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

In the Matter of	*	
CITY OF SPRINGFIELD	*	Case No. MUP-12-2466
and	*	Date issued: June 30, 2015
COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 93	*	

Board Members Participating:

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

Appearances:

Maurice M. Cahillane, Esq. - Representing the City of Springfield

Joseph L. DeLorey, Esq. - Representing AFSCME, Council 93

DECISION ON APPEAL OF HEARING OFFICER DECISION

SUMMARY

On November 25, 2014, a Department of Labor Relations (DLR) Hearing Officer issued a decision holding that the City of Springfield (City or Employer) had violated Section 10(a)(5) and derivatively, Section 10(a)(1) of M.G.L. c.150E (the Law) by: 1) installing tracking devices in vehicles driven by City employees and recording the employees' location, idle time, distance driven, number of stops and speeding events in

those vehicles without first giving the American Federation of State, County and Municipal Employees, Council 93 (Union or AFSCME) prior notice and an opportunity to bargain to resolution or impasse over the decision to install the tracking devices and record relative data, and the impacts of that decision; and 2) failing to bargain on demand with the Union over that decision. The City filed a timely appeal from the decision to the Commonwealth Employment Relations Board (CERB), claiming that the Hearing Officer failed to rely on applicable precedent and disputing the Hearing Officer's conclusion that the installation of the GPS devices altered standards of performance such that bargaining was required. The Union filed a response claiming that the decision was correct. After reviewing the record and the parties' arguments on appeal, we affirm the decision.

Facts

The facts are undisputed. We therefore adopt them in their entirety and reiterate only those facts necessary to an understanding of our Opinion. Further reference may be made to the facts set out in the Hearing Officer's decision, reported at 41 MLC 130 (2014) and attached to the slip opinion of this decision.

Opinion[1]

The question before us is whether the Hearing Officer correctly decided that the City violated the Law when it refused to bargain with the Union before it installed global positioning system (GPS) devices on Department of Public Works (DPW) vehicles driven by members of the Union's bargaining unit. We start with the elemental principle that a public employer violates Section 10(a)(5) and, derivatively, Section 10(a)(1) of the

[1] The CERB's jurisdiction is not contested.

Law when it unilaterally changes an existing condition of employment or implements a new condition of employment involving a mandatory subject of bargaining without first giving its employees' exclusive collective bargaining representative notice and an opportunity to bargain to resolution or impasse. Commonwealth of Massachusetts v. Labor Relations Commission, 404 Mass. 124 (1989). However, a public employer may alter a procedural mechanism for enforcing existing work rules without bargaining, provided that the employer's actions do not change underlying conditions of employment. City of Taunton, 38 MLC 96, 98, MUP-06-4836, MUP-08-5150 (November 2, 2011) (citing Duxbury School Committee, 25 MLC 22, MUP-1446 (August 7, 1998)).

In this case, the Hearing Officer concluded that the City instituted a new practice when it surreptitiously installed the GPS devices. Because she further found that the installation affected a mandatory subject of bargaining, i.e., standards of productivity and performance, she concluded that the City violated Section 10(a)(5) and derivatively, Section 10(a)(1) of the Law when it installed the GPS devices without first giving the Union notice and an opportunity to bargain with the Union over the decision and its impacts.

The City makes several arguments on appeal. It first claims that the Hearing Officer erred when she declined to "properly credit" City of Worcester, MUP-05-4409 (Order of Dismissal, September 5, 2007). The City claims that it is not clear whether this case was a full decision or a pre-probable cause dismissal and, therefore, the Hearing Officer was wrong to dismiss it so cavalierly. We disagree. The title, first and final paragraphs and appeals language of this case make clear that the former Labor

Relations Commission dismissed the charge in this case for lack of probable cause.[2] Therefore, as the Hearing Officer correctly stated, although she could look to this pre-complaint dismissal for guidance, it had no precedential value. See City of Taunton, 38 MLC at 98-99, n. 7 (citing Quincy City Employees Union, H.L.P.E. 15 MLC 1340, 1368, n. 54 (1989) *aff'd sub nom.* Pattison v. LRC, 309 Mass. App. Ct. 9 (1991), f*urther rev. den'd,* 409 Mass. 1104 (1991)) ("Just as an issuance of a complaint reflects only the DLR'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 DLR's dismissal of a charge reflects that the evidence at the investigation was insufficient to establish probable cause to believe the Law had been violated") (emphasis added). As such, the Hearing Officer committed no error, much less reversible error, by failing to rely on this dismissal order. Id.

