

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

In the Matter of	*	Case No. MUP-14-3750
	*	
TOWN OF ARLINGTON	*	Date issued:
	*	September 30, 2015
and	*	
	*	
ARLINGTON POLICE PATROLMEN'S	*	
ASSOCIATION	*	

Board Members Participating:

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

Appearances:

John Foscett, Esq.	-	Representing the Town of
Brian Magner, Esq.		Arlington
Jason R. Powalisz, Esq.	-	Representing the Arlington Police Patrolmen's
		Association

DECISION ON APPEAL OF HEARING OFFICER DECISION

SUMMARY

On March 18, 2015, a Department of Labor Relations (DLR) Hearing Officer issued a decision concluding that the Town of Arlington (Town or Employer) had violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of M.G.L. c. 150E (the Law) when it refused to bargain with the Arlington Police Patrolmen's Association (APPA or Union) over its proposed use of an assessment center as a criteria for promotion from the bargaining unit position of patrol officer to the non-bargaining unit position of

1 sergeant.¹ The Town filed a timely appeal from the decision. The Union filed a
2 response. Upon consideration of the Hearing Officer's decision and the parties'
3 supplementary statements, we affirm the Hearing Officer's conclusion that the Town
4 violated the Law.

5 Background

6 The facts here are simple, undisputed, and summarized briefly below.² The
7 Union represents all the Town's police officers in the rank of patrol officer. The
8 sergeants, lieutenants and captains who supervise the patrol officers are in a separate
9 bargaining unit that is represented by the Arlington Ranking Officers Association
10 (AROA). Prior to May 2014, the Town had a consistent past practice of using standard
11 civil service testing procedures administered by the Commonwealth's Human
12 Resources Division (HRD) to establish an eligible list for promotions from patrol officer
13 to sergeant. In May 2014, the Town's Chief of Police advised the Union that he wanted
14 to use an assessment center format in the promotional process for sergeant in the fall of
15 2014. When and if implemented,³ this would change the Town's prior method of
16 establishing placement on the promotion list by adding assessment techniques, written,
17 oral or practical.⁴ On May 19, 2014, the Union demanded to bargain over the Town's
18 decision to use an assessment center and, on June 2, 2014, the Town refused on

¹ The decision is reported at 41 MLC 272 (2015) and attached to the slip opinion of this decision.

² The parties submitted this case on a fully-stipulated record.

³ As of the decision, HRD and the Town had not executed a delegation agreement or posted notice of an assessment center promotional examination.

⁴ Beyond this description, the record does not describe the components of the assessment center, e.g., the specific testing techniques used or skills measured.

1 grounds that the Law did not require it to do so. On May 20, 2014, the Town
2 requisitioned a fully-delegated assessment center from HRD for use in the development
3 of a promotional list for police sergeant.

4 Opinion⁵

5 An employer violates Section 10(a)(5) and, derivatively, Section 10(a)(1) of the
6 Law when it refuses to meet and bargain on demand over a mandatory subject of
7 bargaining. Lowell School Committee, 26 MLC 111 (2000); Everett School Committee,
8 9 MLC 1308 (1984). Here, there is no dispute that the Union asked to bargain over the
9 Town's decision to use an assessment center in the promotional process from patrol
10 officer to sergeant and that the Town refused to do so. Accordingly, the sole question
11 presented to the Hearing Officer was whether the Employer's decision to use the
12 assessment center was a mandatory subject of bargaining. The Hearing Officer
13 answered this question in the affirmative. We agree for the reasons stated in her
14 decision and below.

15 We begin by reviewing the applicable law regarding bargaining over promotional
16 procedures and criteria for promotions within the same bargaining unit and for
17 promotions from one bargaining unit to another. As we recently stated, although there
18 is no obligation to bargain over which candidate to promote, or when a promotional
19 vacancy must be filled, an employer is obligated to bargain over the means of
20 implementing such decisions. City of Boston, 41 MLC 119, 126, MUP-13-3371, MUP-
21 14-3666, MUP-14-3504 (November 7, 2014) (citing Town of Danvers, 3 MLC 1559,
22 MUP-2292, 2299 (April 6, 1977); Town of Wilbraham, 5 MLC 1773, MUP-3242 (H.O.

⁵ The CERB's jurisdiction is not contested.

1 March 29, 1979) (procedures for promotion are a mandatory subject of bargaining), *aff'd*
2 6 MLC 1668 (December 14, 1979). In Town of Danvers, which appears to be the
3 earliest published decision arising under Chapter 150E that addresses the duty to
4 bargain over promotion processes, the CERB⁶ held that the general topic of promotion
5 procedures was a mandatory subject of bargaining. 3 MLC at 1574-1576. The CERB's
6 holding was premised on its view that "the possibilities of advancement in one's job and
7 the manner in which such advancement is obtained are inexorably intertwined with the
8 nature of an employee's career." *Id.* at 1574-1575. The CERB cautioned, however,
9 that not all issues relating to promotions were necessarily mandatory subjects of
10 bargaining. It noted that the NLRB distinguished between promotions within the
11 bargaining unit, which were mandatory subjects of bargaining, and promotions to
12 supervisory positions outside of the unit, which were not bargainable. *Id.* at 1575 (citing
13 Kono-TV-Mission Telecasting Corp. 163 NLRB 1005 (1967)). It further noted that,
14 under the NLRA, any promotion to a supervisory position is a promotion outside of the
15 unit, since supervisors are not protected employees for purposes of collective
16 bargaining, but that this analysis would not apply under Chapter 150E, because non-
17 managerial, supervisory positions might be within the bargaining unit. *Id.* at n. 17. The
18 CERB declined, however, to reach this issue in that decision. *Id.*

19 Nine days later, the CERB issued Boston School Committee, 3 MLC 1603, MUP-
20 2523, 2528, 2521 (April 15, 1977). At issue was whether the school committee was
21 obligated to bargain with the teachers union before imposing a rule requiring residency
22 for continued employment. *Id.* The CERB held that it was, and, while acknowledging

⁶ References to the CERB include the former Labor Relations Commission.

