

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of

CITY OF WORCESTER

and

NATIONAL ASSOCIATION OF
GOVERNMENT EMPLOYEES,
LOCAL 495

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Case: MUP-14-3729

Date Issued: April 6, 2018

Hearing Officer:

Margaret M. Sullivan, Esq.

Appearances:

William R. Bagley Jr., Esq. - Representing the City of Worcester

Michael F. Manning, Esq. - Representing the National Association
of Government Employees, Local 495

HEARING OFFICER'S DECISION

SUMMARY

1 The issue in this case is whether the City of Worcester (City or Employer)
2 violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General
3 Laws, Chapter 150E (the Law) by hiring a new employee to work in the Department of
4 Public Work's (DPW) Reservoir Division as a motor equipment repairman (MER)
5 without first offering the position to MERs already working in the DPW. For the reasons
6 explained below, I find that the City did not violate the Law in the manner alleged in the
7 complaint.

Statement of the Case

1 On May 22, 2014, the Union filed a charge of prohibited practice with the
2 Department of Labor Relations (DLR), alleging that the City had violated Sections
3 10(a)(5) and (1) of the Law. A DLR hearing officer investigated the charge on
4 September 23, 2014. On December 3, 2014, the investigator issued a complaint
5 alleging that the City violated Sections 10(a)(5) and, derivatively, Section 10(a)(1) of the
6 Law by hiring a new employee to work as a MER in the DPW's Reservoir Division
7 without first offering the position to other MERs already working in the DPW. The City
8 filed its answer on December 9, 2014.

9 I conducted a hearing on April 27, 2017. Both parties had an opportunity to be
10 heard, to call witnesses and to introduce evidence. The parties submitted their post-
11 hearing briefs on August 11, 2017. Upon review of the entire record, including my
12 observation of the demeanor of the witnesses, I make the following findings of fact and
13 render the following opinion.

Stipulated Facts

- 14 1. The City is a public employer within the meaning of Section 1 of the Law.
- 15
- 16 2. The Union (Local 495) is an employee organization within the meaning of Section
- 17 1 of the Law.
- 18
- 19
- 20
- 21 3. The Union is the exclusive bargaining representative for certain mechanic and
- 22 service positions, including Motor Equipment Repairman (MER), employed by
- 23 the City.
- 24
- 25 4. On or about November 22, 2013, the City hired a new employee to fill a Motor
- 26 Equipment Repairman position in the Reservoir Division.

Findings of Fact¹1 Background

2 The Town's DPW consists of several divisions, including Central Garage, Water,
3 Sewer Operations (Sewer), Streets, Traffic Signs, Sanitation, and Reservoir.² Central
4 Garage is the DPW's main garage, whose mechanics service any and all vehicles and
5 equipment from the various divisions. Certain of the DPW's divisions, including the
6 Water, Sewer and Reservoir Divisions, have their own satellite garages, whose
7 mechanics service the vehicles and equipment from those divisions. The City employs
8 approximately eight to ten mechanics, who have the title of MER, at the Central Garage
9 and the satellite garages.³ Most MERs, who work at the Central Garage, are assigned
10 to the day shift, while two MERs, who work at the Central Garage, are assigned to the
11 night shift. MERs who work at the satellite garages are only assigned to the day shift.
12 The types of vehicles and equipment that the MERs maintain and repair vary in the
13 different divisions.

14 Relevant Contractual Provisions

15 The Union represents the MERs in a bargaining unit with employees from various
16 other City departments, including the Library, Public Health, Parks and Recreation,
17 Code Inspection, Weights and Measures, and Traffic Engineering. The Union and the
18 City are parties to a collective bargaining agreement that, by its terms, was in effect

¹ The DLR's jurisdiction in this matter is uncontested.

² Reservoir is actually part of the Water Division but for the purposes of this case is treated as a separate division.

