

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

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In the Matter of

CITY OF HAVERHILL

and

HAVERHILL FIREFIGHTERS UNION,  
LOCAL 1011, IAFF

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Case No. MUP-13-3066

Date Issued: May 24, 2016

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**CERB Members Participating:**

Marjorie F. Wittner, Chair  
Elizabeth Neumeier, CERB Member  
Katherine G. Lev, CERB Member

**Appearances:**

David Grunebaum, Esq.	-	Representing the City of Haverhill
Jillian Ryan, Esq.	-	Representing the Haverhill Firefighters Union, Local 1011, IAFF

**CERB DECISION ON APPEAL OF HEARING OFFICER DECISION**

**SUMMARY**

1        On March 30, 2015 a duly-designated Department of Labor Relations (DLR)  
2        Hearing Officer issued a decision holding that the City of Haverhill (City) violated  
3        Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws  
4        Chapter 150E (the Law) by failing to bargain over the conditions under which members  
5        of the Haverhill Firefighters Union, Local 1011, IAFF (Union) must complete the  
6        Massachusetts Ethics Reform Law's (M.G.L. c. 268A, §28) mandatory online training

1 requirements (Online Training Program). The City filed a request for review of the  
2 decision with the Commonwealth Employment Relations Board (CERB) asserting that  
3 the Hearing Officer made incorrect and unsupported findings of fact, failed to make  
4 required findings of fact, failed to address a critical argument made by the City, and  
5 made incorrect rulings of law. We affirm the Hearing Officer's conclusion but, in one  
6 respect, on alternative grounds.

### 7 Background

8 The parties stipulated to certain facts and the Hearing Officer made additional  
9 findings of fact that we adopt and summarize the salient facts below. Further reference  
10 may be made to the Hearing Officer's decision, published at 41 MLC 291, and attached  
11 to the slip opinion of this decision.

12 In April 2010, the Commonwealth began requiring all public employees to  
13 complete an Online Training Program covering various aspects of M.G.L. c. 268A, §28,  
14 the Massachusetts Ethics Reform Law (Ethics Reform Law). The Online Training  
15 Program consists of a series of power point slides describing the statute and  
16 hypothetical scenarios, and poses multiple choice questions, all of which must be  
17 answered correctly before the employee can move to the next question. At that time,  
18 Captain Richard Accardi (Accardi) was the City Fire Department's Training Officer.  
19 Accardi instructed the firefighters regarding completion of the Online Training Program,  
20 collected their certificates of completion and submitted them to the City's Human  
21 Resources Department. Accardi did not require that each firefighter complete the

1 Online Training Program while on duty, nor did he monitor firefighters as they went  
2 through the Online Training Program.<sup>1</sup>

3 On March 27, 2013, to comply with the State Ethics Reform Bill of 2009  
4 (amended 2011), the City's Human Resources Director, Mary Carrington (Carrington),  
5 sent a Notice to all City employees (Carrington Notice) regarding the requirement that  
6 they complete an Online Training Program "in compliance with the State Ethics Reform  
7 Bill of 2009 (amended 2011)" no later than April 16, 2013. The Notice states, in  
8 pertinent part, that "[c]ompletion can be done on or off work time and could take up to  
9 one (1) hour. Department Heads have been made aware of this arrangement."

10 Sometime between March 27 and April 3, 2013, Fire Chief Richard Borden  
11 (Borden) ordered all firefighters to complete the Online Training Program while on duty  
12 and in the presence of the Training Officer, then Captain David Butt (Butt). Butt set up  
13 multiple computers at a central location for that purpose and informed the firefighters of  
14 certain requirements. Specifically at issue here, firefighters were required to complete  
15 the Online Training Program while on duty and in Butt's presence.

The State Ethics Commission (Commission) promulgated "Mandatory Education and Training Guidelines" (Guidelines), which provide several options for public employers and employees to comply with the online training requirement. The Guidelines specifically state that employees "can complete the training on work time and on their work computers or during non-work time on their home computers or any other available computer, such as, for instance at a public library. . . ." The Guidelines

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<sup>1</sup> As discussed below, we reject the City's challenge to this finding.

also allow employers to combine any of the suggested methods or propose alternative methods to the Commission.

1 Challenges to the Hearing Officer's Findings of Fact

2 Absent a clear preponderance of relevant evidence to indicate that a hearing  
3 officer's credibility determination was incorrect, the CERB will not overrule the  
4 determination. Town of Clinton, 12 MLC 1361, 1365, MUP-5659 (November 9, 1985)  
5 and cases cited therein.