[2] The Appeals Language stated that the charging party could seek review of the determination pursuant to 456 CMR 15.04 (3). Both in 2005, when this dismissal letter issued and presently, this regulation sets forth the procedure a charging party must follow to appeal the dismissal of a charge. In 2005, this regulation stated in pertinent part:

> If, after a charge has been filed, the [Labor Relations] Commission declines to issue a complaint, it shall so notify the parties in writing by a brief statement of the procedural or other grounds for its determination. The charging party may obtain a review of such declination to issue a complaint by filing a request therefor with the Executive Secretary within ten days from the date of receipt of notice of such refusal by the Commission.

The first two sentences of the current regulation are the same except that it has been modified to comport with the 2007 amendments to Chapter 150E providing that DLR investigators and not the Commission issue dismissal letters in the first instance and requests for review are directed to the CERB. See M.G.L c. 150E, §11, as amended by Chapter 145 of the Acts of 2007.

The City next claims that, although the Hearing Officer appropriately declined to rely on Roadway Express, a 2002 NLRB Advice Memorandum,[3] her "strained attempt to diminish [Roadway Express] and City of Worcester only serves to highlight the fact that all the known existing authority on this issue supports the City." Along the same lines, the City argues that the Hearing Officer erroneously distinguished Duxbury School Committee, 25 MLC 22, MUP-1446 (August 7, 1998) in concluding that the installation of the tracking devices changed an underlying condition of employment by impacting standards of performance and productivity, a mandatory subject of bargaining. The City contends that the installation of the GPS devices did not change any performance standards because, both before and after they were installed, employees were required to go to their assigned location and perform their job.

It may be the case, as the City argues, that the installation of GPS devices on City vehicles did not alter the most basic of work rules, requiring employees to show up and work when the GPS devices were installed. This argument, however, ignores the undisputed findings, that prior to the installation of the GPS devices, the City neither monitored real-time data from DPW vehicles driven by unit members, nor required them to formally report this data absent a specific request from a supervisor. As the Hearing Officer correctly observed, these facts distinguish Duxbury, where the open installation of surveillance cameras to monitor discrepancies between employees' departure times and the times recorded on their timecards did not change the fact that employees had always been required report their time accurately on an electronic time clock. Here, however, the introduction of GPS technology occurred at a time where no formal vehicle

[3] 13-CA-39940-1 (Advice Memorandum, April 15, 2002).

data collection method existed and enabled the City to have continuous access to information concerning not only driver location, but also driving speed, idle time, number of stops, etc. Unlike in Duxbury, this plainly changed both the type and amount of information the City had previously been able to obtain regarding its drivers' job performance and productivity as opposed to monitoring compliance with a discrete work rule regarding time reporting.

The Hearing Officer also correctly distinguished Duxbury on grounds that the GPS here were installed surreptitiously. The clandestine installation of devices that enable an employer, for the first time, to engage in constant, remote electronic monitoring of aspects of employee performance that had not previously been routinely reported or observed plainly constitutes the institution of a new practice. The question then becomes whether the City had to bargain over this change. City of Taunton, 38 MLC at 98-99.

The Hearing Officer held that the installation of the GPS devices affected terms and conditions of employment impacting mandatory subjects of bargaining, including standards of productivity and performance. The City disagrees, arguing that employees faced no new work standards and claiming that there is no precedent to support the Hearing Officer's holding. We agree with the Hearing Officer's conclusion. The facts show that the GPS devices provided the City with continuous, real-time information about their drivers' job performance and productivity, e.g., where their drivers were, the distances they drove, how fast they were going, how many stops they made and how long they idled. Thus, even assuming that, in the short period of time that the GPS

devices were installed,[4] no new work rules or standards were formally implemented, the installation of the devices vastly increased the amount of data the employer had to evaluate performance and productivity. Indeed, within four days after the devices were installed in the Union president's vehicle, the City notified him that it had monitored and recorded two purportedly unauthorized trips he had taken to conduct union business. The increased monitoring of, and information about, employee job performance and productivity affected employees' underlying terms and conditions of employment such that the City was required to bargain over whether to install the devices and whether and how it intended to use the constant stream of information before installing them. Id.