1 that the issue had not been raised by the parties, it expressed its view regarding the
2 duty to bargain over residency as a condition of promotion. Id. at 1608. Citing Town of
3 Danvers, the CERB opined that residency as a condition of promotion from one job to
4 another within the same bargaining unit was a mandatory subject of bargaining based
5 on the importance of the topic to bargaining unit members. Specifically, the CERB
6 found that the promotional opportunities available to workers were “of utmost
7 importance in that the possibilities of increased pay, benefits and job satisfaction are at
8 issue.” 3 MLC at 1610.

9 The CERB then went on to discuss the duty to bargain over residency as a
10 condition of promotion to a *different* bargaining unit. Id. The CERB found that
11 “promotional opportunities were not less important merely because the promotional
12 position is within a different bargaining unit.” Id. at 1610-1611. It explained that, “The
13 possibility of promotion is still a most important condition of employment for those
14 employees who aspire to the promotional position. We believe that the bargaining unit
15 which represents the potential promotees has the right under the Law to bargain over
16 these promotional standards.” Id. at 1611. The CERB ultimately concluded that
17 residency as a condition of employment for promotion from one bargaining unit to
18 another was a mandatory subject of bargaining in situations where the promotional
19 position constitutes a step in a typical career ladder, or is a position that is typically filled
20 from within the bargaining unit and the promotional positions were not managerial or
21 confidential titles. 3 MLC at 1610 -1611.

22 The Hearing Officer addressed these cases in her decision. Although she
23 agreed with the Town’s argument that the CERB had never squarely addressed the

1 issue of whether bargaining over promotions into a different unit was a mandatory
2 subject of bargaining,⁷ she nevertheless indicated that she was persuaded by the
3 rationale expressed in Boston School Committee. The Hearing Officer next applied the
4 balancing test set forth in Town of Danvers by weighing the respective interests of
5 employees in bargaining over this subject with the interest of the public employer in
6 maintaining its managerial prerogative. 3 MLC at 1577. In so doing, she considered
7 the relevant factors of whether the topic had a direct impact on employee's terms and
8 conditions of employment, and whether the use of the assessment center in the process
9 of promoting patrol officers to sergeants concerned a core governmental decision. Id.

10 In considering whether the use of an assessment center had a direct impact on
11 employee's terms and conditions of employment, the Hearing Officer, consistent with
12 the view expressed in Boston School Committee, found that this subject was important
13 to bargaining unit members regardless of whether the promotional position is in the
14 same or a different bargaining unit based on the possibility of increased pay, benefits,
15 job satisfaction, prestige and movement on a career ladder. 3 MLC at 1610. In so
16 holding, she rejected the Town's argument that the use of an assessment center had
17 only a minimal impact on employees, and/or that bargaining over a residency
18 requirement was materially different from bargaining over using an assessment center.

19 The Hearing Officer next considered whether the use of an assessment center
20 implicated a core managerial prerogative. She found that that the Town had not
21 demonstrated that the criteria to consider in granting promotions from patrol officer to

⁷ The Hearing Officer accurately summarized the Boston School Committee decision as holding that the School Committee violated the Law by unilaterally imposing a rule requiring residency for continued employment.

1 sergeant was so fundamental to the basic direction of a police department it should be a
2 managerial prerogative.⁸ The Hearing Officer thus concluded that the Town had failed
3 to demonstrate that the criteria that it uses to assess whether to promote a patrol officer
4 to a sergeant is more important to the Town than it is to the patrol officers. Finally, after
5 considering and rejecting the Town's arguments regarding decisions from other
6 jurisdictions and the impact of M.G.L. c. 31 (the Civil Service Law) on the Town's duty to
7 bargain, the Hearing Officer concluded that the Town's refusal to bargain over its
8 decision to use an assessment center as part of the procedure for promoting patrol
9 officer to sergeant violated Section 10(a)(5) of the Law.

10 The Town raises several challenges to the Hearing Officer's decision. First, that
11 she erroneously relied on the importance of the assessment center to employees in
12 deeming it a mandatory subject of bargaining. The Town argues that if that were the
13 legal test, then all the terms and conditions of employment for positions that are in
14 employees' career ladder would be subject to bargaining for employees who sought
15 promotions. Second, the Town contends that the Hearing Officer overstated the impact
16 of its decision to use an assessment center on patrol officers. Third, the Town contends
17 that the Hearing Officer erroneously distinguished the Danvers decision from the
18 scenario presented in this case. Finally, the Town claims error in the Hearing Officer's
19 analysis of decisions it provided from other jurisdictions and of the relevant provisions of
20 Chapter 31.

21 We do not find any of these arguments persuasive. Regarding the first
22 argument, the Hearing Officer's analysis of the importance to members of the patrol

⁸ The Town does not specifically contest this finding on appeal.

1 officers' unit of the criteria that the Town used to assess whether to promote a patrol
2 officer to a sergeant did not occur in a vacuum as the Town suggests. Rather, the
3 Hearing Officer addressed whether this topic was important to bargaining unit members
4 as one factor to be considered when weighing the parties' relative interests in this topic
5 in accordance with the Danvers balancing test discussed above. Discussing a party's
6 interest in a potential bargaining subject in terms of how important the topic is to that
7 party is hardly error, much less reversible error.⁹

8 The Town's second contention - that the Hearing Officer overstated the impact of
9 the assessment center to bargaining unit members - also lacks merit. On appeal, the
10 Town repeats the argument it advanced at hearing: that all an employee needed was
11 advance notice of the format to be used in the examination. This is because the Town
12 insists that the only issue was the substitution of an assessment center for a written
13 examination and the fact that the actual questions would differ each year. We disagree
14 that the impact of the use of the assessment center has only a minimal impact on patrol
15 officers. At its core, this case is about whether the Town had a duty to bargain with the
16 Union representing the patrol officers over a change in the method the Town will use to
17 assess the patrol officers for promotional purposes. Thus, patrol officers are the very
18 employees who will be participating in the proposed assessment exercises. How they
19 perform will impact their future career growth, prestige, pay, and other factors
20 mentioned in the Boston School Committee decision. There is no question that the type

⁹ Further, as the Hearing Officer noted, there is no question that a union cannot bargain over the terms and conditions of employment of employees who are not in its bargaining unit. Chelmsford School Committee, 8 MLC 1515, 1517 (A.O. November 13, 1981). Accordingly, the Town's claims that this ruling would greatly expand the scope of mandatory bargaining are greatly exaggerated.