6 The City, relying upon the testimony of Borden that the same level of monitoring  
7 occurred in 2010 as in 2013,<sup>2</sup> argues that the Hearing Officer incorrectly found that  
8 there was a change in the manner of Haverhill firefighters completing the Online  
9 Training Program. The Hearing Officer, noting that Borden admitted that he did not  
10 know how Accardi administered the Online Training Program beyond collecting the  
11 certificates of completion, did not credit Borden's testimony that the "cookie problem"  
12 that existed in 2010 required the training officer to be present and monitor each  
13 firefighter. The Hearing Officer also referenced the testimony of three firefighters that  
14 Accardi did not monitor them for the 2010 Online Training Program. Although the City  
15 disagrees with this credibility determination, it points to no relevant evidence in the  
16 record, beyond that already rejected by the Hearing Officer, to demonstrate that he was  
17 incorrect. The CERB therefore declines to modify the finding.

18 The City further argues that only a sworn officer with higher rank within the chain  
19 of command can issue an order giving instructions to a firefighter of lower rank and

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<sup>2</sup> The City's Supplementary Statement refers to "taking the mandatory ethics exam in 2010 and 2012." This is an apparent error because there was no such requirement in 2012. We will treat the reference to 2012 as 2013.

1 claims that the Hearing Officer incorrectly appears to place Carrington in the chain of  
2 command. However, according to the City, Carrington did not and could not issue any  
3 order or directive applicable to the City's Fire Department.

4 The City mischaracterizes the Hearing Officer's treatment of Carrington's Notice  
5 to all City employees about completing the Online Training Program. We note that  
6 Carrington's Notice was not an order or directive to the subordinate employees in the  
7 Fire Department. Rather, the Notice conveyed the requirements of the Ethics Reform  
8 Law. Implementation of those requirements was left up to department heads, including  
9 the Fire Chief. The Hearing Officer did not construe the Notice as an "order" regarding  
10 how the Online Training Program was to be conducted. Rather, he found that it  
11 "confirmed the City's past practice of allowing employees to complete it on or off work  
12 time and without supervision." Therefore, we reject the City's "chain of command"  
13 argument as a basis to overturn the Hearing Officer's decision.

#### 14 Opinion<sup>3</sup>

15 The Hearing Officer, after correctly stating the standard applied to determine  
16 whether there has been a unilateral change in an existing condition of employment in  
17 violation of Section 10(a)(5), found that the City had violated Section 10(a)(5) and,  
18 derivatively, Section 10(a)(1) of the Law when it required firefighters to complete the  
19 Online Training Program on duty, in the presence of the training officer, without first  
20 bargaining with the Union over the decision to implement those requirements and the  
21 impacts of that decision. He rejected the City's affirmative defense that the Union had  
22 waived its right to bargain over training, and the defenses that Carrington was outside

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<sup>3</sup> The CERB's jurisdiction is not contested.

1 the fire department's chain of command and that the City's actions were justified. For  
2 the reasons set forth below, we agree but, in one respect, modify the Hearing Officer's  
3 reasoning.

#### 4 Unilateral Change

5 A public employer violates Sections 10(a)(5) and (1) of the Law when it  
6 unilaterally changes wages, hours, or other terms and conditions of employment without  
7 first bargaining to resolution or impasse with the employees' exclusive bargaining  
8 representative. School Committee of Newton v. Labor Relations Commission, 388  
9 Mass. 557 (1983); Town of Arlington, 21 MLC 1125, MUP-8966 (August 1, 1994) and  
10 cases cited. To establish a unilateral change violation, a charging party must show that:  
11 1) the respondent has changed an existing practice or instituted a new one; 2) the  
12 change affected employee wages, hours, or working conditions and thus implicated a  
13 mandatory subject of bargaining; and 3) the change was implemented without prior  
14 notice or an opportunity to bargain. Bristol County Sheriff's Department, 31 MLC 6, 18  
15 MUP-2872 (July 15, 2004)(citing City of Boston, 26 MLC 177, 181, MUP-1431 (March  
16 23, 2000)).

17 The Hearing Officer found that the Union had established all three prongs of this  
18 test. First, on the basis of one occurrence in 2010, the Hearing Officer found a "past  
19 practice" of allowing employees to complete the Online Training Program on or off-duty  
20 and without supervision.<sup>4</sup> As the Hearing Officer stated, to determine whether a  
21 practice exists the CERB analyzes the combination of facts upon which the alleged

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<sup>4</sup> The Hearing Officer's findings with respect to how the training was conducted in 2010 and 2013 were supported by substantial evidence in the record, including his credibility determinations, and we accept those facts as set forth in his decision.