In reaching this conclusion, we find an NLRB Advice Memo issued three years after Roadway Express instructive. In BP Exploration of Alaska, Inc., Case No. 19-CA-29566 (July 11, 2005) (BP Exploration), the issue was whether the employer violated Section 8(a)(5) of the National Labor Relations Act (NLRA) when it installed vehicle data recorders (VDRs) for the purpose of monitoring employee compliance with its driving safety rules without bargaining. The NLRB concluded that the employer was not free to unilaterally install the VDRs to monitor employee driving behavior because their installation "constituted a significant change in the employer's monitoring and disciplinary practices." Id. at slip op. 9-10. The NLRB discussed the Roadway Express Advice memo referenced above, in which the employer installed computer tracking devices on its vehicles to monitor driver locations. Because the drivers in that case had previously been required to radio their locations to dispatchers from destination to destination, the NLRB observed that the only difference between the new and old

[4] The GPS devices were installed sometime in November 2012 and deactivated the same month.

systems was whether the location information was generated by the employees or the computer. On those facts, the NLRB concluded that the unilateral change charge should be dismissed because the installation of the GPS devices did not have a substantial impact on employee working conditions. In BP Exploration, by contrast, the NLRB observed that the VDRs provided the employer with "far more information about employee driving behaviors" than it had previously been able to obtain via radio or personal observation." The NLRB further found that, "By substituting constant electronic observation for the security officers' intermittent, occasional, personal observations and radar readings, the use of the VDRs increases greatly the chances of being disciplined" and thus concluded that their use had a "material, substantial and significant impact on employee working conditions." BP Exploration, slip op. at 9-10 (internal quotation marks omitted). We reach a similar conclusion here and, on these facts, affirm that the City violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law when it installed GPS devices without giving the Union notice and an opportunity to bargain. It also violated the Law when it refused to bargain on demand with the Union over the installation of these devices.[5]

Conclusion

For the foregoing reasons, we affirm the Hearing Officer's decision and issue the following Order.

[5] The City does not dispute the facts on which the Hearing Officer concluded that it refused to bargain over this issue. It only disputes whether this was a mandatory subject of bargaining.

ORDER

WHEREFORE, based on the foregoing, it is hereby ordered that the City of Springfield shall:

Cease and desist from:

a. Implementing GPS tracking devices in DPW vehicles driven by unit members without first giving the Union notice and an opportunity to bargain to resolution or impasse over the decision and its impacts.

b. Failing or refusing to bargain collectively and in good faith with the Union over the issue of installing GPS tracking devices in DPW vehicles driven by unit members.

c. In any like manner, interfering with, restraining and coercing its employees in any right guaranteed under the Law.

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

a. Restore the prior practice of requiring unit members to provide their supervisors DPW vehicle reports via radio communication and in-person supervisory observation.

b. Upon request, bargain with the Union over the decision to install GPS tracking devices on DPW vehicles driven by unit members, and the impacts of that decision.

c. Sign and 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 City customarily communicates to its employees via intranet or e-mail, and maintain for a period of thirty (30) consecutive days thereafter, signed copies of the attached Notice to Employees; and

d. Notify the DLR in writing within thirty (30) days of receiving this Decision of the steps taken to comply with the Order.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
COMMONWEALTH EMPLOYMENT
RELATIONS BOARD

_____
MARJORIE F. WITTNER, CHAIR

_____
ELIZABETH NEUMEIER, CERB MEMBER

_____
HARRIS FREEMAN, 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 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 COMMONWEALTH EMPLOYMENT RELATIONS BOARD

The Commonwealth Employment Relations Board (CERB) has held that the City of Springfield (City) violated Sections 10(a)(5) and, derivatively, 10(a)(1) of General Laws Chapter 150E (the Law) by: (1) installing GPS tracking devices in vehicles driven by City employees and recording the employees' location, idle time, distance driven, number of stops and speeding events in those vehicles without first giving the Union prior notice or an opportunity to bargain to resolution or impasse over the decision to install the GPS tracking devices and record relative data, and the impacts of that decision; and (2) by failing to bargain with the Union to resolution or impasse on November 27 and 28, 2012 after it refused the Union's demand to bargain over the City's installation of GPS tracking devices and recording of relative data. The City posts this Notice to Employees in compliance with the Hearing Officer's order.

Section 2 of the Law gives all employees the right to form, join or assist a union; to participate in proceedings at the Department of Labor Relations; to act together with other employees for the purpose of collective bargaining or other mutual aid or protection; and, to choose not to engage in any of these protected activities.

The City assures its employees that:

WE WILL NOT unilaterally implement GPS tracking devices in DPW vehicles driven by unit members without first giving the Union notice and an opportunity to bargain to resolution or impasse over the decision and its impacts.

WE WILL NOT fail or refuse to bargain collectively and in good faith with the Union over the issue of installing GPS tracking devices in DPW vehicles driven by unit members.