³ In the past, the City employed as many as twenty MERs to work at the DPW.

from July 1, 2010 through June 30, 2013 (2010-2013 CBA). The 2010-2013 CBA provided in relevant part as follows:

Article 4-Management Rights

In the interpretation of this Agreement, the City shall not be deemed to have been limited in any way in the exercise of the regular and customary functions of municipal management or governmental authority and shall be deemed to have retained and reserved unto itself all the powers, authority and prerogatives of municipal management or governmental authority including, but not limited to, the following examples: the operations and direction of the affairs of the departments in all of their various aspects; the determination of the level of services to be provided; the direction, control, supervision and evaluation of the employees; the determination of employee classifications; the determination and interpretation of job descriptions, but not substantive changes; the planning, determination, direction and control of all the operations and services of the departments (and their units and programs); the increase, diminishment, change or discontinuation of operations in whole or in part; the institution of technological changes or the revising of processes, systems or equipment; the alteration, addition or elimination of existing methods, equipment, facilities or programs; the determination of the methods, means, location, organization, number and training of personnel of the departments, or its units or programs; the assignment and transfer of employees; the scheduling and enforcement of working hours; the assignment of overtime; the determination of whether employees (if any) in a classification are to be called in for work at times other than their regularly scheduled hours and the determination of the classification to be so called; the determination of whether goods should be made, leased, contracted or purchased on either a temporary or permanent basis; the hiring, appointment, promotion, demotion, suspension, discipline, discharge, or relief of employees due to lack of funds or of work, or the incapacity to perform duties or for any other reason; the making, implementation, amendment, and enforcement of such rules, regulations, operating and administrative procedures from time to time as the City deems necessary; and the power to make appropriation of funds; except to the extent abridged by a specific provision of this Agreement or law.

The rights of management under this article and not abridged shall not be subject to submission to the arbitration procedure established in Article 11 herein.

Nothing in this article shall be interpreted or deemed to limit or deny any rights of management provided [sic] the City bylaw.

Article 10-Seniority

1. Seniority shall be defined as meaning the length of service from the date of appointment under G.L.c.31, in the respective bargaining unit for vacation purposes. Whenever practicable, vacations will be given at the time most desired by the employee, who will be permitted to indicate his choice by order of seniority provided he does so by May 1 in each vacation year. The City and head of department, however, reserve the right to schedule vacations in the current leave year at such time as in their opinion will cause the least interference with the performance of the regular work.
2. Subject to the provisions of Article 31, preference in assignment to work shifts and to motor equipment operator (Grades 3A, 3B, 3C and 3D, if qualified) will be made in accordance with seniority as defined herein.
3. It is understood by both parties to this Agreement that the present practice regarding rotating shifts (including those at the Worcester Public Library) shall continue notwithstanding the provisions contained herein.

Article 19-Assignment of Overtime

1. Insofar as practicable in the assignment of overtime service, department heads and bureau heads will apply the following standards, consistent with [the] efficient performance of the work involved and the best interests of the operation of the department.
 - a) Overtime will be awarded on an equal opportunity basis. (It is the intent of this standard that each employee shall be afforded an equal number of opportunities to serve with no obligation on the part of the City to equalize actual overtime hours.)
 - b) To be eligible for overtime service employees must, in the opinion of their department head or bureau head, be capable of performing the particular overtime task.
 - c) A roster will be kept by each bureau head of overtime calls and overtime service by name, by date and by hour. In case of a grievance involving such records, they shall be subject to examination by the Union representative or the shop steward in the presence of the department head or his representative. After four (4) consecutive refusals to perform overtime service, an employee's name shall be dropped from the overtime roster for six (6) months.
 - d) There will be no discrimination or personal partiality in the assignment of overtime service.

1 e) Where overtime service is necessary on a particular job at the end
2 of the working day, the overtime opportunity can be granted to
3 person doing that particular job on that day, without need of calling
4 in another person under clause (a) above.

