

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of

CITY OF BOSTON

and

BOSTON POLICE PATROLMEN'S
ASSOCIATION

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Case No.: MUP-15-4374

Date Issued: July 15, 2016

Hearing Officer:

Kendrah Davis, Esq.

Appearances:

Amy Laura Davidson, Esq. - Representing the Boston Police
Patrolmen's Association

Natacha Thomas, Esq. - Representing the City of Boston

HEARING OFFICER'S DECISION

SUMMARY

1 The issue is whether the City of Boston (City) failed to bargain in good faith with
2 the Boston Police Patrolmen's Association (Union) by not providing the Union with prior
3 notice and an opportunity to bargain to resolution or impasse over the decision to deny
4 bargaining unit members the right to have a union representative accompany them at
5 fitness-for-duty physical examinations and the impacts of that decision on employees'
6 terms and conditions of employment in violation of Section 10(a)(5) and, derivatively,
7 Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law).

8 For the reasons explained below, I find that the City did not violate the Law by
9 failing to bargain with the Union when it denied bargaining unit members the right to

1 have a union representative accompany them at fitness-for-duty physical examinations
2 and the impacts of that decision on employees' terms and conditions of employment.

3 STATEMENT OF THE CASE

4 On March 11, 2015, the Union filed a Charge of Prohibited Practice with the
5 Department of Labor Relations (DLR) alleging that the City had engaged in prohibited
6 practices within the meaning of Section 10(a)(5) and, derivatively, Section 10(a)(1) of
7 the Law. On June 29, 2015, a DLR Investigator issued a Complaint of Prohibited
8 Practice (Complaint) and Partial Dismissal, alleging that the City had violated Section
9 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by failing to bargain in good faith
10 with the Union after it denied bargaining unit members the right to have a union
11 representative present during fitness for duty examinations in September of 2014, and
12 the impacts of that decision on employees' terms and conditions of employment. On
13 January 28, 2016, the City filed its Answer to the Complaint.

14 On February 24, 2016, I conducted a hearing at which both parties had a full
15 opportunity to be heard, to examine and cross-examine witnesses and to introduce
16 evidence. On April 11 and 14, 2016, respectively, the Union and the City filed their
17 post-hearing briefs.

18 STIPULATION OF FACTS

19 **The parties stipulated to the following facts:**

- 20 1. The City is a public employer within the meaning of Section 1 of the Law.
21
22 2. The Union is an employee organization within the meaning of Section 1 of the
23 Law.
24
25 3. The Union is the exclusive collective bargaining representative of patrol officers
26 employed by the City in its Police Department (Department).
27

- 1 4. The Department has a Medically Incapacitated Section known as MIS. The City
2 designates doctors assigned to MIS to perform fitness for duty examinations.
3
- 4 5. Fitness for duty exams include evaluations to determine whether the officer is
5 capable of returning to work on light duty or full duty.
6
- 7 6. A fitness for duty exam may include either a physical medical exam or a
8 psychiatric evaluation.
9
- 10 7. On September 15, 2014, the Department's Occupational Health Services Unit
11 [(OHSU)] denied Officer Michael Duggan's [(Duggan)] request to have a union
12 representative accompany him to a fitness for duty examination.
13
- 14 8. Officer Duggan's fitness for duty exam was a physical medical exam.
15
16

ADMISSION OF FACTS

17 In its Answer, the City admitted to the following facts:

- 18 1. On September 15, 2014, OHSU Director Ian Mackenzie (Mackenzie) denied
19 Officer Duggan's request to have a union representative accompany him during
20 his fitness for duty examination.
21
- 22 2. The MIS scheduled a second fitness for duty examination for Officer Duggan on
23 September 23, 2014, and, again, Director Mackenzie denied Officer Duggan's
24 request to have union representation present at that examination.
25

FINDINGS OF FACT

The Collective Bargaining Agreements

29 The City and the Union were parties to a collective bargaining agreement
30 (Agreement) that was effective from July 1, 2007 through June 30, 2010. The parties
31 negotiated a successor Agreement that was effective from July 1, 2013 through June
32 30, 2016. Article XIII, Section 1 pertained to "Fitness to Return to Work After Service-
33 Connected Sickness Injury or Disability." The Agreement was silent about whether unit
34 members may have a third-party representative (such as a union representative or
35 private attorney) accompany them during their fitness-for-duty physical examinations at
36 the MIS.