1 of test used, whether an assessment center, the Civil Service exam, or another method,
2 can have a concrete, direct and significant impact on how they perform. We therefore
3 agree with the Hearing Officer that merely providing notice of the assessment method to
4 be used is no substitute for having an actual voice in negotiating over proposed
5 changes to a long-established practice of using the Civil Service exam.

6 We also reject the Town's argument that the Hearing Officer's decision
7 erroneously states the CERB's rationale for distinguishing the federal NLRB decisions
8 cited in Town of Danvers from the case at bar. The Town's argument centers on a
9 footnote in the Hearing Officer's decision stating that the Danvers decision did not
10 require her to reach a contrary conclusion regarding the Town's duty to bargain here
11 because Danvers "concerned promotions to confidential or managerial positions." The
12 Town challenges this analysis, claiming that the distinction drawn in Danvers was
13 between "*intra-unit* promotions and promotions to non-union positions under the NLRA."
14 (Emphasis in Town's supplementary statement.)

15 We find no fault with the Hearing Officer's reasoning or analysis of Danvers. Just
16 as supervisors are "non-union positions under the NLRA," confidential and managerial
17 employees are excluded from collective bargaining under Chapter 150E.¹⁰ The Hearing
18 Officer therefore reasonably construed Danvers indicating that an employer had no duty
19 to bargain over promotions to excluded positions outside the bargaining unit. In any
20 case, regardless of how this aspect of Danvers is construed, the Hearing Officer
21 correctly concluded that Danvers did not address the issue squarely presented by this

¹⁰ Section 1 of the Law excludes managerial and confidential employees from the definition of "employee" subject to the Law's protection.

1 case: whether an employer is required to bargain over promotional procedures to
2 supervisory positions outside of the bargaining unit that are not otherwise excluded from
3 collective bargaining. We thus agree with the Hearing Officer that Danvers poses no
4 barrier to the conclusion reached here.

5 Other Jurisdictions

6 The Town next argues that the Hearing Officer erroneously ignored the
7 "overwhelming weight of authority from other jurisdictions and misconstrues those
8 decisions." We disagree. First, the Hearing Officer was under no obligation to give
9 these decisions any weight because they arose in different jurisdictions and under
10 substantively different statutes. Cf. Board of Trustees, University of Massachusetts, 8
11 MLC 1139, SUP-2306 (June 24, 1981) (CERB not bound by legal precedent developed
12 under the NLRA). Second, the Hearing Officer did not ignore the decisions – rather,
13 she considered them but ultimately was not persuaded by them because the decisions
14 contained little or no rationale. We agree with this analysis. Finally, other than taking
15 issue with the Hearing Officer's analysis of Teamsters, Local 117 v. City of Tacoma,
16 2006 WL 1194956 (Wash. PERC, April 19 2006) (Teamsters), the Town does not
17 explain or provide argument as to how the Hearing Officer misconstrued the other
18 decisions it cited. We therefore limit our review to that case.

19 The Teamsters decision held that the City of Tacoma was not required to
20 bargain before changing its method for filling supervisory street maintenance vacancies
21 because such bargaining would "hamper the city in filling managerial or supervisory
22 slots for a period of time that could be detrimental to carrying out its mission." Id. at *3.
23 In this case, however, the Hearing Officer found that the Town of Arlington had not

1 argued or established that bargaining would slow down the promotional process, and
2 thus, she was not persuaded by Teamsters' reasoning. The Town claims this analysis
3 "misses the point," because the mere act of requiring bargaining over promotional
4 processes would "make the process and its components hostage to the negotiation of
5 numerous other, unrelated issues."

6 We disagree for two reasons. First, in concluding that bargaining over
7 promotional processes would be unduly burdensome to employers, the examiner in the
8 Teamsters ruling speculated that, if a union were allowed to have the employer "sit
9 down and bargain all of the standards of all of the promotional positions through its
10 organization," this could result in the street maintenance unit bargaining over
11 promotions to positions such as battalion chief in the fire department, and the employer
12 having to deal with competing union proposals. Id. These concerns are not applicable
13 under Chapter 150E. As expressed in Boston School Committee, the duty to bargain
14 over procedures for promotions to positions outside of a bargaining unit is limited to the
15 procedures for promotions to positions that fall within the bargaining unit members'
16 career ladder and extends only to positions that are entitled to collective bargaining
17 rights. 3 MLC at 1610-1611.

18 Second, the Town's argument that bargaining over the promotional process
19 would make that process hostage to numerous, unrelated issues would apply equally to
20 bargaining over intra-unit promotional processes. However, bargaining over intra-unit
21 promotional processes has been a mandatory subject of bargaining since at least 1979.
22 Town of Wilbraham, 5 MLC at 1777 (citing Town of Danvers, 3 MLC 1559 *aff'd*, 6 MLC
23 1668). Given the absence of an explanation as to why the Town's expressed concerns

1 differ depending on whether the promotional opportunity is in the same or a different
2 unit in the employee's career ladder, the Town's argument is not persuasive.

3 Chapter 31 and Section 7(d) of the Law

4 Finally, the Town argues that the Hearing Officer erroneously rejected the Town's
5 argument that the imposition of a bargaining requirement here would present a conflict
6 with the Civil Service Law and in particular with G.L. c. 31, §16 and 5. Section 16 states
7 that HRD's Personnel Administrator (personnel administrator) should consult with
8 "representatives of labor and professionals in the field" with regard to the content and
9 form of civil service promotional exams. The Town asserts that the Hearing Officer
10 erroneously relied on this language as the basis for her statement that, the "Town
11 cannot be heard to argue that the Union should have no meaningful role" in the
12 establishment of an assessment center format.¹¹ The Town claims that this language,
13 coupled with the fact that Section 16 is not listed in Section 7(d) of the Law and, thus,
14 not subordinated to collective bargaining, demonstrates that the Legislature did not
15 intend there to be bargaining over any aspect of promotional exams because it has
16 already arranged for organized labor to have a role in determining the criteria.

17 We agree with the Hearing Officer's analysis of this argument with respect to the
18 use of assessment centers. We see no conflict between the Town's bargaining
19 obligations over the type of test used to determine placement on the promotional list
20 and Chapter 31. As the Supreme Judicial Court has recognized, Chapter 31 and

¹¹ M.G.L. c. 31, §16 states, in pertinent part:

The administrator shall, in the development of examinations, consult with representations of labor and professionals in the field to increase emphasis upon aptitudes relevant to performing the positions to be tested.