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

WE WILL restore the practice of requiring unit members to provide their supervisors DPW vehicle reports via radio communication and in-person supervisory observation.

WE WILL upon request, bargain with the Union in good faith to resolution or impasse over the decision to install GPS tracking devices on DPW vehicles driven by unit members, and the impacts of that decision.

_____ _____
City of Springfield 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 Labor Relations, Charles F. Hurley Building, 1st Floor, 19 Staniford Street, Boston, MA 02114 (Telephone: (617) 626-7132).

DEPARTMENT OF LABOR RELATIONS

In the Matter of	*	
CITY OF SPRINGFIELD	*	Case No. MUP-12-2466
and	*	Date issued: November 25, 2014
AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 93	*	

Hearing Officer:

Kendrah Davis, Esq.

Appearances:

Maurice M. Cahillane, Esq. - Representing the City of Springfield

Joseph L. DeLorey, Esq. - Representing AFSCME, Council 93

HEARING OFFICER'S DECISION

SUMMARY

The issues are whether the City of Springfield (City or Employer) violated Section 10(a)(5) and derivatively, Section 10(a)(1) of M.G.L. c.150E (the Law): (1) by installing tracking devices in vehicles driven by City employees and recording the employees' location, idle time, distance driven, number of stops and speeding events in those vehicles without first giving the American Federation of State, County and Municipal Employees, Council 93 (Union or AFSCME) prior notice and an opportunity to bargain to resolution or impasse over the decision to install the tracking devices and record

relative data, and the impacts of that decision; and (2) by failing to bargain in good faith with the Union when it refused to bargain on November 27 and 28, 2012 after AFSCME requested to meet with the City on those dates to negotiate over the decision to install tracking devices and record relative data.

For the reasons explained below, I find that the City violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by installing tracking devices in vehicles driven by City employees and recording the employees' location, idle time, distance driven, number of stops and speeding events in those vehicles without first giving the Union prior notice and an opportunity to bargain to resolution or impasse over the decision to install the tracking devices and record relative data, and the impacts of that decision. I also find that the City violated the Law by refusing to bargain with the Union on November 27 and 28, 2012, after AFSCME requested to meet with the City on those dates to bargain over the decision to install tracking devices and record relative data.

STATEMENT OF THE CASE

On December 7, 2012, AFSCME filed a Charge of Prohibited Practice (Charge) with the Department of Labor Relations (DLR), alleging that the City had engaged in prohibited practices within the meaning of Section 10(a)(5) and derivatively, 10(a)(1) of the Law. On February 11, 2013, AFSCME filed an Amended Charge alleging an additional Section 10(a)(3) violation which it later withdrew on March 27, 2013. On July 11, 2013, a duly-designated DLR Investigator issued a two-count Complaint of Prohibited Practice (Complaint) alleging that the City: (1) unlawfully installed tracking

devices on City vehicles driven by certain employees and recorded data from those devices without first giving the Union prior notice and an opportunity to bargain to resolution or impasse over the decision to install and record data from the devices, and the impacts of that decision; and (2) refused to bargain in good faith on November 27 and 28, 2012 after the Union requested to meet to bargain over the tracking devices. On June 22, 2013, the City filed its Answer.

On June 17, 2014, I conducted a hearing at which both parties had a full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence.[6] The Union and the City filed their post-hearing briefs on July 16 and 17, 2014, respectively.

STIPULATION OF FACTS

The parties stipulated to the following facts:

1. The City 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 bargaining representative for certain employees employed by the City, including employees who work in the Department of Public Works (DPW).

FINDINGS OF FACT

[6] At the hearing, approximately 26 minutes of witness testimony was missing from the official record due to an inadvertent technical error. In lieu of relitigating that portion of the hearing, on or about September 9, 2014, the parties agreed to include a typed version of my handwritten notes from that 26-minute segment as part of the official record.

The Collective Bargaining Agreement

The Union and the City were parties to a collective bargaining agreement (Agreement) effective from July 1, 2011 – June 30, 2012. The Agreement is silent about the City's use of Global Positioning Systems (GPS) and GPS tracking devices.

The GPS Devices

In or about 2010, the City first acquired four GPS tracking devices for use in DPW vehicles. GPS tracking devices capture and process certain data about the location and movements of DPW vehicles, eliminating the need for alternate forms of monitoring (e.g., radio communication by the driver, in-person supervisory visits and/or public complaints). If a supervisor needed a certain driver's vehicle data, either the driver would informally report that information via radio communication or a supervisor would informally obtain that information via in-person visit.

