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

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In the Matter of	*	
	*	Case No.: MUP-15-4374
CITY OF BOSTON	*	
	*	Date Issued: May 25, 2017
and	*	
	*	
BOSTON POLICE PATROLMEN'S ASSOCIATION	*	
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CERB Members Participating:

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

Appearances:

Amy Laura Davidson, Esq.	-	Representing the Boston Police Patrolmen's Association
Natacha Thomas, Esq.	-	Representing the City of Boston

CERB DECISION ON APPEAL OF HEARING OFFICER DECISION

SUMMARY

On July 15, 2016, a Department of Labor Relations Hearing Officer issued a decision holding that the City of Boston (City) did not fail to bargain in good faith with the Boston Police Patrolmen's Association (Union) when it refused to allow a Union representative to attend a physical fitness-for-duty examination without first giving the Union notice and an opportunity to bargain to resolution or impasse over this decision and the impacts of this decision on bargaining unit members' terms and conditions of employment. The Union filed a request for review of the decision with the Commonwealth Employment Relations Board (CERB) asserting that the Hearing Officer

erred as a matter of fact and law when she held that the Union failed to demonstrate a binding past practice of Union representatives attending such exams. The City filed a response to the supplementary statement urging affirmance of the decision. For the reasons set forth below, the CERB agrees that the Union failed to meet its evidentiary burden and affirms the dismissal of the complaint.

Background

The parties stipulated to certain facts and the Hearing Officer made additional findings of fact that we adopt, as modified and summarized in pertinent part below.[1] Further reference may be made to the Hearing Officer's decision, reported at 42 MLC 14 (2016).

Medically Incapacitated Section

The City's Police Department (Department) includes a Medically Incapacitated Section (MIS). Pursuant to Section 11 of Department Rule 110, officers who are absent for more than thirty (30) calendar days due to sickness, injury or disability are reassigned to the MIS. This rule provides in pertinent part that, "[a]n officer so assigned must obtain a certificate to return to duty from their attending physician and shall not be returned to duty until a physician designated by the Police Commissioner has examined the officer and certified that he is capable of performing assigned duties in whole or in part." Neither the City's collective bargaining agreement nor any Department rule specifies whether Union representatives or attorneys can accompany Union members to MIS examinations.

[1] In August 2016, after the Hearing Officer rendered her decision, the parties moved and the DLR allowed a motion to designate a transcript of the proceedings as the official record in this matter.

MIS Staffing

At all times relevant to this proceeding, the City employed two health professionals to conduct MIS exams: Dr. Kristian Arnold (Arnold), the primary MIS doctor, and Zelma Greenstein (Greenstein), the MIS nurse practitioner.[2] Starting in October 2013, Ian Mackenzie (Mackenzie) served as the City's MIS Director. Mackenzie's duties include assigning Greenstein and Arnold to perform MIS physical examinations.

MIS Examinations

MIS fitness for duty exams include evaluations to determine whether the officer is capable of returning to work on light duty or full duty. These exams can include either a medical examination or a psychiatric examination.[3] With respect to medical exams, both Greenstein and Mackenzie distinguished in their testimony between pre-examination interviews, in which a medical history is taken and reasons for the visit are discussed, and a physical examination, which, as its name suggests, and Greenstein testified, involves a "hands-on" examination of the officer.

The Hearing Officer found, and no party refutes that, since at least 2002, the assigned MIS doctor and nurse practitioner have always allowed Union representatives to attend the pre-examination interview portion of the medical examination. However,

[2] Greenstein testified at hearing. Arnold did not.

[3] Psychiatric exams are not at issue in this decision.

there is no evidence that a Union representative ever attended the physical portion of a medical examination that Greenstein performed.[4]

With respect to Arnold, the record contains exhibits in the form of medical progress notes and law firm billing records reflecting that, since 2002, Union attorney Ken Grace (Grace) attended a number of MIS appointments that Arnold conducted with bargaining unit members. However, neither the progress notes nor billing records made explicit whether Grace attended only a pre-examination interview or the actual physical examination.[5] Grace similarly failed to draw this distinction in his testimony[6] and further testified that the majority of MIS examinations he attended did not include a physical examination.

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[4] Greenstein testified, and the Hearing Officer found that, Greenstein had never allowed a Union representative or other third-party to attend a physical examination. On appeal, the Union argues that this finding is erroneous because it overlooks Greenstein's subsequent testimony that no Union representative had ever made a request to her to attend a bargaining unit member's physical examination To be clear, Greenstein testified that she could not *recall* whether a Union representative had ever made such a request, not that a Union representative had *never* made the request. Regardless of this distinction, however, there is no record evidence that any Union representative or attorney ever attended a physical examination conducted by Greenstein. We have modified the finding accordingly.