5 f) Where overtime service is necessary with respect to a particular job
6 on a day when a person who ordinarily handles that job is not on
7 duty, the overtime opportunity can be granted to that person without
8 need of calling in another person under clause (a) above.
9

- 10 2. Where overtime service must be performed on an emergency basis in the
11 opinion of the department head, the above standards shall not apply.
12
13 3. In any situation where the above standards for overtime service are
14 satisfied and two or more persons are equally available and qualified as
15 determined by the department head for such service, the assignment of
16 overtime service will be made on a seniority basis.
17
18 4. This agreement is understood to be without prejudice to the City's position
19 that mandatory overtime service is a governmental prerogative and to the
20 Union's position that overtime service by the employee is voluntary,
21 provided, however both the Union and the City agree that overtime is
22 mandatory during a declared emergency by the City Manager. Without
23 prejudice to the City's existing position on mandatory overtime, the parties
24 acknowledge that the Department Head can order mandatory overtime for
25 City services which involve preservation of life and property in the City of
26 Worcester.
27

28 Article 24-Savings Clause
29

- 30 1. If any article or section of the Agreement or any addendum thereto should
31 be held invalid by operation of law or by any tribunal of competent
32 jurisdiction, or if compliance with or enforcement of any article or Section
33 should be restrained by such tribunal, the remainder of this Agreement
34 and addendums shall not be affected thereby and the parties shall enter
35 into collective bargaining negotiations for the purpose of arriving at a
36 mutually satisfactory replacement for such article or section.
37
38 2. All job benefits hereto permitted by ordinance or law, or practices or
39 policies duly authorized by the City Manager in writing and enjoyed by
40 employees, which are not specifically provided for or abridged in this
41 [A]greement, are hereby protected.
42
43 3. This Agreement shall not be construed to deprive an employee of any
44 benefits or protections guaranteed by laws of the Commonwealth.

How the DPW Generally Fills Job Openings

The DPW uses several methods to fill job openings for its various positions, which includes the use of Civil Service lists, newspaper advertisements and internal postings. The means that the DPW uses to solicit candidates varies depending upon the operational needs of the situation. DPW Assistant Commissioner Matthew Labovites (Assistant Commissioner Labovites) decides whether to fill a position and what method will be used to do so. If there is a Civil Service list for the position, the DPW may choose to use that list to obtain candidates to fill the vacancy. The only DPW positions for which the Civil Service maintains lists are the labor service positions of MER and motor equipment operator (MEO). Also, the DPW may choose to recruit candidates from newspaper advertisements. Finally, the DPW may seek to fill the opening internally by using postings referred to as "Notices of Interest." The DPW uses a notice of interest, which is posted only within the DPW, to determine whether current employees are interested in an opening. Employees may express interest in openings by signing their names to the notices, but the notices explicitly state that there are no guarantees that individuals will be appointed to the positions. The DPW uses notices of interest to fill some, but not, all openings. Although the DPW has hired nine or ten MERs in the past ten years, it only posted a notice(s) of interest for those openings on one or two occasions. The record contains no evidence of the number of transfers by MERs between divisions that have occurred in the last ten years.

How the DPW Generally Uses Seniority

Pursuant to longstanding language present in the parties' successive collective bargaining agreements, including the 2010-2013 CBA, seniority is used only for

1 vacation selection, shift assignments, and ratings for MEOs, which determines the
2 vehicles that they operate. In each of these instances, seniority is exercised within a
3 division,⁴ including transfers between shifts in the same division. Although the parties
4 disagree as to whether the DPW permits MERs to transfer to open positions in other
5 divisions based upon their seniority, they agree that the DPW does not permit any other
6 employees to transfer between divisions based upon their seniority. Neither the rule
7 prohibiting transfers nor the alleged exception for MERs is recorded in writing
8 anywhere.

9 How the DPW has filled certain MER openings

10 Matthew Campaniello

11 In 1988, Matthew Campaniello (Campaniello) began working as a MER at the
12 Central Garage on the night shift. On or about 1991, the DPW transferred Campaniello
13 to the Water Division where he worked on the day shift. Campaniello's transfer was not
14 based on his seniority, because the DPW gave him the opportunity to work at the Water
15 Division to avoid laying him off.⁵ Approximately, one year later, the DPW recalled
16 Campaniello to a MER opening at the Central Garage on the night shift. In 1995, he
17 transferred to the day shift at the Central Garage.⁶ In January 2003, Campaniello
18 transferred to a MER position at the Reservoir on the day shift. Campaniello was asked

⁴ Divisions are also sometimes referred to as bureaus.