In or about November of 2012, DPW Deputy Director Mario Mazza (Mazza) first installed GPS tracking devices in vehicles operated by DPW administrative personnel (non-bargaining unit members) for experimental purposes only. After that experimental period, Mazza installed those devices in DPW vehicles driven by unit-members. The City also began electronically monitoring the GPS tracking devices from a remote location via a GPS unit map on the GPS website. By remotely monitoring the GPS

tracking devices, supervisors were able to determine the drivers' "real time" work locations, idle time, speed, distance driven and number of stops made.[7]

Prior to the GPS device installations, the City did not have any tracking devices in its DPW vehicles. Nor did it have the capacity to determine a DPW vehicle's "real-time" location, idle time, speeding events or number of stops other than what the driver reported to the supervisor over the radio or what the supervisor observed personally.[8] Prior to, during and after the GPS device installations, the City never required individual unit members to formally report their vehicle's location, idle time, vehicle speed, distance driven or number of stops made unless that information was specifically requested by a supervisor. At all relevant times, the City expected unit members to adhere to traffic laws and the "rules of the road."

Sumares' GPS data

The City authorizes DPW employees to make work-related trips in their DPW vehicles. If DPW employees want to make non work-related trips in DPW vehicles, they must first secure proper authorization.[9]

[7] The record is unclear about whether the City kept the GPS data in perpetuity or deleted the information.

[8] The record is unclear about the frequency of driver-to-supervisor radio reports and when/how many times a supervisor would personally observe a driver's DPW vehicle information.

[9] The record is unclear about whether the City allows employees to take DPW vehicles home with them.

On or about November 23, 2012, Mazza instructed Bob Bernard (Bernard) to install a GPS tracking device on a vehicle operated by DPW foreman and Union President Charles Sumares (Sumares). Soon after the installation, Mazza learned that Sumares had made two unauthorized trips in his DPW vehicle to conduct Union business at the City's Police Department and at another city's municipal water treatment plant.[10] At some point between November 23 and 27, 2012, the City notified Sumares that it had monitored and recorded his two unauthorized trips via the GPS tracking device that it installed on his DPW vehicle. Sumares then complained to Union Staff Representative Martha Fila (Fila) about the City's installation of a GPS tracking device on his DPW vehicle and explained that his two unauthorized trips were for Union-related business.

Fila corresponded with the City's Director of Human Resources William Mahoney (Mahoney) by e-mail on November 27 and 28, 2012, demanding that the City stop using GPS tracking devices on DPW vehicles driven by unit-members, including Sumares. Specifically, on November 27, 2012, Fila stated in full:

> Good Morning,
>
> It has been reported to me that a change in working conditions has taken place. I understand that a GPS device has been placed in one of the Foreman's trucks by Bob Bernard.

[10] The record does not indicate whether Sumares used his DPW vehicle to make unauthorized trips during or after his scheduled work hours.

> Please let this e-mail serve as an official notice to cease and desist from this immediately. I am requesting that you provide to me in writing that this demand has been met no later than November 29, 2012.
>
> Thank you,
> Martha Fila

By reply e-mail to Fila on November 27, 2012, Mahoney stated that the City was authorized to use the GPS tracking devices pursuant to a probable cause determination made by the Commonwealth Employment Relations Board (CERB) where it had dismissed a similar GPS allegation raised by another union in a separate case. Specifically, Mahoney's e-mail stated, in full:

> Hi Martha,
>
> I believe the DLR has already decided this issue in one or two cases and determined that this is not a change in working conditions. Specifically, please see City of Worcester and NAGE Local 495 MUP-05-4409.
>
> Thanks,
> Bill

By e-mail on November 28, 2012, Fila responded to Mahoney's November 27, 2012 e-mail, inquiring about whether his response meant that the City would "not be cooperating with the Union's demand to cease and desist?" By reply e-mail on that same day, Mahoney replied to Fila, stating in full:

> Hi Martha,
>
> Yes, I don't believe we are in violation of the law based on the DLR's decision in the City of Worcester case. If you have another decision on point please let me know.
>
> Thanks,

Bill

Fila corresponded with Mahoney on November 28, 2012, reiterating the Union's position that the installation of GPS tracking devices constituted "a change in working conditions, and requires notice to the union, and is a mandatory subject of bargaining." The City did not reply to Fila's last correspondence and the parties never met to bargain over the issue.

The Employer never disciplined Sumares for his unauthorized travel in November of 2012; and, since that incident, the City has deactivated and discontinued its use of the four GPS tracking devices.