1 Chapter 150E must be read “so as to constitute a harmonious whole.” Town of
2 Dedham v. Labor Relations Commission, 365 Mass. 392 (1974). The language at issue
3 here relates to the personnel administrator’s authority with respect to the form, method
4 and subject matter of promotional examinations, and is silent as to the Town’s role in
5 this process. Neither HRD nor the personnel administrator is the public employer of unit
6 members, however, and only the public employer is required to bargain. See generally
7 M.G.L. c. 150E, §10(a)(5). Thus, contrary to the Town’s argument, the fact that Section
8 16 requires the personnel administrator to consult with labor representatives in
9 developing the promotional examinations does not establish that the Legislature
10 intended to preclude the Town from bargaining over the subject with the exclusive
11 representative of the employees directly impacted by the use of an assessment center.
12 Compare City of Somerville, 470 Mass. 563, 572 (2015) (municipalities’ contributions to
13 retirees’ health insurance premiums is not a mandatory subject of bargaining because
14 the Legislature expressly conferred authority to the municipalities over the provision of
15 this benefit) with Adams v. Boston (Adams), 461 Mass. 602, 607-608 (2012) (in light of
16 statutory silence, municipalities may agree via collective bargaining to pay more than
17 one-half of educational incentives to police officers).

18 Further, because the Town had a choice as to what type of promotional test to
19 use to establish placement on the promotional list, the Appeals Court’s reasoning in City
20 of Boston v. Commonwealth Employment Relations Board, 453 Mass. 389 (2009) is
21 applicable. In that case, the Court recognized the City’s duty to bargain over its
22 decision to adopt the partial public safety exemption for overtime compensation under
23 the Fair Labor Standards Act (Act) where the Act provides the employer with the option

1 of using the exemption, and, if it chose to do so, a wide range of choices regarding the
2 length of the work period it may use for overtime calculations. Likewise here, where
3 HRD provides the Town with freedom to choose between standard civil service testing
4 procedures and assessment centers to determine placement on the promotional list for
5 sergeant, the Town must bargain when selecting among the options that differ from its
6 established practice.

7 Conclusion

8 For the foregoing reasons, we affirm the Hearing Officer and issue the following
9 Order.

10 ORDER

11 WHEREFORE, based on the foregoing, IT IS HEREBY ORDERED that the Town
12 of Arlington shall:

13 1. Cease and desist from:

- 14 a. Failing to bargain in good faith with the Union to resolution or
15 impasse concerning the decision and the impacts of the decision to
16 use an assessment center as part of the procedure for promoting
17 patrol officers to sergeant positions.
- 18 b. In any like or similar manner, interfering with, restraining, or
19 coercing any employees in the exercise of their rights guaranteed
20 under the Law.

21
22 2. Take the following affirmative action that will effectuate the purposes of
23 the Law:¹²

- 24
25 a. Upon request, bargain in good faith with the Union to resolution or
26 impasse concerning the decision and the impacts of the decision to
27 use an assessment center as part of the procedure for promoting
28 patrol officers to sergeant positions.
29

¹² The Union indicated in its post-hearing brief that it does not seek an order from the DLR to post a notice.

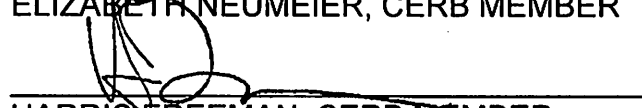
- 1 b. Notify the DLR in writing of the steps taken to comply with this
2 decision within ten (10) days of receipt of this decision.

3 **SO ORDERED.**

COMMONWEALTH OF MASSACHUSETTS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD


MARJORIE F. WITTNER, CHAIR


ELIZABETH NEUMEIER, CERB MEMBER


HARRIS FREEMAN, CERB MEMBER

APPEAL RIGHTS

Pursuant to M.G.L. c. 150E, Section 11, decisions of the Commonwealth Employment Relations Board are appealable to the Appeals Court of the Commonwealth of Massachusetts. To claim such an appeal, the appealing party must file a notice of appeal with the Commonwealth Employment Relations Board within thirty (30) days of receipt of this decision. No Notice of Appeal need be filed with the Appeals Court.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of

TOWN OF ARLINGTON

and

ARLINGTON POLICE PATROLMEN'S
ASSOCIATION

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Case No. MUP-14-3750
Date Issued: March 18, 2015

Hearing Officer:

Susan L. Atwater, Esq.

Appearances:

Jason Powalisz, Esq.-

Representing the Arlington Police
Patrolmen's Association

John Foscett, Esq. -
Brian Magner, Esq.

Representing the Town of Arlington

HEARING OFFICER DECISION

Summary

1 The issue in this case is whether the Town of Arlington (Town) refused to bargain
2 with the Arlington Police Patrolmen's Association (Union or Association) over the
3 Town's proposed use of an assessment center as a criteria for promotion from the
4 bargaining unit position of patrol officer to the non-bargaining unit position of sergeant in
5 violation of Section 10(a)(5) and, derivatively, 10(a)(1) of M.G.L. c.150E (the Law). I
6 find that the criteria for promotion from a position in the patrol officers' bargaining unit to

1 a sergeant position in the superior officers' bargaining unit is a mandatory subject of
2 bargaining and, therefore, the Town violated the Law.

3 Statement of the Case

4 On June 4, 2014, the Union filed a charge of prohibited practice with the
5 Department of Labor Relations (DLR), alleging that the Town had engaged in prohibited
6 practices within the meaning of Sections 10(a)(1) and 10(a)(5) of the Law. The DLR
7 investigated the Union's charge and on October 15, 2014, issued a 2-count Complaint
8 of Prohibited Practice. The Town filed an Answer to the Complaint on or about October
9 23, 2014.

10 Count 1 of the Complaint alleges that the Town failed to bargain in good faith by
11 unilaterally replacing the standard Civil Service examination with an assessment center in
12 the process for promoting patrol officers to sergeants. Count 2 alleges that the Town
13 refused to bargain on demand with the Union over the inclusion of the assessment center
14 in the promotional process. The parties subsequently waived their right to a hearing and
15 agreed to submit evidence in the form of a stipulated record. They filed initial briefs on
16 or about February 4, 2015, and reply briefs on or about February 13, 2015. Based on
17 the record, which includes stipulated facts and documentary exhibits, and in
18 consideration of the parties' arguments, I render the following opinion.