Department Rule 110

Effective December 31, 2012, the Department issued Rules and Procedures, Rule 110. Section 11 of Rule 110 concerns the MIS, and states in relevant part:

After 30 calendar days of absence because of sickness, injury or disability, an employee shall be reassigned to the [MIS]. An 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.

Section 27 of Rule 110 states in full, "Police officers who have been certified by the department physician as fit to return to duty shall return to duty on the date specified by the department physician."

Rule 110 is silent about whether the City permits unit member requests to have third-party representatives accompany them during physical examinations at the MIS.

MIS Personnel

Prior to October of 2013, and for approximately 40 years, Roberta Mullan (Mullan) was employed by the City as the Director of the Department's MIS. At some point in or about January of 2014, Mullan retired and the City appointed Ian Mackenzie to assume her position. Since his appointment, Mackenzie has assigned doctors and nurse practitioners employed by the MIS to perform fitness for duty physical examinations on injured officers to determine whether those officers are incapacitated due their injuries or capable of returning to work on light duty or full duty.

For the past 30 years, and at all relevant times, the City has employed Zelma Greenstein (Greenstein) as the MIS nurse practitioner (N.P.). As part of her duties, Greenstein conducts pre-examination interviews with the injured officers to discuss their medical histories, the nature of their injuries, current symptoms and trauma (if any).

1 During her tenure, N. P. Greenstein has performed thousands of physical examinations
2 on unit members. At no point during her tenure has N.P. Greenstein ever allowed a
3 union representative, union attorney, private attorney or other third party to be present
4 with an officer during her physical examination.

5 For many years, and at all relevant times, the City employed Kristian Arnold,
6 M.D. (Arnold) as its primary MIS doctor. As part of his duties, Dr. Arnold presided over
7 the medical appointments and physical examinations of officers at the MIS. At the end
8 of each officer's examination, Dr. Arnold would memorialize his findings and make
9 suggestions via official "Progress Notes" that he filed with the Department. When third-
10 parties accompanied officers to their MIS appointments, Dr. Arnold indicated their
11 presence in his Progress Notes. Between 2006 and 2014, Dr. Arnold noted at least ten
12 occasions when third parties (e.g., union representatives or attorneys) had
13 accompanied officers to their MIS appointments. Wherever Dr. Arnold identified a third-
14 party representative in his Progress Notes, most often the person identified was Union
15 counsel Kenneth Grace, Esq. (Grace).

16 In his Progress Notes, Dr. Arnold failed to distinguish whether the third-party
17 representatives were present during the officers' pre-examination interviews, the
18 physical exams or any follow-up conferences.¹ Instead, his notes reflected only the
19 medical issues that he discussed with the third party and the officer.

20 On or about September 22, 2009, Dr. Arnold documented that he had prohibited
21 Officer Mark Bordley's (Bordley) private attorney from attending a scheduled physical

¹ Dr. Arnold did not testify at the hearing because after his retirement in November of 2015, he relocated to France.

1 examination with Officer Bordley at the MIS. On or about September 23, 2009, Officer
2 Bordley's attorney contacted Attorney Grace and communicated what had happened at
3 the MIS concerning Dr. Arnold's prohibition. Attorney Grace memorialized his
4 conversation with Officer Bordley's private attorney via handwritten notes. The Union
5 did not file a grievance or a charge against the City for Dr. Arnold's decision on
6 September 22, 2009.

7 **MIS Examinations**

8 At the MIS, both doctors and nurse practitioners may perform physical
9 examinations on officers. When the Department assigns either an MIS doctor or nurse
10 practitioner to perform a physical examination, he or she will usually conduct a pre-
11 examination interview with the officer to discuss that officer's medical history. If the
12 doctor or nurse practitioner determines that a physical examination is needed, then he
13 or she may proceed to examine the officer on that day or at a later time. After
14 conducting the pre-examination interview and/or the physical examination, the doctor or
15 nurse practitioner will memorialize his or her professional thoughts about the officer's
16 medical exam by completing the Department's "Progress Report" form.