DECISION

A public employer violates Section 10(a)(5) and, derivatively, 10(a)(1) of the Law when it unilaterally changes an existing condition of employment or implements a new condition of employment involving a mandatory subject of bargaining without first giving its employees' exclusive bargaining representative notice and an opportunity to bargain to resolution or impasse. Commonwealth of Massachusetts v. Labor Relations Commission, 404 Mass. 124 (1989); School Committee of Newton v. Labor Relations Commission, 388 Mass. 557 (1983); Commonwealth of Massachusetts, 30 MLC 63, SUP-4784 (Oct. 9, 2003). To establish a violation, a union must show that: (1) the employer changed an existing practice or instituted a new one; (2) the change had an impact on a mandatory subject of bargaining; and, (3) the change was implemented without prior notice to the union and an opportunity to bargain to resolution or impasse.

Commonwealth of Massachusetts, 30 MLC at 64; Town of Shrewsbury, 28 MLC 44, 45, MUP-1704 (June 29, 2001); Commonwealth of Massachusetts, 27 MLC 11, 13, SUP-4378 (Aug. 24, 2000).

The Unilateral Change.

The Union argues that the City instituted a new practice when it installed GPS tracking devices on DPW vehicles driven by unit employees in November of 2012. The Union contends that the installation was unlawful because prior to November of 2012, the City did not have an established practice of requiring unit members to report their "real-time" location, idle time, speed distance traveled and number of stops made, absent a request for that information by a supervisor. In the alternative, the Union asserts that if the City did establish a prior work rule that required unit members to report their location, idle time, speed distance traveled and number of stops made while driving DPW vehicles, such reporting was only done by the driver via radio communication or by a supervisor's personal observations; but, never by real-time, 24-hour monitoring on a GPS website.

The City contends that because it has always monitored DPW employees while driving DPW vehicles, there was neither a change to any existing practice nor an institution of a new practice when it installed GPS tracking devices on those vehicles in November of 2012. To the extent that the installation of GPS tracking devices on DPW vehicles was a new (or changed) practice, the City argues that the decision was based

on a "brief" experimental time period that ended without discipline or consequence to unit members.

Specifically, the Employer relies on an unpublished CERB determination in City of Worcester, MUP-05-4409 (Sept. 5, 2007).[11] In that case, the city required unit members to carry GPS cellular telephones while they were on duty but not during their breaks. At the investigatory stage, the CERB dismissed the charge after finding that the Union had failed to show: (1) how the GPS phones altered unit members 'wages, hours and other terms and conditions of employment; and (2) how the GPS phones constituted anything more than a more efficient and accurate way for the employer to enforce its existing work rules. The Employer also relies on a National Labor Relations Board (NLRB) advisory memorandum in Roadway Express, Inc., Case 13-CA-39940-1 (April 15, 2002), which dismissed the allegations that an employer's implementation of GPS technology violated the National Labor Relations Act (NLRA).

While I find some guidance in the City of Worcester and Roadway Express, Inc. dismissals, I need not rely on them here because neither the CERB nor the NLRB gives precedential value to pre-hearing dismissals. See City of Taunton, 38 MLC 96, 98-99 n.7, MUP-06-4836 and MUP-08-5150 (H.O. May 19, 2011), aff'd 38 MLC 96 (Nov. 2, 2011) (citing Quincy City Employees Union, H.L.P.E., 15 MLC 1340, 1368 n. 54, MUPL-

[11] Between 2006 and 2007, the CERB issued probable cause determinations for prohibited practice charges filed at the investigatory stage. At some point on or after November 14, 2007, this practice changed and hearing officers began issuing probable cause determinations pursuant to Chapter 145 of the Acts of 2007.

2883 and MUP-6037 (Jan. 24, 1989) aff'd sub nom Pattison v. Labor Relations Commission, 309 Mass. App. Ct. 9, (1991), further rev. den'd, 409 Mass. 1104 (1991)); see also Bakery Wagon Drivers & Salesmen, Local Union No. 484 v. NLRB, 321 F.2d 353, 356-57 (1963) (the NLRB will not find a violation of the NLRA that is not fully litigated at the hearing). Consequently, the City's reliance on City of Worcester and Roadway Express, Inc. as binding precedent must fail.

