

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

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

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

STATEMENT OF THE CASE

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

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

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.

- 1
2 4. On or about March 27, 2013, the City's Human Resources Department issued a
3 notice to all City employees instructing employees how to complete the required
4 Online Training Program mandated by the State Ethics Commission (the
5 Commission) and that such training must be completed by Tuesday, April 16,
6 2013.

7 FINDINGS OF FACT

8 I. Ethics Reform Law

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

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

21
22 The commission shall establish procedures for implementing this section
23 and ensuring compliance.

24
25 The Commission's Mandatory Education and Training Guidelines (the
26 Guidelines) provide several options for public employers and employees to comply with
27 the online training requirement. The Guidelines specifically state that employees "can
28 complete the training on work time and on their work computers, or during non-work
29 time on their home computers or any other available computer, such as, for instance, at
30 a public library." The Guidelines also allow employers to combine any of the suggested
31 methods or propose alternative methods to the Commission. If the Commission
32 approves an employer's proposal, the alternative method will satisfy the online training
33 requirement.

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

8 II. Online Training Program for Haverhill Firefighters

9 a. 2010

10 In April 2010, the Commonwealth began requiring all public employees to
11 complete the Online Training Program. Captain Richard Accardi (Accardi), the Haverhill
12 Fire Department's Training Officer at the time, instructed Haverhill firefighters to
13 complete the Online Training Program by the end of the week. Accardi then collected
14 the certificates of completion from each firefighter and submitted them to the City's
15 human resources department. Accardi did not require that each firefighter complete the
16 Online Training Program while on duty, nor did he monitor firefighters as they went
17 through the Online Training Program.¹

¹ 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.

b. 2013

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

Sometime between March 27, 2013 and April 3, 2013, Chief Richard Borden (Borden) ordered all firefighters to complete the Online Training Program while on duty and in the presence of the Training Officer, Captain David Butt (Butt). Borden and Butt developed a procedure for Butt to administer the Online Training Program. Butt called each crew, one at a time, to a central location. Butt set up multiple computers so that several firefighters could complete the Online Training Program simultaneously. Butt determined that the Online Training Program should be completed in approximately 55 minutes. He informed the firefighters that if they completed the Online Training Program in less than 55 minutes, he would know that they had skipped a portion of the program. Butt recorded each firefighter's start time and end time. He also recorded any breaks and noted where they stopped in Online Training Program. Butt did not monitor each firefighter for the entire Online Training Program, but would check in intermittently. When the firefighter completed the Online Training Program, the firefighter was required to call Butt in to mark the time and witness the firefighter print the certificate of completion. Butt then entered the certificate of completion into the fire department's training records along with the firefighter's start and end time.

OPINION

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

13 To establish a unilateral change violation, the charging party must show that: 1)
14 the employer altered an existing practice or instituted a new one; 2) the change affected
15 a mandatory subject of bargaining; and 3) the change was established without prior
16 notice or an opportunity to bargain. City of Boston, 20 MLC 1603, 1607, MUP-7976
17 (1994); Commonwealth of Massachusetts, 20 MLC 1545, 1552, SUP-3460 (May 13,
18 1994).

- 19 1. The City altered an existing practice by requiring firefighters to complete the
20 Online Training Program on-duty, in the presence of the training officer.
21

22 I first address whether the employer altered an existing practice or instituted a
23 new one. To determine whether a practice exists, I must analyze the combination of
24 facts upon which the alleged practice is predicated, including whether the practice has

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

15 In 2010, the only other time the Commonwealth required public employees to
16 complete the Online Training Program, the City did not require firefighters to complete
17 the Online Training Program on duty and in the presence of the training officer. In 2013,
18 the City issued the Notice stating that the required Online Training Program "can be
19 done on or off work time." Although the City only conducted the Online Training
20 Program once, the Notice confirmed the City's past practice of allowing employees to
21 complete it on or off work time and without supervision.

- 22 2. The City's decision affected mandatory training requirements a mandatory
23 subject of bargaining.
24

1 Mandatory training is a mandatory subject of bargaining. Town of Bridgewater,
2 MUP-8634 (slip op. June 20, 1997). See also, City of Boston, 23 MLC 177, MUP-1431
3 (2000). Here, the Commonwealth has exercised its authority to require that public
4 employees complete the Online Training Program, and there is no dispute that the City
5 had no duty to bargain over the decision to require the Online Training Program
6 because a public employer has no duty to bargain if a third party exercised its authority
7 to make a decision. Massachusetts Correction Officers Federated Union v. Labor
8 Relations Commission, 417 Mass. 7, 8-9 (1994). However, an employer's voluntary
9 selection of an option not mandated by law about a mandatory subject must be
10 bargained. City of Boston v. Commonwealth Employment Relations Board, 453 Mass.
11 389 (2009).