17 On occasion, an officer might request to have a union representative or attorney
18 accompany him or her to the MIS and into the physical examination room. Since at
19 least 2002, the assigned MIS doctor and nurse practitioner has always allowed third
20 parties (e.g., union representatives and/or attorneys) to accompany officers during their
21 pre-examination interviews. While N.P. Greenstein has never allowed union
22 representatives and/or other third parties to be present in the examination room during
23 an injured officer's actual physical exam, in July of 2014, Dr. Arnold permitted Officer

1 Brenda James (James) to have her father and Attorney Grace accompany her into the
2 examination room while Dr. Arnold performed a physical examination. Besides this July
3 2014 exception, Dr. Arnold never performed physical examinations on officers while a
4 third-party (union representative, attorney or other) was present in the examination
5 room.

6 **Officer Duggan's MIS Examinations**

7 **1. July 2014**

8 On or about July 1, 2014, Officer Duggan was injured-on-duty (IOD) while
9 attempting to place an individual into custody. On or about July 17, 2014, Officer
10 Duggan scheduled an appointment at the MIS with Dr. Arnold but for unforeseen
11 reasons, Officer Duggan was unable to attend that appointment.

12 **2. August 2014**

13 On or about August 7, 2014, Dr. Arnold met with Officer Duggan and instructed
14 him about the City's restrictions of light-duty status for returning to work. At some point
15 during or after that meeting, Officer Duggan signed a light-duty agreement,
16 acknowledging the light-duty instructions communicated by Dr. Arnold earlier that day.
17 On August 26, 2014, Dr. Arnold met with Officer Duggan and performed a physical,
18 fitness-for-duty examination. Prior to that examination, Officer Duggan complained to
19 Dr. Arnold that he was experiencing discomfort in the areas of his right forearm, hip and
20 right knee. Based on those complaints, Dr. Arnold examined Officer Duggan and
21 torqued his right knee, causing him additional pain.

22 At some point after his August 26, 2014 physical examination with Dr. Arnold,
23 Officer Duggan met with his personal physician Dr. Kai Mithoefer, M.D., (Dr. Mithoefer)

1 who injected cortisone into Officer Duggan's knee. After his appointment with Dr.
2 Mithoefer, Officer Duggan spoke with the MIS front desk administrators Maria and
3 Linda, who instructed him to file a Form 26 regarding his IOD status. At some point
4 after his conversation with Maria and Linda, Officer Duggan spoke with Lieutenant
5 Wilbanks (Lt. Wilbanks) who also recommended that he file a Form 26. Pursuant to Lt.
6 Wilbanks' request, on or about August 29, 2014, Officer Duggan filed a Form 26 with
7 the Department, which included a written account of his August 26, 2014 examination
8 with Dr. Arnold.

9 **3. September 2014**

10 On September 15, 2014, Officer Duggan attended another fitness-for-duty
11 examination at the MIS. Prior to Officer Duggan's arrival, MIS Director Mackenzie
12 directed Linda and Maria to prohibit anyone one other than Officer Duggan from
13 entering the examination room. When Officer Duggan and his Union representative
14 arrived at the MIS, they requested to enter the examination room but Linda and Maria
15 denied the request. Officer Duggan then terminated his appointment. He scheduled
16 another appointment for September 23, 2014, arriving on that day with Attorney Grace.
17 Again, Linda and Maria prohibited Attorney Grace from accompanying Officer Duggan
18 into the examination room pursuant to Director Mackenzie's express directive.

19 **4. October 2014**

20 On or about October 7, 2014, Officer Duggan attended his rescheduled fitness-
21 for-duty examination at the MIS. Attorney Grace traveled with Officer Duggan to the
22 MIS but did not accompany him into the examination room. On that day, N. P.
23 Greenstein performed Officer Duggan's examination, instead of Dr. Arnold. At some

1 point on October 21, 2014, the City permitted Officer Duggan to return to work, which he
2 did on or about October 22, 2014.

