or inexplicably failed to demand bargaining. City of
8 Gardner, 10 MLC 1218, 1221, MUP-4917 (September 14, 1983). The information
9 conveyed to the union must be sufficiently clear for it to make an appropriate response.
10 Id. Here, the Town did not tell the Union prior to June 28, 2012 that it planned to
11 appoint Action Ambulance as the certified EMD resource and transfer pre-arrival
12 medical advice duties from Desk Officers to Action Ambulance personnel. Nor does the
13 evidence in the hearing record establish that Apalakis and Ponzo, prior to June 28,
14 2012, acquired clear enough information to permit the Union to assess an appropriate
15 response. Rather, the evidence establishes merely that Apalakis and Ponzo heard
16 rumors from other Town employees that the Town might appoint Action Ambulance as
17 the certified EMD resource. An employee organization is not required to respond to
18 rumors of proposed changes, speculation or proposals that are so indefinite that no
19 response could be formulated. Id. at 1222. Additionally, because the Town announced
20 the transfer of unit work on June 28, 2012, and implemented the transfer the following
21 day, the Union had no reasonable opportunity to negotiate about the transfer of
22 bargaining unit work issue prior to implementation. The CERB does not apply the
23 doctrine of waiver by inaction where the employer presents the union with a fait

1 accompli. Ashburnham-Westminster Regional School District, 29 MLC 191, 194, MUP-
2 01-3144 (April 9, 2003).

3 The Town further argues that it gave the Union an opportunity to bargain about
4 the matter within a few days of the Union's first demand to do so, and that the parties
5 discussed the matter on several occasions. However, absent evidence that
6 circumstances beyond the Town's control required immediate action, such as external,
7 exigent time constraints not present here, post-implementation bargaining does not
8 satisfy the statutory requirements. City of Newton, 35 MLC 296, 298, MUP-04-4254
9 (May 27, 2009).

10 5. Contractual Waiver

11 Finally, the Town argues that the Union waived by contract any right to bargain
12 over dispatching functions. According to the Town, Article XXVIII, Civilian Dispatch
13 contains no reservation regarding the Town's ability to assign dispatching duties. The
14 Town maintains that Article XXVIII, Civilian Dispatch is clear evidence that the parties
15 consciously explored and agreed upon the use of civilian dispatchers without
16 reservation, and that the Town is not obligated to engage in any further bargaining on
17 the subject. However, the contract language only addresses the Town's right to
18 "employ civilian employees for the purpose of public safety (Police, Fire, EMT, etc.)
19 dispatching." Here, the Town transferred bargaining unit work to Action Ambulance
20 personnel, not to Town civilian employees. Therefore, Article XXVIII is inapplicable.

21 6. Section 10(a)(1) Violation

22 The Town maintains that the Union failed to state a claim under Section 10(a)(1)
23 of the Law because there is no allegation that any bargaining unit member engaged in

1 protected activity or that the Town interfered with any such rights under the Law.
2 However, it is well established that a public employer violates Section 10(a)(5) and,
3 derivatively, Section 10(a)(1) of the Law when it transfers bargaining unit work to non-
4 unit employees without giving the employees' exclusive collective bargaining
5 representative prior notice and an opportunity to bargain to resolution or impasse.
6 Commonwealth of Massachusetts v. Labor Relations Commission, 404 Mass. 124
7 (1989). Consequently, I find that the Town derivatively violated Section 10(a)(1) of the
8 Law.

9 CONCLUSION

10 Based on the record, and for the reasons stated above, I conclude that the Town
11 violated Sections 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by transferring
12 pre-arrival medical advice duties from Desk Officers to non-unit Action Ambulance
13 personnel without giving the Union prior notice and an opportunity to bargain to
14 resolution or impasse about the impacts of the decision on employees' terms and
15 conditions of employment.

16 REMEDY

17 The CERB fashions remedies for violations of the Law by attempting to place
18 charging parties in the positions they would have been in but for the unfair labor
19 practice. Natick School Committee, 11 MLC 1387, 1400, MUP-5157 (February 1,
20 1985). The traditional remedy where a public employer has unlawfully refused to
21 bargain is an order to restore the status quo ante until the employer has fulfilled its
22 bargaining obligation, and to make all affected employees whole for any economic
23 losses they may have suffered. Commonwealth of Massachusetts, 35 MLC 105, 110,

SUP-04-5054 (December 10, 2008). Where the bargaining obligation runs not to the underlying decision, but to its impact upon mandatory subjects of bargaining, the CERB fashions a remedy to restore the status quo ante applicable to those affected mandatory subjects, rather than to the decision itself. Town of Dennis, 12 MLC 1033.

Nevertheless, the Union does not request, and I do not order a return to status quo. Pursuant to M.G.L. c.6A, s.18B and 560 CMR 5.05 Desk Officers may not provide pre-arrival medical advice without training and certification as emergency medical dispatchers. Although the Union seeks a make whole remedy for all police officers who suffered any loss as a consequence of the Town's transfer of bargaining unit work, the evidence of economic harm is speculative, thus, I decline to order a make whole remedy. However, I order the Town to bargain in in good faith about the impacts of its decision to transfer pre-arrival medical advice duties from Desk Officers to non-unit Action Ambulance personnel on employees' terms and conditions of employment, which may include future training opportunities lost as the result of the Town's actions.

WHEREFORE, based upon the foregoing, IT IS HEREBY ORDERED that the Town shall:

1. Cease and desist from:

- a) Failing and refusing to bargain in good faith with the Union by unilaterally transferring bargaining unit work from Desk Officers to non-unit Action Ambulance personnel without first giving the Union notice and an opportunity to bargain to resolution or impasse about the impacts of the decision on employee's terms and conditions of employment.
- b) In any like manner, interfering with, restraining and coercing its employees in any rights guaranteed under the Law.

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

- 1 a) Upon request by the Union, bargain in good faith to resolution or
2 impasse with the Union over the impacts of the Town's decision to
3 transfer bargaining unit work from the Desk Officers to Action
4 Ambulance personnel on the employees' terms and conditions of
5 employment.
6
7 b) Post immediately in all conspicuous places where members of the
8 Union's bargaining unit usually congregate, or where notices are
9 usually posted, including electronically, if the Town customarily
10 communicates with these unit members via intranet or email and
11 display for a period of thirty (30) days thereafter, signed copies of
12 the attached Notice to Employees.
13
14 c) Notify the DLR in writing of steps taken to comply with this decision
15 within ten (10) days of receipt of this decision.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS



KATHLEEN GOODBERLET, ESQ.
HEARING OFFICER

APPEAL RIGHTS

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



THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

NOTICE TO EMPLOYEES

**POSTED BY ORDER OF A HEARING OFFICER OF THE
MASSACHUSETTS DEPARTMENT OF LABOR RELATIONS
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS**

A hearing officer of the Massachusetts Department of Labor Relations has held that the Town of Stoneham (Town) has violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by unilaterally transferring bargaining unit work. The Town posts this Notice to Employees in compliance with the Hearing Officer's order.

Section 2 of the Law 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.

The Town hereby assures its employees that:

WE WILL NOT unilaterally transfer bargaining unit work from Desk Officers to non-unit Action Ambulance personnel without first giving the Union notice and an opportunity to bargain to resolution or impasse about the impacts of the decision on employees' terms and conditions of employment.

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

WE WILL take the following affirmative action that will effectuate the purposes of the Law: bargain to resolution or impasse with the Union over the impacts of the decision to transfer bargaining unit work from the Desk Officers to Action Ambulance personnel on the employees' terms and conditions of employment.

Date

Town of Stoneham

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).