[5] The Union argues that, based on Arnold's notes, some of the medical examinations that Grace attended could have included physical examinations. However, Arnold did not testify and the referenced notes, like all of Arnold's notes that were admitted as exhibits at hearing, are handwritten, not entirely legible and use unexplained medical terminology, abbreviations and symbols. Moreover, as discussed below, the only physical examination that Grace could recall with any specificity was the physical examination that Grace attended with Officer Brenda James (James). Accordingly, the Union's speculation as to what Arnold's notes "could" mean is insufficient to establish that Arnold conducted physical examinations on the specified occasions.

[6] As the Union points out on page 4 of its supplementary statement, Grace testified that "to me, a physical examination includes the history as well as the possible examination."

Rather, the record reflects only a single instance of a Union representative or attorney attending a physical examination conducted by Arnold.[7] [8] This occurred in July 2014, when Grace attended the physical examination that Arnold performed on Officer James.[9]

Officer Michael Duggan

Officer Michael Duggan (Duggan) was injured on duty in July 2014. He met with Arnold in August 2014, and Arnold conducted a physical examination.[10] On September 15, 2014, Duggan had another MIS appointment to which he brought a Union representative (not Grace).[11] When the MIS secretaries informed Mackenzie that Duggan had brought a Union representative with him, Mackenzie told them that the Union representative could not attend. The examination was rescheduled to September

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[7] The Union objects to the Hearing Officer's finding that, "besides the [James] exception, Dr. Arnold never performed physical examinations on officers while a third-party (union representative, attorney or other) was present in the examination room." Unlike Greenstein, Arnold did not testify to this effect. We have therefore modified the finding as set out in the accompanying text.

[8] As discussed above, both the documentary evidence and Grace's testimony failed to differentiate between physical exams and pre-examination interviews and Grace was unable to recall attending any actual physical exams besides the James examination. We therefore disagree with the Union that the Hearing Officer erred when she declined to give weight to Grace's otherwise unsupported testimony that he attended physical exams other than the James examination. On this basis, and having modified certain findings regarding Arnold and Greenstein, see footnotes 4 and 7 and accompanying text, we make the findings set out above.

[9] James' father was also present at this physical examination.

[10] The parties stipulated that Duggan's fitness for duty examination was a physical medical examination.

[11] The Union representative is not identified in the record.

23, 2014, and Duggan arrived at that examination with Grace. Pursuant to Mackenzie's instructions, Grace was prohibited from entering the examination room.

Duggan's MIS examination was again rescheduled to a date in October 2014. On this occasion, Grace travelled with Duggan to the examination, but did not accompany him into the examination room.

Opinion[12]

A public employer violates Section 10(a)(5) and, derivatively, 10(a)(1) of the Law when it unilaterally changes an existing condition of employment or implements a new condition of employment involving a mandatory subject of bargaining without first giving its employees' exclusive bargaining representative notice and an opportunity to bargain to resolution or impasse. Commonwealth of Massachusetts v. Labor Relations Commission, 404 Mass. 124 (1989); School Committee of Newton v. Labor Relations Commission, 388 Mass. 557 (1983). To establish a violation of the Law, the Union must prove that a change has occurred in a pre-existing condition of employment. Commonwealth of Massachusetts, 23 MLC 137, SUP-4016, December 4, 1996 (citing City of Peabody, 9 MLC 1447, MUP-4750, MUP-4767 (November 17, 1982)). The change must impact on a mandatory subject of bargaining. Town of Billerica, 8 MLC 1957, MUP-4000, MUP-4122 (March 19, 1982). An employer's obligation to bargain before changing conditions of employment extends to working conditions established through past practice, as well as those specified in a collective bargaining agreement. City of Peabody, 9 MLC at 1449. The CERB has consistently held, and the City did not dispute at hearing, that the criteria and procedures for fitness-for-duty examinations are

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

mandatory subjects of bargaining. Massachusetts Port Authority, 36 MLC 5, 11-12, UP-04-2669 (June 30, 2009) *aff'd sub nom. on other grounds,* Massachusetts Port Authority v. CERB, 78 Mass. App. Ct. 1122 (unpublished disposition).

To determine whether a practice exists, the CERB analyzes the combination of facts upon which the alleged practice is predicated, including whether the practice has occurred with regularity over a sufficient period of time so that it is reasonable to expect that the practice will continue. Swansea Water District, 28 MLC 244, 245, MUP-2436, 2456 (January 23, 2002). Further, a practice may be found despite sporadic or infrequent activity where a consistent practice that applies to rare circumstances is followed each time that the circumstances preceding the practice recur. Commonwealth of Massachusetts, 23 MLC 171, 172, SUP-3586 (January 30, 1997).