3 **Attorney Grace's Record-Keeping**

4 In 1982, Sandulli Law Offices hired Attorney Grace and three years later, offered
5 him a partnership. Grace accepted the partnership and, in 1985, Sandulli Law Offices
6 became Sandulli Grace. Prior to 2002, Attorney Grace documented his client meetings
7 with unit members by summarizing the scope of those meetings in his personal
8 appointment books.² In or about 2002, Attorney Grace began documenting his client
9 meetings with unit members by inputting that data into Sandulli Grace's electronic,
10 record-keeping database. These electronic documentations were very brief (a few short
11 sentences) and contained only generalized information about the meetings. For
12 example, between 2002 and 2014, Attorney Grace made the following data entries
13 concerning client meetings with various unit members:

14 2002:

- 15 • April 22 – Conference on medical hearing; Second conference on
16 same.
- 17 • May 6 – Meeting with Officer prior to medical exam; Meeting with
18 City doctor to review accidental disability retirement options;
19 Conference with Officer after medical appointment.

20 2003:

- 21 • Jan. 7 – Meeting with Officer at MIS to resolve light duty status;
22 Follow up conference on same.
- 23 • May 7 – Review of cases for meeting with Officer; Meeting with
24 Officer prior to medical exam; Medical exam at MIS; Follow up on
25 same.

26 2007:

² The Union did not offer into evidence any of Attorney Grace's personal appointment books.

- Jan. 8 – Preparation of position to meet with Dr. Arnold; Conference with Officer on same; Meeting with Dr. Arnold at MIS; Conference after meeting.
- Feb. 26 – Review of medicals; Attendance at medical appointment at MIS; conference after appointment with Officer.
- June 27 – Conference on medical exam; Meeting with Officer; Meeting at MIS; Conference after meeting with Officer.
- Oct. 10 – Meeting with Officer prior to appointment at MIS; Meeting with Department doctor; Follow up conference on same.

2009:

- March 30 – Preparation for medical appointment with Officer at MIS; Meeting at MIS to secure return to full duty; Follow up conference on same.
- April 13 – Conference on strategy to challenge department's refusal to return Officer to full duty; Discussion of legal options; Meeting with Officer prior to MIS; Conference after appointment.
- Sept. 3 – Meeting with Officer prior to examination at MIS; Attend examination at MIS; conference with Officer after exam.

2010:

- Jan. 21 – Review of medicals and injury reports; Meeting with Officer; Meeting at MIS with Dr. Arnold; conference after meeting on strategy.
- July 12 – Preparation for MIS meeting with Officer; Meet with Department doctor and Officer; Follow up conference on same.

2014:

- July 14 – Medical exam for Officer at MIS; Conference with MIS on next steps for clearance.

Attorney Grace and the MIS

Whenever Union leaders would contact Attorney Grace about accompanying officers to the MIS for physical examinations, Grace would first contact the officers to confirm whether they wanted him to be present during their exams. If an officer wanted Attorney Grace to accompany him or her to the MIS, Attorney Grace would meet with the officer prior to the exam (usually on the day of the exam) and review their case.

1 Attorney Grace would then walk the officer into the MIS office and wait to be called into
2 the examination room by Dr. Arnold or N. P. Greenstein. Once called into the
3 examination room, the doctor or nurse practitioner would commence a medical history
4 interview with the officer. When Attorney Grace attended these medical history
5 interviews, he did not actively participate in the interview, except as a silent observer.

6 The majority of pre-examination interviews observed by Attorney Grace ended
7 without the doctor or nurse practitioner conducting an actual physical exam on the
8 officer. When no physical examination occurred, Attorney Grace would leave the
9 examination room with the officer at the end of the interview.

10 **The City's 2016 Information Request**

11 By letter dated January 19, 2016, the City requested certain information from the
12 Union, including:

- 13 1. Any and all names and dates Kenneth Grace accompanied BPPA
14 members to the Office of the Occupational Health Services at the
15 Boston Police Department from 1992 to present;
- 16 2. Any instance...where Mr. Grace was allowed to be present while a
17 BPD doctor conducted a medical examination...[including] the name of
18 the doctor;
- 19 3. All instances Mr. Grace waited outside the medical room while a
20 medical examination took place.