Arguing that it was not obligated to bargain with the Union over the installation of the GPS tracking devices or its impacts, the City also cites Duxbury School Committee, 25 MLC 22, 24, MUP-1446 (Aug. 7, 1998). In that case, the CERB found that there was no violation of the Law when the employer installed a surveillance camera in an open and fixed location to monitor employees' arrival and departure times because the installation neither altered any pre-existing work rules nor affected any underlying conditions of employment. Specifically, the employer had required unit members to regularly record their arrival and departure times by punching an electronic time clock. After learning that some unit members had falsified their time cards, the employer installed a surveillance camera to ensure the accuracy of the existing method of timekeeping. Id. at 24. Because the employer's surveillance was limited to recording only employees' departure times and was instituted merely as a more efficient and dependable means of enforcing existing work rules, the CERB held that the employer was not obligated to bargain with the union over the surveillance camera installation.

The City contends that it was not obligated to bargain with the Union because like the employer's installation of surveillance cameras in Duxbury, its installation of GPS tracking devices on DPW vehicles in November of 2012 did not change any underlying conditions of employment. However, Duxbury is distinguished because in that case the employer had previously required employees to electronically report their arrival and departure times, and only installed one surveillance camera in an open and fixed location to monitor the accuracy of employees' arrival and departure times. Here, there is no evidence that the City had previously required employees to electronically report their whereabouts while traveling in DPW vehicles; instead that reporting was done via radio communication or in-person observation and, only upon request. Also, the City's installation of GPS tracking devices did not occur in a fixed and open location where employees could see the devices, but were surreptitiously placed on DPW vehicles without first notifying the employees or the Union of their installation. Duxbury is further distinguished because the employer in that case was motivated to install the surveillance camera to enforce a pre-existing timekeeping system and to prevent already discovered fraud. Here, the City installed the GPS tracking devices at a time when no formal vehicle data collection method existed; and made those installations weeks *before* Sumares had taken his two unauthorized trips.

In addition, the City contends that its sole motivation for instituting the GPS program was for "experimental" purposes only, not to monitor or investigate any pre-existing suspicions of inappropriate employee conduct. Because of the experimental

nature of the GPS program and because the City terminated the program after a brief test-period, the Employer argues that there was no need for it to bargain with the Union. However, the CERB holds that an employer must still bargain over experimental/temporary changes to employees' terms and conditions of employment when those changes affect mandatory subjects of bargaining. See generally Commonwealth of Massachusetts, 39 MLC 14, SUP-08-5447 (H.O. July 31, 2012), aff'd in part, rev'd in part (Dec. 27, 2012) (employer's implementation of policy created new changes in the way it temporarily reassigned state-owned vehicles).

1. Standards of Productivity and Performance

A public employer must bargain with its employees' bargaining representative to impasse or resolution before establishing new conditions of employment affecting mandatory subjects of bargaining. Newton School Committee, 5 MLC 1016 (1978), enf'd sub. nom. School Committee of Newton v. Labor Relations Commission, 388 Mass. 557, 572 (1983). The charging party must establish a unilateral change in a pre-existing condition of employment affecting a mandatory subject of bargaining to prove a violation of the Law. City of Boston, 8 MLC 1077, 1081 (1981). The Board holds that a performance evaluation system, which measures standards of productivity and performance is a mandatory subject of bargaining within the meaning of Section 6 of the Law. Town of Wayland, 5 MLC 1738, 1741 (1979).

Prior to November of 2012, the City neither monitored real-time data from DPW vehicles driven by unit members, nor required unit members to formally report their real-

time data absent a specific request from a supervisor. On or about November 23, 2012 the City changed that underlying condition of employment when it installed GPS tracking devices in DPW vehicles driven by unit members and began monitoring real-time data gleaned from those tracking devices (e.g., idle time, speed, distance driven or number of stops made) via the GPS website, which impacted standards of performance and productivity. Town of Andover, 28 MLC 264, 269-70, MUP-1012 and MUP-1186 (Feb. 7, 2002) (citing City of Lowell, 28 MLC 126, 127-28, MUP-2299 (October 10, 2001); Commonwealth of Massachusetts, 27 MLC 1, 4-5, SUP-4304 (June 30, 2000) (it is well established that the decision to implement a new standard for assessing performance is a mandatory subject of bargaining); see generally Murphy Diesel Co., 184 NLRB 757, 762-64 (1970) aff'd 454 F.2d 303 (7th Cir. 1971) (employer changed a pre-existing work rule that did not require a written explanation to be excused for an absence; the new work rule required written explanations for excused absences, which constituted a material, substantial, and a significant change that affected employees' terms and conditions of employment).