⁵ Because Campaniello was facing a possible layoff, he could not have been the most senior MER but instead was likely the most junior MER.

⁶ Although Campaniello was not told the reason for his transfer, he assumed that it was because of his seniority.

1 whether he wanted to transfer and he agreed.⁷ Campaniello never signed a Notice of
2 Interest for any of his transfers.⁸

3 Jonathan Camarra

4 In 1999, Jonathan Camarra (Camarra) began working as a MER at the Water
5 Division on the day shift. During the morning of his first day of work, Ray Jesse (Jesse),
6 a DPW building maintenance supervisor, informed him that there was a mistake.
7 Robert Barbato (Barbato), a MER, who worked on the night shift at the Central Garage
8 and who had more seniority than Camarra, wanted the position at the Water Division on
9 the day shift. The Employer directed Camarra to replace Barbato as an MER on the
10 night shift at the Central Garage, which he did later that same day.

11 Thomas Culverhouse (Culverhouse), the DPW's Personnel and Payroll Manager,
12 was unaware of the nature of the conversation between Jesse and Camarra about
13 Camarra's transfer to the Central Garage. Instead, Culverhouse understood that the
14 DPW had assigned Camarra to the Central Garage because of concerns that Camarra,
15 a new employee, would be working at the Water Division with a supervisor who was
16 considered difficult to work with. Because Barbato and the supervisor already were
17 acquainted with each other, the Employer decided that Barbato would be a better fit for
18 the Water Division position and that Barbato's seniority was not the reason for the

⁷ Campaniello had no personal knowledge of how his transfer was made. However, because he spoke with some but possibly not all of the more senior MERs, who told him they were not interested in the position, he concluded that his seniority was the reason for the transfer.

⁸ In August of 2011, the City promoted Campaniello to the position of working foreman mechanic.

1 transfer. There is no evidence that Camarra was ever informed that the concern about
2 the Water Division supervisor was the reason for his assignment to the Central Garage.

3 In 2005, Camarra signed a notice of interest for a MER opening in the Sewer
4 Division on the day shift.⁹ Camarra knew that executing the notice of interest did not
5 guarantee that he would receive the position. The notice of interest (October 24, 2005
6 notice of interest),¹⁰ which had a posting date of October 24, 2005 and a removal date
7 of November 4, 2005, stated in pertinent part:

8 The Department of Public Works & Parks is seeking any **CURRENT** Motor
9 Equipment Repairman in the DPW who is interested in being considered
10 for reassignment to the Sewer Operations satellite garage at 20 East
11 Worcester Street. (Emphasis in the original). Any Motor Equipment
12 Repairman assigned to this position will work in the Sewer Operations
13 Garage on a daily basis. Although as with any DPW employee, you could
14 be assigned to work any 8 hours per day, any 5 days per week, or any 40
15 hours per week, the current normal hours at this work location are Monday
16 through Friday from 7:30 a.m. to 4:00p.m. Overtime is on an as-needed
17 basis.

18
19 This is not a promotional opportunity at this time. This notice is simply to
20 offer current Motor Equipment Repairmen the opportunity to express their
21 interest in being considered for reassignment to the Sewer Operations
22 satellite garage. Any current Motor Equipment Repairman assigned to
23 this position would maintain their current Motor Equipment Repairman title
24 and classification. If you are interested in being considered for this
25 assignment to this work location, please sign the attached sheet.

26
27 *This notice is merely to determine employee interest. There is no*
28 *guarantee than any individual will be appointed /promoted to this position.*
29 *Employees who apply to be considered for this position may be subject to*
30 *an interview before an employment decision is finalized in this matter.*
31 *Employees interested in being considered for this position should sign*

⁹ Although Camarra may have seen other notices of interest, the October 24, 2005 notice of interest was the only notice of interest to which Camarra paid attention.

¹⁰ The notice of interest bore the heading of the City's DPW and at the bottom a signature line and the typed name of Assistant Commissioner Labovites.