21 Pursuant to the City's January 19, 2016 request for information, Attorney Grace
22 instructed his legal secretary to conduct an electronic data search in Sandulli Grace's
23 record-keeping system, using the search terms MIS, medical exam or medical hearing.
24 After concluding the search on or about February 1 and 18, 2016, the results showed
25 that there were 15 instances where Attorney Grace had either met with an officer prior
26 to attending a scheduled appointment at the MIS, or had accompanied that officer to the
27 MIS to "meet with Dr. Arnold" and conduct a "follow-up conference." Nothing in the

1 search results stated clearly whether Attorney Grace actually accompanied the officers
2 into their physical examinations at the MIS, or if he was just present during their pre-
3 examination interviews.³ By letter dated February 19, 2016, the Union replied to the
4 City's information request, stating in pertinent part:

5 [T]he information below covers as many as these situations as Mr. Grace
6 could find from 2001 to the date the BPPA alleges a change in practice
7 occurred in September/October, 2014. Specific information going back
8 from 1992 to 2001 is not available without doing an exhaustive hand
9 search of multiple filing boxes which may or may not contain the relevant
10 files. My point to you is that there are other instances over the 22 year
11 period besides those listed below where Mr. Grace accompanied BPPA
12 officers to the Office of Occupational Health Services and was present
13 during their medical examinations. In each of the instances of Mr. Grace's
14 representation of an officer where an examination was conducted for a
15 physical injury, the examination was conducted by either the Department's
16 Physician Dr. Kris Arnold or the Department's Nurse Practitioner, Zelma
17 Greenstein. If it is necessary for you to know which person was at each
18 examination, please let me know and I will see if Mr. Grace can answer
19 that question. Except where noted for 2 psychological exams...Mr. Grace
20 was present during all the other exams....

- 21
22 1. January 7, 2003 – Officer O'Brian
23 2. May 7, 2003 – Officer Flores
24 3. November 2, 2006 – Officer Lynch

³ At the hearing, Attorney Grace testified that he did not distinguish between pre-examination interviews and actual physical exams conducted at the MIS. Instead, he testified that he conflated the term "examination" to include both the pre-exam interview and the physical examination. Attorney Grace conceded that when he accompanied officers to medical appointments at the MIS, a majority of those appointments consisted only of the interview and not the physical exam. He also conceded that between 2002 and 2014, his entries into Sandulli Grace's electronic database did not specify whether he actually attended a pre-examination interview, a physical exam or both. Similarly, Dr. Arnold failed to clarify in his Progress Notes whether the third-party representatives who had accompanied officers to the MIS actually observed the pre-examination interviews, the physical exams or both. Consequently, because N. P. Greenstein gave unequivocal and un rebutted testimony that she never permitted third-parties into the physical examination room, and because Attorney Grace could not testify conclusively to being present in the physical examination room every time that an officer made such a request (except in July of 2014), I do not credit his testimony that Dr. Arnold always permitted Attorney Grace to accompany officers into the physical examination room while Dr. Arnold conducted physical examinations.

4. January 8, 2007 – Officer Lynch
5. February 26, 2007 – Officer Lynch
6. June 27, 2006 – Officer Bynoe Simpson
7. October 10, 2007 – Officer Garcia
8. March 30, 2009 – Officer Hart
9. April 13, 2009 – Officer Hart
10. September 3, 2009 – Officer Trull
11. December 10, 2009 – Officer Guilford
12. January 13, 2010 – Officer Antonino
13. January 21, 2010 – Officer Antonino
14. July 12, 2010 – Officer Guilford
15. March 2, 2011 – Officer Lamb (psychological with Dr. Scott)
16. July 10, 2014 – Officer James (psychological with Dr. Brown)
17. July 14, 2014 – Officer James

The Union's 2016 Information Request

By letter dated February 1, 2016, the Union submitted a request for information from the City, seeking:

1. Any and all names and dates when the City denied a request by a Boston patrol officer to have a Union representative or attorney accompany him or her to a medical examination for the period at the Office of Occupational Health Services at the Boston Police Department from 1992 until September 15, 2014.
2. The names and dates when such requests were denied, the name of the officer and the name of the representative who was excluded from the examination.

By letter dated February 17, 2016, the City replied to the Union's request for information, stating in pertinent part:

1. Patrolman Mark Bordley was denied union/legal representation during a medical exam on September 22, 2009.
2. Patrolman Mark Bordley was denied union representation during a medical exam on September 22, 2009. We do not have the name of the legal representative who was not allowed in.