1 practice is predicated, including whether the practice has occurred with regularity over a  
2 sufficient period of time so that it is reasonable to expect that the practice will continue.  
3 Swansea Water District, 28 MLC 244, 245, MUP-2436, 2456 (January 23, 2002).  
4 Further, a practice may be found despite sporadic or infrequent activity where a  
5 consistent practice that applies to rare circumstances is followed each time that the  
6 circumstances preceding the practice recurs. Commonwealth of Massachusetts, 23  
7 MLC 171, 172, SUP-3586 (January 30, 1997). The City contends that the Hearing  
8 Officer wrongly found that one event can establish a past practice. However, as the  
9 Hearing Officer stated, the CERB has not set a definitive length of time required for a  
10 practice to become a binding term or condition of employment. See City of Boston, 41  
11 MLC 119, 126, MUP-13-3771, MUP-14-3466, MUP-14-3504 (November 7, 2014 (citing  
12 City of Boston, 20 MLC 1603, 1608-1609, MUP-7976 (May 20, 1994))). Nor do we  
13 believe that it is practical to consider an artificial or arbitrary length of time as a proper  
14 standard to be applied in making these standards. City of Boston, 20 MLC at 1608-  
15 1609. Nevertheless, none of the cases cited by the Hearing Officer involve a single  
16 instance of an activity giving rise to a binding past practice. To the contrary, in  
17 Swansea Water District, supra, the CERB expressly found that the one time when the  
18 employer had called vacationing employees back to work during an emergency did "not  
19 constitute an existing practice over a sufficient period of time so that it would be  
20 reasonable for the bargaining unit members to conclude that the practice would  
21 continue." 28 MLC at 245. Nor do any of the other cases cited by the Hearing Officer  
22 provide for basing a past practice solely on one event. See, e.g., City of Everett, 8 MLC  
23 1036, MUP-3807 (June 4, 1981), aff'd 8 MLC 1393 (October 21, 1981)(the fact that Civil

1 Service exams were given on an irregular basis did not defeat the past practice  
2 because the practice was followed each of the *three* previous times the exams had  
3 been given). Here, as in Swansea Water District, we find that the one prior time the  
4 Online Training Program was administered was neither regular nor recurring and  
5 therefore was insufficient to establish a past practice. We therefore do not uphold the  
6 Hearing Officer's conclusion on this point.

7 However, a charging party can also establish the first prong of a unilateral  
8 change violation by showing that the employer implemented a *new* condition of  
9 employment involving a mandatory subject of bargaining. Bristol County Sheriff's  
10 Department, 31 MLC at 18. Here, we have upheld the Hearing Officer's finding that,  
11 before Borden issued the directive, firefighters were not required to complete the Online  
12 Training Program while on duty or monitored as they completed it. Under similar  
13 circumstances, the CERB has held that a charging party had established the first prong  
14 of a unilateral change violation by showing that the Employer imposed a new term or  
15 condition of employment. See Commonwealth of Massachusetts 39 MLC 169, 172,  
16 SUP-08-5447 (December 27, 2012) (July 2008 order establishing assignment of state-  
17 owned vehicles based on mileage and other criteria was a new working condition that  
18 the union only became aware of in July 2008); City of Westfield, 25 MLC 163, 165,  
19 MUP-9698 (April 20, 1999)(where there was no evidence that employer had ever  
20 ordered an officer on injured-on-duty status to perform an assignment that was limited  
21 to dispatch or restricted from overtime and outside details, the city was obligated to  
22 bargain before imposing these new conditions upon injured-on-duty officer)(citing  
23 Higher Education Coordinating Council, 22 MLC 1662, 1669, SUP-4078 (April 11 1996)



1 and cases cited therein)). Likewise here, in the absence of evidence of a countervailing  
2 practice, Borden's first-time directive that bargaining unit members complete the Online  
3 Training Program while on duty and in the presence of a training officer constitutes a  
4 new term or condition of employment and thus satisfies the first element of a unilateral  
5 change violation. City of Westfield, 25 MLC at 163.

6       There is no dispute that Borden's directive affected employees' hours, working  
7 conditions and mandatory training, all mandatory subjects of bargaining. There is also  
8 no dispute that the new condition was implemented without prior notice and an  
9 opportunity to bargain. Thus, all three elements of the unilateral change violation have  
10 been established. We therefore affirm the Hearing Officer's conclusion that the City  
11 was obligated to give the Union notice and an opportunity to bargain over that decision  
12 and its impacts, prior to implementation.

13       The City argues that firefighters are in training every day, and the decision,  
14 methods, means and manner of implementation are never bargained. This argument  
15 appears to rely upon a practice regarding the types of training firefighters need on a  
16 regular basis. However, the Online Training Program is mandated by the  
17 Commonwealth to be completed every two years. G. L. c. 268A, §28. The existence of  
18 a practice regarding daily training therefore does not affect the bargaining obligation  
19 with respect to the new requirements Borden has imposed for completing the Online  
20 Training Program.