1 *their names below. This notice is not to be considered as precedent-*
2 *setting, and is only for the purposes described below.*¹¹

3 The Employer subsequently awarded the position to Camarra. Although there
4 were nine MERs with more seniority than him, none of them came to Camarra and
5 complained to him that they had wanted the Sewer Division position. Camarra had
6 never seen a position filled by a junior person when a senior person wanted it.¹²
7 Culverhouse believed that seniority was not a factor in Camarra's 2005 selection
8 although seniority might be a factor in certain situations.

9 Between seven and nine years ago,¹³ the City hired Alan Pulsifer (Pulsifer) to
10 work as a MER on the day shift at the Sewer Division. Pulsifer was a new hire, and the
11 City appointed him from a Civil Service list for MERs. The record does not show that
12 the City posted a notice of interest for the position or offered the position to any current
13 MERs before it hired him. When Maher became aware of Pulsifer's hiring, he went to
14 the Central Garage and inquired whether any of the MERs working there were
15 interested in the Sewer Division position. The MERs at the Central Garage informed
16 Maher that they were aware of the opening for a MER at the Sewer Division, but that

¹¹ The DPW routinely included the italicized paragraph above in the notices of interest that it posted for unit members, including notices of interest for promotions and overtime assignments.

¹² In 2009, the City promoted Camarra to the position of working foreman mechanic in the Sewer Division.

¹³ Camarra testified that the Employer hired Pulsifer nine years ago, while Sean Maher (Maher), who has been Union president since 2007, recalled that the Employer hired Pulsifer seven or eight years ago. I need not reconcile the differences in their testimonies as it is not material to the outcome of this decision.

1 they were not interested in the position. Because none of the MERs at the Central
2 Garage were interested in the position, the Union took no further action on the matter.

3 Robert LeBoeuf

4 On or about November 22, 2013, the City hired Robert LeBouef (LeBouef) to
5 work as a MER on the day shift at the Reservoir.¹⁴ LeBouef was a new hire and the
6 City appointed him from a Civil Service list for MERs. The City did not post a notice of
7 interest for the position or offer the position to any current MERs before it appointed
8 LeBoeuf. Two MERs, who had worked for approximately two years on the night shift at
9 the Central Garage, contacted Maher to protest the City's failure to offer them the
10 position before it hired LeBouef. Both MERs were interested in transferring to the day
11 shift. Thereafter, the Union filed the present case.

12 Maher

13 In Maher's testimony at the hearing, he described how previously MERs would
14 have the opportunity to exercise their seniority by moving to another garage or to a
15 preferred work shift when there was an opening.¹⁵ Maher summarized the practice as:
16 "If the senior man wants it, the senior man gets it." Such a practice would permit MERs,
17 who were assigned to the night shift at the Central Garage, to transfer to another
18 division and move to the day shift, the only shift at those divisions. Although Maher
19 stated that he had seen MERs transfer between divisions based on their seniority "many

¹⁴ LeBoeuf is now deceased.

¹⁵ Maher, who has been a DPW employee since 2001 and currently holds the title of senior engineering aide, has never worked as a MER.

1 times,"¹⁶ he provided no specific examples of those transfers, except for Camarra's
2 2005 transfer.

3 Opinion

4 The Complaint alleges that: a) the City had a past practice of first offering MER
5 vacancies to current MERs, which gave them the option of changing their work shifts or
6 locations; and b) the City unilaterally changed that practice by hiring a new employee to
7 fill a MER position in Reservoir, without offering the position to other MERs. A public
8 employer violates Section 10(a)(5) of the Law when it implements a change in a
9 mandatory subject of bargaining without first providing the employees' exclusive
10 collective bargaining representative with prior notice and an opportunity to bargain to
11 resolution or impasse. School Committee of Newton v. Labor Relations Commission,
12 338 Mass. 557 (1983). The duty to bargain extends to both conditions of employment
13 that are established through a past practice as well as conditions of employment that
14 are established through a collective bargaining agreement. Town of Burlington, 35 MLC
15 18, 25, MUP-04-4157 (June 30, 2008), aff'd sub nom. Town of Burlington v.
16 Commonwealth Employment Relations Board, 85 Mass. App. Ct. 1120 (2014);
17 Commonwealth of Massachusetts, 20 MLC 1545, 1552, SUP-3460 (May 13, 1994).