As framed by the Union, the question on appeal is whether the Hearing Officer erred in concluding that the Union had failed to meet its burden of proving a past practice of permitting Union representatives and attorneys to accompany bargaining unit members to MIS physical examinations.[13] The Union argues that it met its burden based on evidence showing that Grace attended physical exams with officers who requested his presence on the sporadic occasions when such exams were performed, and the absence of any evidence showing that Grace was ever asked to leave a

[13] We do not reach a second issue that the Union raises on appeal concerning a 2009 MIS examination. At hearing, the City claimed that it had excluded a Union representative from attending this examination, but the Union argued that the City had excluded a private attorney from this examination, not a Union representative. In the course of addressing a separate timeliness argument that is not at issue in this appeal, the Hearing Officer treated the 2009 incident as concerning a private attorney only, and thus tacitly agreed with the Union. Because the 2009 incident did not otherwise factor into the Hearing Officer's ultimate decision to dismiss the Complaint, there is no need to address the Union's arguments on appeal.

physical examination prior to the Duggan incident. However, for the reasons set forth above, we have affirmed the Hearing Officer's finding that the evidence presented by the Union demonstrated only a single occasion on which Grace attended an actual physical examination.

Even in situations where the event at issue only occurs sporadically, this single event is insufficient to constitute an existing practice over a sufficient period of time so that it would be reasonable for bargaining unit members to conclude that the practice would continue. Town of Haverhill, 42 MLC 273, MUP-13-3066 (May 24, 2016); Swansea Water District, 28 MLC at 245. The cases cited by the Union are inapposite because they premise their finding of binding past practice on multiple occurrences of the same or similar events.[14]

Under these circumstances, the Union has failed to meet its burden of establishing that the City had a binding past practice of permitting Union representatives to attend the physical examination portions of MIS appointments. The absence of evidence showing that the City ever barred Grace from attending MIS examinations prior to Duggan does not change this result, given the dearth of evidence that Grace attended actual physical exams before then and the more general principle that "the

[14] The Union relied on City of Worcester, 38 MLC 190, MUP-07-5034 (August 24, 2012) (practice of granting certain types of union leave based on two events); Town of Natick, 23 MLC 123, 125, MUP-1058 (H.O. November 25,1996), *aff'd* August 8, 2001(finding binding practice of allowing EMTs to swap shifts based on two occurrences of event); Town of Arlington, 16 MLC 1350, 1351, MUP-7128 (November 9,1989) (past practice of prioritizing details by cancelling low priority details in order to ensure coverage of high priority details found based on one incident where town canceled all details until the high priority detail was filled *and* other instances of town insisting that certain paid details be filled before others); Town of Lee, 10 MLC 1262, 1264, MUP-5211 (September 30, 1983) (finding practice based on three instances of allowing an officer to reside out of town), *aff'd* Town of Lee v. Labor Relations Commission, 21 Mass. App. Ct. 166 (1985).

absence of evidence to support a negative does not automatically mean that sufficient evidence exists to support the corresponding positive practice." NAGE v. Commonwealth Employment Relations Board, 89 Mass. App. Ct. 1106, 2016 Mass. App. Unpub LEXIS 144, at n. 5 (February 18, 2016)(unpublished disposition).

Given the Union's failure to establish that the City had a past practice of permitting Union representatives to attend physical examinations, Mackenzie's refusal to allow a Union representative to attend the Duggan physical examination did not constitute a change in an existing condition of employment that triggered the City's obligation to give the Union notice and an opportunity to bargain under the Law. City of Peabody, 9 MLC at 1449. Accord City of Worcester, 39 MLC 23, MUP-07-5034 (August 24, 2012) *aff'd sub nom* NAGE v. Commonwealth Employment Relations Board, 89 Mass. App. Ct. 1106 (holding that employer did not fail to bargain in good faith when it refused to grant paid leave to a union representative to attend certain types of union meetings where the union failed to demonstrate that the employer had a past practice of granting paid leave for those types of union meetings; absence of evidence to support a past practice of consistently *denying* that leave did not suffice to meet the union's burden).

Conclusion

For the foregoing reasons, we conclude that the City's conduct did not violate Section 10(a)(5 and derivatively, 10(a)(1) of the Law in the manner alleged and dismiss the Complaint.

SO ORDERED

COMMONWEALTH OF MASSACHUSETTS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD

MARJORIE F. WITTNER, CHAIR

KATHERINE C. LEV, CERB MEMBER

APPEAL RIGHTS

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