12 G.L. c. 268A § 28 mandates that all public employees must complete the Online
13 Training Program, but does not mandate what procedure a public employer must follow
14 in administering the Online Training Program. The Guidelines provide several options
15 and leave open the possibility of alternative methods. Therefore, which option the City
16 chooses to administer the Online Training Program is a mandatory subject of
17 bargaining.

18 3. The City's defenses are without merit.

19
20 The City makes three arguments in support of its actions: 1) that Carrington is
21 outside of the fire department's chain of command and has no authority over the
22 activities of the fire department; 2) the Union waived its right to bargain over training;
23 and 3) the City's actions were justified. I am not persuaded by these arguments.

1 The City's argues that the Haverhill Fire Department's chain of command means
2 that the Fire Chief has complete authority over the fire department, and the City's
3 human resources department does not have any control over its activities. I disagree. A
4 city's fire department is not an independent entity subject only to the fire chief's
5 authority. The fire department is a subdivision of the City, and all fire employees are City
6 employees. Borden is an agent of the City and must comply its human resources
7 policies and procedures. Therefore, I do not find that the Fire Department's chain of
8 command allows the Chief to make unilateral changes in mandatory subjects of
9 bargaining.

10 Next, the City argues that the Union waived its right to bargain over training
11 because it has never raised any issues concerning the manner, methods or means of
12 training at the bargaining table, and did not specifically request to bargain the
13 administration of the Online Training Program. The affirmative defense of waiver by
14 inaction must be supported by evidence that the union had actual knowledge and a
15 reasonable opportunity to negotiate over the proposed change, but unreasonably or
16 inexplicably failed to bargain or request to bargain. Commonwealth of Massachusetts, 8
17 MLC 1894 (1982). The Board does not apply the doctrine of waiver by inaction where
18 the employer presents the union with a fait accompli. Ashburnham-Westminster
19 Regional School District, 29 MLC 191, 194 (2003). Further, a union does not waive all
20 future rights to bargain over a mandatory subject of bargaining simply because it has
21 not bargained over certain issues in the past. Therefore, I do not find that the Union
22 waived its right to bargain over the Online Training Program or mandatory training
23 generally.

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

10 CONCLUSION

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

15 ORDER

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

18 1. Cease and desist from:

- 19 a) Requiring firefighters to complete the Online Training Program on
20 duty and under the supervision of the training officer.
21
22 b) In any like manner, interfering with, restraining and coercing its
23 employees in any right guaranteed under the Law.
24

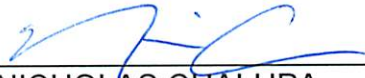
25 2. Take the following action that will effectuate the purpose of the Law:
26

- 27 a) Restore the prior practice of allowing firefighters to complete the
28 Online Training Program independently, on or off work time.

- 1
2 b) Post immediately in all conspicuous places where members of the
3 Haverhill Firefighters bargaining unit usually congregate, or where
4 notices are usually posted, including electronically, if the City
5 customarily communicates with these unit members via intranet or
6 email and display for a period of thirty (30) days thereafter, signed
7 copies of the attached Notice to Employees.
8
9 c) Notify the DLR in writing of steps taken to comply with this decision
10 within ten (10) days of receipt of this decision.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS



NICHOLAS CHALUPA
HEARING OFFICER

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. c.150E, Section 11, 456 CMR 13.02(1)(j), and 456 CMR 13.15, to request a review of this decision by the Commonwealth Employment Relations Board by filing a Notice of Appeal with the Executive Secretary of the Department of Labor Relations not later than ten days after receiving notice of this decision. If a Notice of Appeal is not filed within ten days, the 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 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 changing the conditions under which City firefighters must complete the Massachusetts Ethics Reform Law's (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. The hearing officer also held that the Town violated Section 10(a)(1) of the Law when it interfered with, restrained and coerced its employees in the exercise of their rights guaranteed under Section 2 of the Law.

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

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

WE WILL NOT unilaterally change the conditions under which City firefighters must complete G.L. c. 268A §28's 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 fail or refuse to bargain collectively and in good faith with the Union over the issue of the conditions under which unit members must complete the Online Training Program.

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:

Restore the practice of allowing unit members to complete the Online Training Program on or off work time and without supervision.

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.

City of Haverhill

Date

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

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