19 Stipulations of Fact

- 20 1. The Arlington Police Patrolmen's Association (Association or Union) is the lawful
21 bargaining agent for all police officers employed by the Town of Arlington (Town) in
22 the rank of patrol officer, and is an employee organization within the meaning of G.L.
23 c.150E, Section 1.
24
25 2. At all times material, Patrol Officer Robert Pedrini has served as the President of the
26 Association.
27

- 1 3. The Town and the Association have historically negotiated collective bargaining
2 agreements covering the members of the Association's bargaining unit, and are
3 currently parties to a collective bargaining agreement due to expire in June of 2015.
4
- 5 4. The Town is a public employer within the meaning of G.L. c.150E, Section 1. At all
6 times material, Caryn Malloy (Malloy) has served as the Town's Director of Human
7 Resources and Frederick Ryan (Ryan) has served as the Town's Chief of Police.
8 Both Ms. Malloy and Chief Ryan serve as the Town's representative with the
9 Association for purposes of negotiations, contract administration and other labor
10 relations matters.
11
- 12 5. The Arlington Ranking Officers Association (AROA) is the bargaining agent within
13 the Town for all police officers within the ranks of sergeant, lieutenant, and captain.
14 The sergeants, lieutenants and captains represented by the AROA are public
15 employees within the meaning of G.L. c.150E, Section 1 who supervise the patrol
16 officers, and the superior officers are in a separate bargaining unit from the patrol
17 officers.
18
- 19 6. The Town and the AROA have historically negotiated collective bargaining
20 agreements covering the members of the AROA's bargaining unit, and are currently
21 parties to a collective bargaining agreement due to expire in June of 2015.
22
- 23 7. Historically, the Town has continuously and consistently used the standard civil
24 service testing procedures to establish an eligible list for promotions from patrol
25 officer to sergeant. Those procedures are as follows:
26
 - 27 a. HRD administers the civil service examination.
 - 28 b. Based on the results of the exam, HRD would generate a promotional list based
29 on the exam score and statutory, non-assessment center factors such as veteran's
30 status.
 - 31 c. The Town would requisition the list when it desired to make a promotional
32 appointment.
 - 33 d. Based on the list, the Town reserved the right to conduct interviews and review
34 other non-assessment center relevant factors such as prior discipline and past
35 performance.
 - 36 e. Based on a review of the factors in part d, above, the Town would either appoint
37 the highest ranking applicant on the list or bypass that individual pursuant to the Civil
38 Service Statute, M.G.L. c.31, s.27.
39
- 40 8. On or about May 9, 2014, Chief Ryan verbally advised Association President Pedrini
41 that he wanted to use the assessment center format in the promotional process for
42 sergeant to occur in the fall of 2014. President Pedrini indicated that that issue had
43 to be bargained, but Chief Ryan replied that he did not believe that a bargaining
44 obligation existed.
45

- 1 9. On May 19, 2014, Association counsel wrote to counsel for the Town indicating that
2 a duty to bargain existed over the decision to substitute an assessment center for
3 the standard exam process, and/or the impacts of that decision. The Association
4 counsel's May 19, 2014 letter is marked as Joint Exhibit 1.
5
- 6 10. By email dated May 20, 2014, Ms. Malloy wrote to President Pedrini advising that
7 she had that day requisitioned from the Massachusetts Human Resources Division
8 (HRD) for a "fully delegated assessment center for use in the development of a
9 promotional list for Police Sergeant." The May 20, 2014 email is marked as Joint
10 Exhibit 2.
11
- 12 11. The Town sought to use a delegated assessment center from HRD, and that format
13 would have changed the established practice described in paragraph 7, above, by
14 adding assessment techniques, written, oral or practical, other than the standard
15 written civil service examination, to establish the promotional list.
16
- 17 12. By letter dated June 2, 2014, counsel for the Town replied to the letter from counsel
18 for the Association referenced in Paragraph [9], above, and rejected both the
19 Association's request to cease processing the assessment center and the
20 Association's request for bargaining over the implementation of the assessment
21 center. Town counsel's June 2, 2014 letter is marked as Joint Exhibit 3. The Town
22 refused to bargain over the implementation of the assessment center in response to
23 the Association's bargaining demand, and no bargaining has occurred.
24
- 25 13. The assessment center that the Town plans to use to develop a promotional list will
26 change the method of assessment that establishes placement on the list, that the
27 Town has previously used to promote officers from patrol officer to sergeant.
28
- 29 14. Although on May 20, 2014, Ms. Malloy requisitioned a fully delegated assessment
30 center from HRD for use in the development of a promotional list for Police
31 Sergeant, HRD and the Town have not executed a delegation agreement or posted
32 notice of an assessment center promotional examination.

33 Opinion

34 A public employer violates Sections 10(a)(5) and (a)(1) of the Law when it
35 unilaterally alters a condition of employment involving a mandatory subject of bargaining
36 without first bargaining with the union to resolution or impasse. School Committee of
37 Newton v. Labor Relations Commission, 388 Mass. 557 (1983). The employer's
38 obligation to bargain before changing conditions of employment extends to working
39 conditions established through past practice, as well as those specified in a collective

1 bargaining agreement. Town of Wilmington, 9 MLC 1694, 1699, MUP-4688 (March 18,
2 1983). To establish a violation, a union must demonstrate by a preponderance of
3 evidence that there was a pre-existing practice, that the employer unilaterally changed
4 that practice, and that the change impacted a mandatory subject of bargaining. Boston
5 School Committee, 3 MLC 1603, 1605, MUP-2503, 2528, 2541 (April 15, 1977).

6 The past practice here is undisputed: the Town continuously and consistently
7 used the standard civil service testing procedures to establish an eligible list for
8 promotions from patrol officer to sergeant, and those procedures did not include the use
9 of an assessment center. The parties also agree that the use of an assessment center
10 would change the prior practice, and that the Town refused to bargain over the use of
11 an assessment center in the promotional process. Thus, the question to be decided is
12 whether the Town is obligated to bargain with the Union over its use of an assessment
13 center in the promotional process from the bargaining unit position of patrol officer to the
14 non-bargaining unit position of sergeant.