The City intended for the GPS program to electronically measure in real-time, specific information that the employer had previously used to evaluate the performance of DPW drivers. Thus, because the Employer changed the standards of measuring Sumares' performance by using electronic GPS tracking devices instead of using radio call-ins or supervisory in-person check-ins, the City was obligated to first negotiate with the Union prior to implementing that change. See City of Taunton, 38 MLC at 98-99. In

that case, the city had established a practice of taking employees' daily attendance on sheets of paper, which did not include their actual arrival or departure times. Without bargaining to resolution or impasse with the union, the city installed a new time-punch clock along with a surveillance camera to monitor employees' activity at the time-punch clock. The city later upgraded the time-punch clock and installed an electronic card swipe system to track employees' attendance, again without notifying the union and providing it with an opportunity to bargain to resolution or impasse. Consequently, the CERB found that the employer in City of Taunton was obligated to bargain over the installation of surveillance equipment because the installation affected an underlying term or condition of employment. Id., 38 MLC at 98-99.

Based on this evidence, I find that the City unlawfully instituted a new practice of installing GPS tracking devices and recording real-time data from DPW vehicles driven by unit members, which impacted a mandatory subject of bargaining. The City instituted that change without giving the Union prior notice and an opportunity to bargain to resolution or impasse over the decision or its impacts because it was implemented in the beginning of November of 2012, several weeks before the Union actually became aware of the change. Commonwealth of Massachusetts, 27 MLC at 13. Accordingly, I find that the City has violated Section 10(a)(5) of the Law in the manner alleged.

1. The Failure to Bargain.

Section 6 of the Law requires public employers to negotiate before changing the wages, hours, working conditions or standards of productivity and performance of their

employees. School Committee of Newton v. Labor Relations Commission, 388 Mass. 557 (1983); see also Commonwealth of Massachusetts, 36 MLC 65, 68, SUP-05-5191 (Oct. 23, 2009); Town of Andover, 28 MLC at 269-70. Although there is no precise formula for determining the level of participation in the bargaining process required to meet the requirement of Section 6 of the Law, the CERB has long recognized that refusing to meet is a per se violation of Section 10(a)(1) and (5). New Bedford Housing Authority, 27 MLC 21, 24, MUP-1650 (Sept. 7, 2000) (citing Boston School Committee, 23 MLC 111, MUP-9810 and MUP-1090 (Nov. 13, 1996)); see also Everett School Committee, 9 MLC 1308, 1311-12, MUP-4599 (Sept. 21, 1982).

Once the Union became aware that the City had installed GPS tracking devices on DPW vehicles driven by unit members, it immediately demanded to bargain with City. However, by e-mails on November 27 and 28, 2012, the Employer expressly refused to meet with the Union and bargain over the issue. The City raises the same defenses to the refusal to bargain allegation as it asserted to justify the unilateral change, and I have rejected those defenses. Consequently, I find that the City's failure to bargain with the Union on November 27 and 28, 2012, over the installation of GPS tracking devices on DPW vehicles driven by unit members violated the Law.

CONCLUSION

For the reasons stated above, I conclude that the City violated Section 10(a)(5) and, derivatively, Section 10(a)(1) the Law by installing GPS tracking devices on DPW vehicles driven by unit members and recording the location, idle time, distance driven,

number of stops and speeding events from those tracking devices without first giving the Union prior notice and an opportunity to bargain to resolution or impasse over the decision and its impacts. I also conclude that the City violated the Law by refusing to bargain with the Union on November 27 and 28, 2012 after AFSCME requested to meet with the City on those dates to bargain over the installation of GPS tracking devices on DPW vehicles driven by unit members and the recording of relative data from those vehicles.

ORDER

WHEREFORE, based on the foregoing, it is hereby ordered that the City of Springfield shall:

Cease and desist from:

e. Implementing GPS tracking devices in DPW vehicles driven by unit members without first giving the Union notice and an opportunity to bargain to resolution or impasse over the decision and its impacts.

f. Failing or refusing to bargain collectively and in good faith with the Union over the issue of installing GPS tracking devices in DPW vehicles driven by unit members.

g. In any like manner, interfering with, restraining and coercing its employees in any right guaranteed under the Law.

3. Take the following affirmative action that will effectuate the purpose of the Law:

a. Restore the prior practice of requiring unit members to provide their supervisors DPW vehicle reports via radio communication and in-person supervisory observation.

b. Upon request, bargain with the Union over the decision to install GPS tracking devices on DPW vehicles driven by unit members, and the impacts of that decision.

c. Sign and 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 City customarily communicates to its employees via intranet or e-mail, and maintain for a period of thirty (30) consecutive days thereafter, signed copies of the attached Notice to Employees; and

d. Notify the DLR in writing within thirty (30) days of receiving this Decision of the steps taken to comply with the Order.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

/s/
KENDRAH DAVIS, ESQ.