21       Further, the Hearing Officer correctly found that the Union did not waive its right  
22 to bargain because it did not demand to bargain or identify impacts of the change.  
23 Where a public employer raises the affirmative defense of waiver by inaction, it bears

1 the burden of proving that the union had: 1) actual knowledge of the proposed change;  
2 2) a reasonable opportunity to negotiate prior to the employer's implementation of the  
3 change; and, 3) unreasonably or inexplicably failed to bargain or to request bargaining.  
4 School Committee of Newton v. Labor Relations Commission, 388 Mass. at 570 (1983).  
5 Such a waiver will not be lightly inferred. Town of Natick and IBPO, 2 MLC 1086, 1092,  
6 MUP-2098, 2102 (1975) and cases cited therein.

7 When Carrington issued the Notice on March 27, 2013 with the completed  
8 certificates due no later than April 16, 2013, Borden admittedly announced the changes  
9 discussed above, without prior notice to the Union and without any effort to solicit the  
10 Union's views or to negotiate. Thus, this is a classic case of "fait accompli" in that the  
11 Chief's order was announced and implemented, unilaterally, with no opportunity for  
12 bargaining. Hence, the Union cannot be held to have waived its right to bargain.  
13 Town of Dennis, 12 MLC 1027, 1032, MUP-5247 (June 21, 1985)(union presented with  
14 a fait accompli was not required to demand bargaining to preserve its right to  
15 an adjudication of unlawful conduct or remedial relief.)

16 Borden chose to impose the new conditions of requiring firefighters to complete  
17 the Online Training Program while on duty and in the presence of the training officer,  
18 without notice to the Union or providing an opportunity to bargain. Relying upon City of  
19 Boston v. CERB, 453 Mass. 389 (2009), the Hearing Officer found that an employer's  
20 voluntary selection of an option not mandated by law about a mandatory subject must  
21 be bargained. The City seeks to distinguish this decision by arguing that this is a claim  
22 arising under Section 7(d) of the Law with no wage involvement. This argument lacks  
23 merit.

1        City of Boston involved a dispute over the obligation to bargain over the city's use  
2 of the partial public safety exemption to the length of the work period used for overtime  
3 calculations permitted under the Fair Labor Standards Act., 29 USC, §§201 et. seq.  
4 The Supreme Judicial Court rejected the city's argument that federal law preempted its  
5 obligation to bargain. 453 Mass. at 395-399. Finding that, at most, the federal law  
6 allowed the city to choose from a greater range of permissible overtime calculation  
7 formulas than would otherwise be available, the Court concluded, among other things,  
8 that the obligation to bargain under Chapter 150E did not conflict with federal law or  
9 stand as an obstacle to the accomplishment of a federal objective. 453 Mass. at 395-  
10 399. Here, similarly, the Guidelines provide a range of choices for how employees can  
11 complete the Online Training Program required under the Ethics Reform Law. Thus,  
12 what must be bargained, as the Hearing Officer found, is the selection and institution of  
13 those new terms and conditions that are not mandated by G. L. c. 268A §28 or the  
14 various options for compliance set forth in the Guidelines. The fact that City of Boston  
15 involved federal law and actual wages due, rather than a state requirement is irrelevant  
16 to this analysis.

17        The City makes the related argument that the Hearing Officer erred as a matter  
18 of law in failing to find that G. L. c. 268A, §28 is outside the scope of bargaining and not  
19 a mandatory subject of bargaining. G. L. c. 268A, §28 is not among the statutes listed  
20 in Section 7(d) that are subordinate to a collective bargaining agreement. It is well-  
21 established, however, that collective bargaining over a topic is prohibited only where  
22 such bargaining would materially conflict with the authority imposed upon the public  
23 employer by a statute not listed in Section 7(d) of the Law. Daniel Adams v. City of

Boston, 461 Mass. 602 (2012). As set forth above, while M.G.L. c. 268A, §28 mandates that all public employees must complete the Online Training Program, it does not mandate what procedure the public employer must follow in administering it. Accordingly, there is no conflict between M.G.L. c. 268, §28 and the duty to bargain over the selection and institution of those new terms and conditions that are not mandated by G. L. c. 268A, §28 or the procedures for implementation established by the Commission. In the absence of such conflict, the fact that M.G.L. c. 268A, §28 is not specifically enumerated in Section 7(d) of the Law does not preclude the requirement that the City bargain over the institution of Borden's newly-instituted requirements for completing the Online Training Program. Id. Thus, the Hearing Officer properly found that the City was obligated to bargain over the institution of Borden's newly-instituted requirements for completing the Online Training Program.