15 The Union argues that the Commonwealth Employment Relations Board (CERB)
16 has stated or assumed in numerous cases that the criteria for promotion within a
17 bargaining unit and from one bargaining unit to another (unit to unit promotions) is a
18 mandatory subject of bargaining. The Union urges me to follow the CERB's articulated
19 rationale and ignore contrary case law from other jurisdictions regarding unit to unit
20 promotions, noting that those decisions rest on their unique statutes.

21 The Town argues that the CERB has never specifically held that the criteria for
22 promotion from a position in one unit to a position in another unit is a mandatory subject
23 of bargaining, and the commentary on this issue in Boston School Committee and other

1 cases is unpersuasive dicta. The Town criticizes the analysis and case law underlying
2 the CERB's conclusions in Boston School Committee,¹ and suggests that the CERB
3 drew a different and more appropriate distinction in Town of Danvers 3 MLC 1559,
4 1577, MUP-2292, 2299 (April 6, 1977). The Town cites numerous cases from other
5 states concluding that public employers need not bargain with unions over the criteria
6 for unit to unit promotions, and argues that those states got it right. It further suggests a
7 distinction between the residency requirement at issue in Boston School Committee and
8 the proposed use of an assessment center here. Finally, it argues that bargaining over
9 the promotional criteria at issue here is not required by operation of Section 7(d) of the
10 Law.

11 As a threshold matter, I agree with the Town that the CERB has not decided a
12 case which specifically held that a change in the criteria for a promotion from a position
13 in one bargaining unit into a position in another unit requires bargaining. The CERB²
14 has discussed this issue in prior cases, but its holdings addressed different issues. See
15 generally, City of Boston, 41 MLC 119, MUP-13-3371, 14-3466, 14-3504 (November 7,

¹ I express no opinion on the Town's critique of Boston School Committee and its argument that the decision misuses case law from other jurisdictions because, as discussed below, I agree with the CERB's perspective notwithstanding its reliance on other cases. Also, Town of Danvers does not require a contrary result here since its conclusions regarding promotions to non-unit positions concern promotions to confidential and/or managerial positions.

² In Sheriff's Office of Worcester County, 36 MLC 147, SUP-09-5462, (April 1, 2010), a hearing officer considered whether the sheriff had unilaterally implemented a new policy for promoting employees to positions within the same bargaining unit and to positions in a different bargaining unit. The hearing officer held that the sheriff did not violate the Law because the union had waived its bargaining rights. In a footnote, she indicated that one of the counts in the complaint concerned the lieutenant promotional process even though the lieutenant position was not in a bargaining unit "...because it is part of the bargaining unit members' career ladder and is therefore a mandatory subject of bargaining."

1 2014) (employer did not unlawfully include an assessment center in its promotional
2 examination procedures because it did not change the past practice); Boston School
3 Committee, supra, (school committee violated the Law by unilaterally imposing a rule
4 requiring residency for continued employment); Town of Danvers, supra, (CERB simply
5 ruled that the general topic of promotion procedures is mandatorily bargainable).
6 However, I am persuaded by the rationale in Boston School Committee even though I
7 am not required to follow it.

8 To determine whether a matter is a mandatory subject of bargaining, the CERB
9 balances the interests of employees in bargaining over a particular subject with the
10 interests of the public employer in maintaining its managerial prerogatives, and
11 considers factors like the degree to which the issue has a direct impact on terms and
12 conditions of employment, whether the issue concerns a core governmental decision, or
13 whether it is far removed from terms and conditions of employment. Commonwealth of
14 Massachusetts, 25 MLC 201, 205, SUP-4075 (June 4, 1999). Permissive subjects of
15 bargaining involve the type of governmental decision which should be reserved for the
16 sole discretion of the elected representatives. Town of Danvers, 3 MLC at 1577.

17 Applying the Danvers balancing test requires me to first consider whether the
18 issue has a direct impact on terms and conditions of employment. I agree with the
19 perspective that the CERB articulated in Boston School Committee and Town of
20 Danvers, that promotional opportunities available to workers are important regardless of
21 whether the promotional position is in the same or a different bargaining unit because of
22 the possibility of increased pay, benefits, job satisfaction, prestige, and movement on a
23 career ladder. I do not agree with the Town's contention that the criteria for unit to unit

1 promotions has, at best, a minimal impact on an employee since the Town can bypass
2 employees who top the Civil Service promotional list, and any impact can be mitigated
3 by giving advance notice of the promotional criteria. Advanced notice may help an
4 employee to decide whether to seek a promotion or how to prepare for an assessment,
5 but because an employee may not possess or be able to attain all of the necessary
6 skills and qualifications, notice alone is no substitute for a voice in determining which
7 criteria will be used to assess an employee's supervisory skills and thereby determine
8 placement on the list.³ List placement is significant because the Town appoints the
9 highest ranking applicant on the list unless it decides to bypass that applicant following
10 the interview and its assessment of the applicant's prior discipline and past
11 performance. The Town's ability to bypass an applicant notwithstanding their list
12 placement only comes into play if the candidate's rank on the list is high enough to put
13 him or her into consideration for the position. The use of an assessment center, in
14 addition to the selected assessment center techniques and the weight of the
15 assessment center, will help determine if a candidate places high enough on the list to
16 be considered. Therefore, the Town's bypass argument does not persuade me that the
17 use of an assessment center would have a minimal impact.

18 Additionally, I am not persuaded by the Town's alternative argument that some
19 unit to unit promotional criteria might require bargaining, but the use of an assessment
20 center is not one of them. In this vein, the Town tries to distinguish the residency

³ Additionally, an employee who possesses unique skills or experience, i.e. fluency in multiple languages, or prior residence in certain communities, may believe that these are important supervisory attributes and would enhance his/her promotional prospects. This employee would benefit from the union's ability to bargain over inclusion of those skills and experiences as promotional criteria.