18 To establish a unilateral change violation, the charging party must show that: 1)
19 the employer altered an existing practice or instituted a new one; 2) the change affected
20 a mandatory subject of bargaining; and 3) the change was established without prior
21 notice and an opportunity to bargain. City of Boston, 20 MLC 1603, 1607, MUP-7976

¹⁶ Maher also noted that because the number of MERs and satellite garages had diminished over the years, the opportunities to transfer did not occur very often.

1 (May 20, 1994); Commonwealth of Massachusetts, 20 MLC 1545, 1552, SUP-3460
2 (May 13, 1994).

3 Binding Past Practice

4 I first consider whether the Employer altered an existing practice or instituted a
5 new one. In determining whether a binding past practice exists, the Commonwealth
6 Employment Relations Board (CERB) analyzes the combination of facts upon which the
7 alleged practice is predicated, including whether the practice has occurred with
8 regularity over a sufficient period of time so that it is reasonable to expect that the
9 practice will continue. Swansea Water District, 28 MLC 244, 245, MUP-2436, MUP-
10 2456 (January 23, 2002); Commonwealth of Massachusetts, 23 MLC 171, 172, SUP-
11 3586 (January 30, 1997). A condition of employment may be found despite sporadic or
12 infrequent activity where a consistent practice that applies to rare circumstances is
13 followed each time that the circumstances preceding the event recurs. Commonwealth
14 of Massachusetts, 23 MLC at 172; City of Everett, 8 MLC 1036, 1038, MUP-3807 (June
15 4, 1981), aff'd 8 MLC 1393, MUP-3807 (October 21, 1981) (applying this standard with
16 respect to practice of allowing time off to take promotional Civil Service exams and
17 acknowledging hearing officer's finding that it was "only because the promotional Civil
18 Service exams are given on an irregular basis that the City had few occasions to
19 implement the practice.")

20 To establish the existence of a past practice, the Union relied on the testimonies
21 of Campaniello, Camarra and Maher that each time a MER vacancy was filled, it was
22 filled by the most senior MER who was interested in the position. Turning first to
23 Campaniello, he identified two of his transfers, his transfer from the night shift to the day

1 shift at Central Garage in 1995, and his transfer to the day shift at Reservoir in 2003,
2 which he believed were made due to his seniority. However, it appears that
3 Campaniello's belief that he received those two positions by seniority is based on his
4 subjective belief rather than on any objective facts, because he admitted to having no
5 knowledge of how his transfers were made. Further, it is undisputed that MERs on the
6 second shift at Central Garage always were given the opportunity to bid on open day
7 shift positions in that same division pursuant to Article 10 of the 2010-2013 CBA. Thus,
8 Campaniello's testimony about moving from nights to days at Central Garage does not
9 establish that the Employer had a practice of consistently giving MERs the opportunity
10 to bid on open positions across division lines and awarding those positions on the basis
11 of seniority.

12 Regarding Campaniello's transfer to the day shift at Reservoir, he based his
13 subjective belief that the transfers were based upon his seniority on the fact that none of
14 the more senior MERs with whom he had spoken, complained to him that they wanted
15 the position. Based upon the dearth of complaints, the Union argues that that the
16 transfer must have been by seniority. I disagree. First, it is possible that certain MERs
17 might not have told Campaniello that they wanted the Reservoir position. Second,
18 Campaniello may have been the only MER interested in transferring to the position.
19 Under that scenario, it cannot be said that the transfers were by seniority if the more
20 senior employees chose not to bid on the position. Finally, Campaniello also identified
21 a third transfer, his transfer to the day shift in the Water Division, which he did not
22 believe was based upon his seniority because it was done to allow him to avoid a layoff.