### Conclusion

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

### **ORDER**

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

1. Cease and desist from:

- a) Unilaterally requiring firefighters to complete the Online Training Program while on duty and under the supervision of the training officer;
- b) In any like manner, interfering with, restraining and coercing its employees in any right guaranteed under the Law.

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

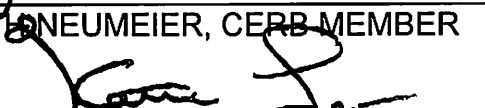
- 1 a) Upon request, bargain with the Union in good faith to agreement or  
2 impasse over the decision to require unit members to complete the Online  
3 Training Program while on duty and under the supervision of the training  
4 officer, and the impacts of that decision.  
5  
6 b) Post immediately in all conspicuous places where members of the  
7 Haverhill Firefighters bargaining unit usually congregate, or where notices  
8 are usually posted, including electronically, if the City customarily  
9 communicates with these unit members via intranet or email and display  
10 for a period of thirty (30) days thereafter, signed copies of the attached  
11 Notice to Employees.  
12  
13 c) Notify the DLR in writing of steps taken to comply with this decision within  
14 ten (10) days of receipt of this decision.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS  
COMMONWEALTH EMPLOYMENT RELATIONS BOARD

  
MARJORIE F. WITTNER, CHAIR

  
ELIZABETH NEUMEIER, CERB MEMBER

  
KATHERINE G. LEV, 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  
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS**

The Commonwealth Employment Relations Board has held that the City of Haverhill (City) has violated Sections 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by failing to bargain in good faith by unilaterally imposing the conditions under which City firefighters must complete the Massachusetts Ethics Reform Law's (M.G.L. c. 268A, §28) mandatory online training requirements (Online Training Program) without first giving the Union notice and an opportunity to bargain to resolution or impasse over the decision and its impacts.

Section 2 of the M.G.L. c. 150E gives public employees the following rights:

- to engage in self-organization: to form, join or assist any union;
- to bargain collectively through representatives of their own choosing;
- to act together for the purpose of collective bargaining or other mutual aid or protection; and
- to refrain from all of the above.

WE WILL NOT unilaterally impose the conditions under which City firefighters must complete the Online Training Program without first giving the Union notice and an opportunity to bargain to resolution or impasse over the decision and its impacts.

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 to effectuate the purposes of the Law:

Upon request, bargain with the Union in good faith to resolution or impasse over the decision to require unit members to complete the Online Training Program on work time and under supervision, and the impacts of that decision.

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City of Haverhill

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Date

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

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

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS

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In the Matter of

CITY OF HAVERHILL

and

HAVERHILL FIREFIGHTERS UNION,  
LOCAL 1011, IAFF

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Case No. MUP-13-3066

Date Issued: March 30, 2015

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Hearing Officer:

Nicholas Chalupa, Esq.

Appearances:

David Grunebaum, Esq.	-	Representing the City of Haverhill
Jillian Ryan, Esq.	-	Representing the Haverhill Firefighters Union, Local 1011, IAFF

HEARING OFFICER DECISION

SUMMARY

1  
2 The issue in this case is whether the City of Haverhill (City) violated Section  
3 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws Chapter  
4 150E (the Law) by failing to bargain over the conditions under which members of the  
5 Haverhill Firefighters Union, Local 1011, IAFF (Union) must complete the  
6 Massachusetts Ethics Reform Law's (G.L. c. 268A §28) mandatory online training

1 requirements (Online Training Program). I find that the City violated the Law in the  
2 manner alleged.

3 STATEMENT OF THE CASE

4 On August 22, 2013, the Union filed a charge of prohibited practice with the  
5 Department of Labor Relations (DLR) alleging that the City had violated Sections  
6 10(a)(5) and (1) of the Law. A DLR hearing officer conducted an investigation on  
7 December 18, 2013. On December 20, 2013, the investigator issued a Complaint  
8 alleging that the City violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the  
9 Law by requiring employees to complete the Online Training Program in the presence of  
10 the City's training officer without giving the Union notice and an opportunity to bargain to  
11 resolution or impasse over the decision and its impacts on bargaining unit members'  
12 terms and conditions of employment. The City filed an Answer to the Complaint on  
13 January 21, 2014.

14 I conducted a hearing on August 20, 2014 (Day 1). Due to a recording equipment  
15 malfunction, I held a second day of hearing on October 15, 2014 to rehear the portion of  
16 Day 1 that was not properly recorded. Both parties had an opportunity to be heard, to  
17 examine witnesses and to introduce evidence. The parties submitted their post-hearing  
18 briefs on November 17, 2014. Upon review of the entire record, including my  
19 observation of the demeanor of the witnesses, I make the following findings of fact and  
20 render the following decision.