1 requirement at issue in Boston School Committee from the use of the assessment
2 center proposed here, arguing that a residency requirement has a fundamentally
3 different impact on an employee because the time, expense, and personal/family
4 disruption involved in changing one's domicile would effectively foreclose a promotional
5 opportunity. The stipulated record does not describe the components of an assessment
6 center in sufficient detail to permit a comparison to other promotional criteria. However,
7 the impact of the assessment center could certainly vary depending on the weight given
8 the results and candidates' aptitude for taking verbal and demonstrative tests. Also, an
9 employee's ability to change his/her residency may not always be as formidable as the
10 Town suggests. Thus, I cannot conclude on this record that requiring residency as a
11 condition of promotion would necessarily have a stronger impact on employee terms
12 and conditions of employment than the use of an assessment center.⁴ An employee
13 could have comparable interests in bargaining over either and consequently, I find that
14 the criteria for promotion to a supervisory position in a different bargaining unit has a
15 direct impact on employee terms and conditions of employment.

16 I next consider whether the use of an assessment center in the process of
17 promoting patrol officers to sergeants concerns a core governmental decision. In

⁴ The Town's argument that allowing the Union to bargain the criteria for promotion to sergeant positions will open the floodgates to any proposal that is important to an upwardly mobile patrol officer is unavailing. The CERB held in an advisory opinion in Chelmsford School Committee, 8 MLC 1515, 1517 (November 13, 1981) that the administrators' union could not insist on bargaining over terms and conditions of employment of the administrators after they leave the bargaining unit and become teachers. The obligation to bargain extends only to the terms and conditions of employment of the employer's employees in the unit appropriate for such purposes which the union represents. Brockton School Committee, 23 MLC 43, MUP-9131 (July 15, 1996).

1 Boston School Committee, the CERB quoted the Michigan Court of Appeals in Detroit
2 Police Officers Association v. City of Detroit, 61 Mich. App. 487, 493-494 (1975) as
3 saying: “[m]anagement prerogative is not threatened by allowing a union some input on
4 the subject of promotions. Fundamental police department policy is not undermined by
5 a decision granting unit members the right to bargain about the conditions under which
6 they will be allowed to rise in the ranks of the profession of their choice.” The Town has
7 not demonstrated here that the criteria to consider in granting promotions from patrol
8 officer to sergeant is so fundamental to the basic direction of a police department that it
9 should be a managerial prerogative. It offers no evidence or argument that unilaterally
10 choosing the criteria for police supervisory positions will enhance public safety; impact
11 the Town’s ability to set law enforcement priorities and deploy law enforcement
12 resources; or implicate the nature of police services in any way. Simply put, it has not
13 shown why the criteria that it uses to assess whether to promote a patrol officer to a
14 sergeant is more important to the Town than it is to the patrol officers. In the absence of
15 any persuasive contrary rationale, I share the CERB’s view.⁵

16 Further, I am not persuaded by the cases that the Town cites from other
17 jurisdictions because they offer little to no rationale for their conclusions. Teamsters
18 Local 117 v. City of Tacoma, 2006 WL 1194958 *3 (Wash. PERC 2006) indicates that

⁵ The Law does not require different bargaining units for each rank of police officer. Consequently, the result that the Town seeks would produce different bargaining obligations depending on whether supervisory employees are included in the same or a different bargaining unit from employees whom they supervise. Yet, the Town does not explain why an employer’s interest in determining promotional criteria differs depending on whether the patrol officers are in the same or a different unit from the sergeants. Moreover, the concerns for loyalty and labor relations that underlay the CERB statements in Boston School Committee regarding the criteria used to promote employees to managerial/confidential positions are not applicable here.

1 setting conditions for promotion to positions outside the unit impacts an employer's
2 managerial prerogative more than it impacts bargaining unit employees because the
3 employer could be hampered in filling managerial or supervisory slots, which could be
4 detrimental to its mission. The Town has not argued or established that bargaining
5 would slow down the promotional process, so I do not find that reasoning persuasive in
6 this case. I do not share the view expressed in Public Employees Relations
7 Commission, 435 So. 2nd 275 (1983), that promotional criteria cannot be a mandatory
8 subject of bargaining because the promotion itself is speculative and uncertain, because
9 the same could be said of similar issues that the CERB has found to require bargaining,
10 i.e. longevity or injured-on-duty pay. See generally, Town of Chatham(II), 28 MLC 56,
11 MUP-9186 (June 29, 2001); Town of Easton, 16 MLC 1407, MUP-6555 (November 29,
12 1989).⁶

13 Finally, I consider the Town's argument that it is not required to bargain over the
14 use of an assessment center in the procedure for promoting patrol officers to sergeants
15 because Section 16 of G.L. c.31, which governs the form, method and subject matter of
16 promotional examinations, is not listed in Section 7(d) of the Law. Section 7(d) of the
17 Law provides that, with respect to matters within the scope of negotiations under G.L.
18 c.150E, s.6, the terms of a collective bargaining agreement prevail over contrary terms
19 in certain enumerated statutes. Commonwealth of Massachusetts v. Labor Relations
20 Commission, 404 Mass. 124, 126 (1989). If a statute specifically mandating certain
21 terms and conditions of employment is not listed in Section 7(d), the public employer

⁶ The other non-Massachusetts state cases that the Town cites do not explain the reason for their conclusion that the criteria for unit to unit promotions is not a mandatory subject of bargaining.

1 and union are incapable of amending the statute's requirements through bargaining,
2 and consequently, neither party has a duty to bargain over the subject matter of the
3 statute, even though the subject matter refers to what otherwise would be a mandatory
4 subject of bargaining. National Association of Government Employees, Local R1-162 v.
5 Labor Relations Commission, 17 Mass. App. Ct. 542, 544 (1984). If a statute implicates
6 mandatory subjects of bargaining, and the statute is not listed in Section 7(d), the CERB
7 examines the specific language of that statute to determine if a public employer has a
8 duty to bargain under that law, looking to see if the statute creates a specific statutory
9 mandate that controls all issues to the exclusion of any collective bargaining. Town of
10 South Hadley, 27 MLC 161, 163, MUP-1834 (June 12, 2001).

11 Section 16 of c. 31 provides in pertinent part as follows:

12 Examinations shall be conducted under the direction of the [personnel
13 administrator of the human resources division within the executive office for
14 administration and finance], who shall determine their form, method and subject
15 matter. Examinations shall fairly test the knowledge, skills and abilities which can
16 be practically and reliably measured and which are actually required to perform
17 the primary or dominant duties of the position for which the examination is held.
18 The administrator shall, in development of examinations, consult with
19 representatives of labor and professionals in the field to increase emphasis upon
20 aptitudes relevant to performing the positions to be tested...