1 This candid statement by Campaniello undermines the Union's argument that transfers
2 of MERs must be by seniority.

3 Additionally, Camarra related how he was told on his first day of work that he had
4 to switch locations and shifts because a more senior MER named Barbato wanted his
5 position on days in the Water Division. However, Culverhouse testified that the real
6 reason for the move was because the Employer had determined that, as a new
7 employee, it would be better that Camarra not work with a particular supervisor on his
8 initial assignment. Even relying on Camarra's version of events, this is only a single
9 instance of a transfer which falls short of establishing a practice. See City of Haverhill,
10 42 MLC 273, 275, MUP-13-3066 (May 24, 2016) (finding that a single prior event of how
11 an online exam was administered was insufficient to establish a past practice because it
12 was neither regular nor recurring); Town of Swansea, 28 MLC at 245 (finding that a
13 single occurrence of forced overtime does not constitute an existing practice over a
14 sufficient period of time).

15 In 2005, the Employer appointed Camarra to a day shift position in the Sewer
16 Division after he completed a notice of interest for the position. Camarra recounted at
17 hearing that the MERs, who were more senior to him, were not interested in the
18 position. As discussed above, seniority is not established by senior employees
19 choosing not to bid for a position or by awarding a position to the sole bidder for it.
20 Seniority is established by the position being awarded to the senior employee of a group
21 of bidders. Here, the record does not indicate that any other MER, including the MER
22 whom Camarra alluded to as being junior to him at that time, bid on the position. Thus,
23 I do not find that, because the other MERs were not interested in the position, Camarra

1 was awarded the position by seniority, which is also consistent with Culverhouse's
2 claims.

3 Camarra also stated that he had never seen a position filled by a junior MER
4 when a senior MER had expressed an interest in the position. However, he provided no
5 details in support of his statement, including the names of those senior MERs, when the
6 positions were filled, how the positions were filled, and whether any junior MERs
7 actually bid on the positions. Camarra's statement alone is insufficient to support a
8 finding of a past practice.

9 Similarly, Maher made the general claim that if "the senior man wants it, the
10 senior person gets it." However, Maher provided no specific examples in support of his
11 claim, except for his reference to Camarra's transfer to the Sewer Division. In the
12 absence of specific examples, his testimony does not support a finding of a past
13 practice.

14 However, even if Campaniello's and Camarra's transfers evinced a past practice,
15 a subsequent event took place which deviated from that practice. Seven to nine years
16 ago, the Employer appointed Pulsifer from a Civil Service list to a day position in the
17 Sewer Division without first offering the position to other MERs. Thus, the alleged
18 practice of offering current MERs an open position before hiring a new employee no
19 longer remained a consistent practice that occurred each time there was an opening.
20 See Town of Lee, 11 MLC 1274, 1277, MUP-5211 (November 21, 1984), aff'd Town of
21 Lee v. Labor Relations Commission, 21 Mass. App. Ct. 166, 168-169 (1985)
22 (establishing a past practice of not enforcing a residency requirement where three
23 officers over thirty-year period did not live in the town and were not required to do so).


1 The Union in its post-hearing briefs attempts to distinguish Pulsifer's hiring on the
2 grounds that no unit members actually were interested in the opening. However, the
3 salient point is whether the Employer first offered the Sewer Division opening to unit
4 members and gauged their interest in the position before hiring Pulsifer. Here, the
5 record before me does not show that the Employer took such action.

6 Accordingly, the Union has failed to establish by a preponderance of the
7 evidence that a binding past practice existed and thus, has failed to satisfy the first
8 element in the analysis. Therefore, I must dismiss the Complaint. See City of Boston,
9 41 MLC 119, 126, MUP-13-3371, MUP-14-3466 and MUP-14-3504 (Nov. 7, 2014)
10 (dismissing an allegation that failed to satisfy the first prong of the unilateral change
11 analysis); see also Town of Seekonk, 14 MLC 1725, 1732-33, MUP-6131 and MUP-
12 6132 (May 10, 1988) (dismissing a complaint after union failed to show employer
13 changed a past practice or created a new practice).

14 CONCLUSION

15 Based on the record and for the reasons stated above, I conclude that the City
16 did not violate Sections 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by hiring
17 a new employee to work as a MER at the Reservoir without first offering the position to
18 other MERS in the DPW.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS


MARGARET M. SULLIVAN
HEARING OFFICER

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. c.150E, Section 11 and 456 CMR 13.19, 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, this decision shall become final and binding on the parties.