21 Stipulated Facts



1. The City of Haverhill ("City" or "Respondent") is a public employer within the meaning of Section 1 of the Law.
2. Haverhill Firefighters Union, Local 1011, IAFF ("Union" or "Charging Party") is an employee organization within the meaning of Section 1 of the Law.
3. The Union is the exclusive bargaining representative for a bargaining unit of employees including firefighters employed by the City.
4. On or about March 27, 2013, the City's Human Resources Department issued a notice to all City employees instructing employees how to complete the required Online Training Program mandated by the State Ethics Commission (the Commission) and that such training must be completed by Tuesday, April 16, 2013.

#### FINDINGS OF FACT

##### I. Ethics Reform Law

G.L. c. 268A § 28 (the Ethics Reform Law) states:

The state ethics commission shall prepare and update from time to time the following online training programs, which the commission shall publish on its official website: (1) a program which shall provide a general introduction to the requirements of this chapter; and (2) a program which shall provide information on the requirements of this chapter applicable to former state, county, and municipal employees. Every state, county, and municipal employee shall, within 30 days after becoming such an employee, and every 2 years thereafter, complete the online training program. Upon completion of the online training program, the employee shall provide notice of such completion to be retained for 6 years by the appropriate employer.

The commission shall establish procedures for implementing this section and ensuring compliance.

The Commission's Mandatory Education and Training Guidelines (the Guidelines) provide several options for public employers and employees to comply with the online training requirement. The Guidelines specifically state that employees "can

1 complete the training on work time and on their work computers, or during non-work  
2 time on their home computers or any other available computer, such as, for instance, at  
3 a public library.” The Guidelines also allow employers to combine any of the suggested  
4 methods or propose alternative methods to the Commission. If the Commission  
5 approves an employer’s proposal, the alternative method will satisfy the online training  
6 requirement.

7 The Online Training Program consists of a series of power point slides describing  
8 the various aspects of the G.L. c. 268A, and includes hypothetical scenarios and a final  
9 assessment. All questions included in the Online Training Program are multiple choice  
10 and must be answered correctly before the employee can move on to the next question.  
11 If an employee selects an incorrect answer, the employee must continue selecting  
12 answers until he or she chooses the correct one. There is no consequence for choosing  
13 an incorrect answer, and it is impossible to fail the final assessment.

14 II. Online Training Program for Haverhill Firefighters

15 a. 2010

16 In April 2010, the Commonwealth began requiring all public employees to  
17 complete the Online Training Program. Captain Richard Accardi (Accardi), the Haverhill  
18 Fire Department’s Training Officer at the time, instructed Haverhill firefighters to  
19 complete the Online Training Program by the end of the week. Accardi then collected  
20 the certificates of completion from each firefighter and submitted them to the City’s  
21 human resources department. Accardi did not require that each firefighter complete the

1 Online Training Program while on duty, nor did he monitor firefighters as they went  
2 through the Online Training Program.<sup>1</sup>

3  
4 b. 2013

5 On March 27, 2013, the City's Human Resources Director Mary Carrington  
6 (Carrington) issued a notice to all City employees as described in paragraph 4 of the  
7 stipulated facts (the Notice). The Notice states that "[c]ompletion can be done on or off  
8 work time and could take up to one (1) hour. Department Heads have been made aware  
9 of this arrangement."

10 Sometime between March 27, 2013 and April 3, 2013, Chief Richard Borden  
11 (Borden) ordered all firefighters to complete the Online Training Program while on duty  
12 and in the presence of the Training Officer, Captain David Butt (Butt). Borden and Butt  
13 developed a procedure for Butt to administer the Online Training Program. Butt called  
14 each crew, one at a time, to a central location. Butt set up multiple computers so that  
15 several firefighters could complete the Online Training Program simultaneously. Butt  
16 determined that the Online Training Program should be completed in approximately 55  
17 minutes. He informed the firefighters that if they completed the Online Training Program  
18 in less than 55 minutes, he would know that they had skipped a portion of the program.

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<sup>1</sup> Chief Borden described a "cookie problem" with the Fire Department's computers that required the Training Officer to erase the cookies on each computer after a firefighter completed the Online Training Program. I credit Chief Borden's testimony that the described "cookie problem" existed, but I do not credit Chief Borden's testimony that the "cookie problem" required the training officer to be present and monitor each firefighter's Online Training Program. Borden admitted during testimony that he did not know how Accardi administered the Online Training Program beyond collecting the certificates of completion. Further, firefighters Gregg Roberts, Stephen Ryan and David Butt all testified that Accardi did not monitor them for the 2010 Online Training Program.