21
22 This section of the statute delegates the form, method and subject matter of promotional
23 examinations to the administrator of HRD, who must consult with labor representatives
24 and professionals in the field that is the subject of the promotional examination. Boston
25 Police Superior Officers Federation v. Civil Service Commission, 35 Mass. App. Ct. 688,
26 692 (1993). Section 16 does not create a specific statutory mandate that controls all
27 issues to the exclusion of any collective bargaining because it does not require the
28 public employer to take any particular action, give the employer unfettered authority to

1 determine promotional criteria, or in any way hinder the employer's ability to bargain.
2 Since Section 16 mandates union involvement in the overall process of developing a
3 promotional examination, the Town cannot be heard to argue that the Union should
4 have no meaningful role. There is no statutory reason why the Town cannot bargain
5 with the Union over the use of an assessment center (or any other promotional criteria)
6 in promotions from patrol officer to sergeant and upon agreement, requisition one from
7 HRD. See generally, School Committee of Medford v. Labor Relations Commission, 8
8 Mass. App. Ct. 139, 141-142 (1979) (school committee free to bargain with teachers'
9 union over whether to pay over fifty percent of the cost of teachers' health insurance
10 even though the legislative body must confirm any agreement to do so by adopting
11 Section 7A of G.L.c.32B); Commonwealth of Massachusetts v. Labor Relations
12 Commission, 404 Mass. at 127 (no inconsistency between statutory provision that
13 commissioner of administration determine salaries and the requirement that the
14 commonwealth bargain to resolution or impasse before doing so); Town of Dedham v.
15 Labor Relations Commission, 365 Mass. 392 (1974) (civil service statute and public
16 employer bargaining statute should be read together to constitute a "harmonious
17 whole").

18 The Town further argues that the recent Supreme Judicial Court decision in City
19 of Somerville, 470 Mass. 562 (2015) compels a different result. In City of Somerville, the
20 SJC considered whether the city's contribution rate for retired employees' health
21 insurance coverage is a mandatory subject of bargaining. The city argued that G.L.

1 c.32B, Section 9E⁷ gave it the exclusive authority to determine those contribution rates.
2 The SJC agreed, citing Lynn v. Labor Relations Commission, 43 Mass. App. Ct. 172,
3 183 (1997) and noting that there is no obligation to engage in collective bargaining over
4 matters entirely controlled by statute, and that bargaining would effectively negate the
5 legislative purpose in entrusting the matter to the city. 470 Mass. at 571-572. The Court
6 then indicated that it would reach the same conclusion if it considered the import of
7 Section 7(d), reciting the familiar rule that statutes not specifically enumerated in
8 Section 7(d) will prevail over contrary terms in collective bargaining agreements, and
9 there is no duty to bargain over the specific requirements of such statutes. Id. at 572-
10 573.

11 The Town appears to suggest that the Court reduced the 7(d) bargaining
12 obligation analysis to a simple determination of whether or not a statute is listed in
13 Section 7(d). The Court's many references to prior case law belie that contention. The
14 Court focused on the specific language of Section 9E of c.32B which gave the city the
15 authority to decide whether and how much to contribute to the monthly health insurance
16 premiums of retired city employees.

17 Section 16 of c.31 is different from Section 9E of c.32B and need not be
18 interpreted the same way. Section 9E concerns the singular authority of the public
19 employer. Section 16 describes the authority of HRD's personnel administrator and

⁷ Section 9E provides in pertinent part as follows: "[a]...city by vote of its city council, approved by the mayor...may provide that it will pay in addition to fifty percent of a stated monthly premium as described in section seven A for contracts of insurance authorized by sections three and eleven C, a subsidiary or additional rate which may be lower or higher than the aforesaid premium and the remaining fifty percent of said premium is to be paid by a retired employee under the provisions of the first sentence of section nine...."

1 does not reference the role or authority of the public employer. Additionally, the
2 legislative goal of Section 16 is to ensure that promotional examinations fairly test an
3 applicant's ability to perform the primary or dominant duties of the position sought, see
4 Boston Police Superior Officers Federation, 35 Mass. App. Ct. at 693-694, and the
5 Town has not demonstrated that collective bargaining would conflict with or hinder that
6 goal. Consequently, Section 16 does not prohibit the Town from bargaining over the
7 criteria to use in the promotional process from patrol officer to sergeant.

8 Conclusion

9 The Town of Arlington violated Section 10(a)(5), and, derivatively Section
10 10(a)(1) of the Law by refusing to bargain with the Arlington Police Patrolmen's
11 Association over the Town's proposed use of an assessment center as a criteria for
12 promotion from the bargaining unit position of patrol officer to the non-bargaining unit
13 position of sergeant.

14 ORDER

15 WHEREFORE, based on the foregoing, IT IS HEREBY ORDERED that the Town
16 of Arlington shall:

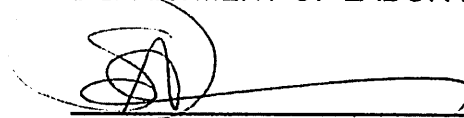
17 1. Cease and desist from:

- 18 a. Failing to bargain in good faith with the Union to resolution or
19 impasse concerning the decision and the impacts of the decision to
20 use an assessment center as part of the procedure for promoting
21 patrol officers to sergeant positions.
- 22 b. In any like or similar manner, interfering with, restraining, or
23 coercing any employees in the exercise of their rights guaranteed
24 under the Law.
25

- 1 2. Take the following affirmative action that will effectuate the purposes of
2 the Law:⁸
3
4 a. Upon request, bargain in good faith with the Union to resolution or
5 impasse concerning the decision and the impacts of the decision to
6 use an assessment center as part of the procedure for promoting
7 patrol officers to sergeant positions.
8
 b. Notify the DLR in writing of the steps taken to comply with this
 decision within ten (10) days of receipt of this decision.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS



SUSAN L. ATWATER, ESQ.
HEARING OFFICER

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. Chapter 150E, Section 11 and 456 CMR 13.15, to request a review of this decision by the Commonwealth Employment Relations Board by filing a Request for review with the Executive Secretary of the Department of Labor Relations within ten days after receiving notice of this decision. If a Request for Review is not filed within ten days, this decision shall become final and binding on the parties.

⁸ The Union indicated in its brief that it does not seek an order from the DLR to post a notice.