1 Butt recorded each firefighter's start time and end time. He also recorded any breaks  
2 and noted where they stopped in Online Training Program. Butt did not monitor each  
3 firefighter for the entire Online Training Program, but would check in intermittently.  
4 When the firefighter completed the Online Training Program, the firefighter was required  
5 to call Butt in to mark the time and witness the firefighter print the certificate of  
6 completion. Butt then entered the certificate of completion into the fire department's  
7 training records along with the firefighter's start and end time.

### 8 9 10 OPINION

11 A public employer violates Section 10(a)(5) of the Law when it implements a  
12 change in a mandatory subject of bargaining without first providing the employees'  
13 exclusive collective bargaining representative with prior notice and an opportunity to  
14 bargain to resolution or impasse. School Committee of Newton v. Labor Relations  
15 Commission, 338 Mass. 557 (1983). The duty to bargain extends to both conditions of  
16 employment that are established through past practice<sup>1</sup> as well as conditions of  
17 employment that are established through a collective bargaining agreement. Town of  
18 Burlington, 35 MLC 18, 25, MUP-04-4157 (June 30, 2008), aff'd sub nom., Town of  
19 Burlington v. Commonwealth Employment Relations Board, 85 Mass. App. Ct. 1120  
20 (May 19, 2014); Commonwealth of Massachusetts, 27 MLC 1, 5, SUP-4304 (June 30,  
21 2000).

22 To establish a unilateral change violation, the charging party must show that: 1)  
the employer altered an existing practice or instituted a new one; 2) the change affected

1 a mandatory subject of bargaining; and 3) the change was established without prior  
2 notice or an opportunity to bargain. City of Boston, 20 MLC 1603, 1607, MUP-7976  
3 (1994); Commonwealth of Massachusetts, 20 MLC 1545, 1552, SUP-3460 (May 13,  
4 1994).

- 5 1. The City altered an existing practice by requiring firefighters to complete the  
6 Online Training Program on-duty, in the presence of the training officer.  
7

8 I first address whether the employer altered an existing practice or instituted a  
9 new one. To determine whether a practice exists, I must analyze the combination of  
10 facts upon which the alleged practice is predicated, including whether the practice has  
11 occurred with regularity over a sufficient period of time so that it is reasonable to expect  
12 that the practice will continue. Swansea Water District, 28 MLC 244, 245, MUP-2436,  
13 MUP-2456 (January 23, 2002); Commonwealth of Massachusetts, 23 MLC 171, 172,  
14 SUP-3586 (January 30, 1997). A condition of employment may be found despite  
15 sporadic or infrequent activity where a consistent practice that applies to rare  
16 circumstances is followed each time that the circumstances preceding the practice  
17 recurs. Commonwealth of Massachusetts, 23 MLC at 172; City of Everett, 8 MLC 1036,  
18 1038, MUP-3807 (June 4, 1981), aff'd 8 MLC 1393 (October 21, 1981) (applying this  
19 standard to the practice of allowing time off to take promotional Civil Service exams  
20 which are given on an irregular basis). The Commonwealth Employment Relations  
21 Board (Board) has not set a definitive length of time required for a practice to become a  
22 binding term or condition of employment, but has used a case-by-case approach. City of  
23 Boston, 41 MLC 119, MUP-13-3371, MUP-14-3466, MUP-14-3504 (November 7, 2014),  
24 citing, City of Boston, 20 MLC 1603, 1608-1609, MUP-7976 (May 20, 1994).

1 In 2010, the only other time the Commonwealth required public employees to  
2 complete the Online Training Program, the City did not require firefighters to complete  
3 the Online Training Program on duty and in the presence of the training officer. In 2013,  
4 the City issued the Notice stating that the required Online Training Program "can be  
5 done on or off work time." Although the City only conducted the Online Training  
6 Program once, the Notice confirmed the City's past practice of allowing employees to  
7 complete it on or off work time and without supervision.

8 2. The City's decision affected mandatory training requirements a mandatory  
9 subject of bargaining.  
10

11 Mandatory training is a mandatory subject of bargaining. Town of Bridgewater,  
12 MUP-8634 (slip op. June 20, 1997). See also, City of Boston, 23 MLC 177, MUP-1431  
13 (2000). Here, the Commonwealth has exercised its authority to require that public  
14 employees complete the Online Training Program, and there is no dispute that the City  
15 had no duty to bargain over the decision to require the Online Training Program  
16 because a public employer has no duty to bargain if a third party exercised its authority  
17 to make a decision. Massachusetts Correction Officers Federated Union v. Labor  
18 Relations Commission, 417 Mass. 7, 8-9 (1994). However, an employer's voluntary  
19 selection of an option not mandated by law about a mandatory subject must be  
20 bargained. City of Boston v. Commonwealth Employment Relations Board, 453 Mass.  
21 389 (2009).

22 G.L. c. 268A § 28 mandates that all public employees must complete the Online  
23 Training Program, but does not mandate what procedure a public employer must follow  
24 in administering the Online Training Program. The Guidelines provide several options

1 and leave open the possibility of alternative methods. Therefore, which option the City  
2 chooses to administer the Online Training Program is a mandatory subject of  
3 bargaining.

4 3. The City's defenses are without merit.  
5

6 The City makes three arguments in support of its actions: 1) that Carrington is  
7 outside of the fire department's chain of command and has no authority over the  
8 activities of the fire department; 2) the Union waived its right to bargain over training;  
9 and 3) the City's actions were justified. I am not persuaded by these arguments.

10 The City's argues that the Haverhill Fire Department's chain of command means  
11 that the Fire Chief has complete authority over the fire department, and the City's  
12 human resources department does not have any control over its activities. I disagree. A  
13 city's fire department is not an independent entity subject only to the fire chief's  
14 authority. The fire department is a subdivision of the City, and all fire employees are City  
15 employees. Borden is an agent of the City and must comply its human resources  
16 policies and procedures. Therefore, I do not find that the Fire Department's chain of  
17 command allows the Chief to make unilateral changes in mandatory subjects of  
18 bargaining.

19 Next, the City argues that the Union waived its right to bargain over training  
20 because it has never raised any issues concerning the manner, methods or means of  
21 training at the bargaining table, and did not specifically request to bargain the  
22 administration of the Online Training Program. The affirmative defense of waiver by  
23 inaction must be supported by evidence that the union had actual knowledge and a  
24 reasonable opportunity to negotiate over the proposed change, but unreasonably or

1 inexplicably failed to bargain or request to bargain. Commonwealth of Massachusetts, 8  
2 MLC 1894 (1982). The Board does not apply the doctrine of waiver by inaction where  
3 the employer presents the union with a fait accompli. Ashburnham-Westminster  
4 Regional School District, 29 MLC 191, 194 (2003). Further, a union does not waive all  
5 future rights to bargain over a mandatory subject of bargaining simply because it has  
6 not bargained over certain issues in the past. Therefore, I do not find that the Union  
7 waived its right to bargain over the Online Training Program or mandatory training  
8 generally.

9 Finally, the City argues that it was justified in its decision to monitor the  
10 firefighters closely because of previous ethics violations by the City's firefighters. Unlike  
11 retaliation charges under Section 10(a)(3) or 10(a)(4) of the Law, the analysis under  
12 Section 10(a)(5) of the Law does not include a review of the employer's reason for  
13 taking the alleged unlawful act. Justification is not a defense to a charge that an  
14 employer has made unilateral changes in a mandatory subject of bargaining. City of  
15 Chelsea, 1 MLC 1299, MUP-2031 (February 27, 1975) (finding that, although employer  
16 has legitimate interest in curbing sick leave abuse, it must bargain over any change to  
17 its sick leave policies).

### 18 CONCLUSION

19 Based on the record and for the reasons stated above, I conclude that the City  
20 violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by failing to  
21 bargain with the Union over the conditions under which members of Union must  
22 complete the Online Training Program.

### 23 ORDER



1        WHEREFORE, based upon the foregoing, IT IS HEREBY ORDERED that the  
2 City shall:

3        2. Cease and desist from:

4            c) Requiring firefighters to complete the Online Training Program on  
5 duty and under the supervision of the training officer.

6  
7            d) In any like manner, interfering with, restraining and coercing its  
8 employees in any right guaranteed under the Law.

9  
10        3. Take the following action that will effectuate the purpose of the Law:

11  
12            a) Restore the prior practice of allowing firefighters to complete the  
13 Online Training Program independently, on or off work time.

14  
15            b) Post immediately in all conspicuous places where members of the  
16 Haverhill Firefighters bargaining unit usually congregate, or where  
17 notices are usually posted, including electronically, if the City  
18 customarily communicates with these unit members via intranet or  
19 email and display for a period of thirty (30) days thereafter, signed  
20 copies of the attached Notice to Employees.

21  
22            c) Notify the DLR in writing of steps taken to comply with this decision  
23 within ten (10) days of receipt of this decision.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS

\_\_\_\_\_/s/\_\_\_\_\_  
NICHOLAS CHALUPA  
HEARING OFFICER