OPINION

Timeliness

1 DLR Rule 15.03, 456 CMR 15.03, states that, "except for good cause shown, no
2 charge shall be entertained based upon any prohibited practice occurring more than six
3 months prior to the filing of a charge with the [DLR]." The Commonwealth Employment
4 Relations Board (Board) has established that pursuant to Rule 15.03, a charging party
5 must file a charge of prohibited practice with the DLR within six months of the alleged
6 violation or within six months of the date the violation became known or should have
7 become known to the charging party, except for good cause shown. Felton v. Labor
8 Relations Commission, 33 Mass. App. Ct. 926 (1992); Town of Lenox, 29 MLC 51, 52,
9 MUP-01-3214 and MUP-01-3215 (Sept. 5, 2002) (citing Town of Dennis, 26 MLC 203,
10 205, MUP-1868 (April 21, 2000)).

11 The City argues that the Union's charge is untimely because Attorney Grace
12 knew about the change in 2009 when Dr. Arnold refused to meet with Officer Bordley's
13 private attorney and prohibited him from accompanying Officer Bordley into his physical
14 examination at the MIS on or about September 22, 2009. Because the Union was
15 aware of this change in 2009 but waited until 2015 to file its charge, the City argues that
16 I should dismiss the charge based on timeliness. In contrast, the Union argues that its
17 charge is timely because Officer Bordley's case involved a non-union, third-party
18 representative (i.e., his private attorney) and, therefore, it never had notice of any
19 change until Dr. Arnold denied Attorney Grace from accompanying Officer Duggan into
20 his physical examination in September of 2014.

21 Because an allegation that a charge is untimely is an affirmative defense, the
22 City has the burden of showing that the Union failed to file its charge within six months
23 of Dr. Arnold changing the alleged practice of permitting third-party representatives to

1 accompany officers into their physical examinations at the MIS. See Diane McCormick
2 v. Labor Relations Commission, 412 Mass. 164, 171, n. 13 (1992); see also
3 Commonwealth of Massachusetts, 29 MLC 43, 46, SUP-4546 (Aug. 7, 2002); City of
4 Boston, 26 MLC 177, 181, MUP-1431 (March 23, 2000).

5 Here, the record shows that the City denied Officer Bordley's request to have his
6 private attorney accompany him to his physical examination at the MIS in September of
7 2009. However, there is no evidence that this decision changed a prior practice or
8 created a new one in 2009. Rather, Dr. Arnold's September 2014 denials of Officer
9 Duggan's requests triggered the statutory limitations period because that was when his
10 decision became inconsistent with his earlier practice of granting Officer James' request
11 in July of 2014. The Union knew about this inconsistency in September of 2014, and
12 filed its charge in March of 2015, which fell within the six month limitations period. See
13 Commonwealth of Massachusetts, 39 MLC 169, 171, SUP-08-5447 (Dec. 27, 2012)
14 (citing Town of Lenox, 29 MLC at 52)) (in unilateral change cases, the timeliness of a
15 charge turns on when the union knew or should have known that the employer would
16 implement a change affecting a mandatory subject of bargaining without satisfying its
17 Section 6 bargaining obligation).

18 **10(a)(5)**

19 A public employer violates Section 10(a)(5) and, derivatively, 10(a)(1) of the Law
20 when it unilaterally changes an existing condition of employment or implements a new
21 condition of employment involving a mandatory subject of bargaining without first giving
22 its employees' exclusive bargaining representative notice and an opportunity to bargain
23 to resolution or impasse. Commonwealth of Massachusetts v. Labor Relations

1 Commission, 404 Mass. 124 (1989); School Committee of Newton v. Labor Relations
2 Commission, 388 Mass. 557 (1983); Commonwealth of Massachusetts, 30 MLC 63,
3 SUP-4784 (Oct. 9, 2003), aff'd Secretary of Administration and Finance v.
4 Commonwealth Employment Relations Board, 74 Mass. App. Ct. 91 (2009). The Board
5 holds that the eligibility criteria for paid injury-on-duty leave is a mandatory subject of
6 bargaining. Town of Harwich, 32 MLC 27, 30-31, MUP-01-2960 (June 27, 2005) (citing
7 City of Medford, 28 MLC 136, 137-38, MUP-2389 (Oct. 10, 2001); City of Springfield, 12
8 MLC 1051, 1054, MUP-5365 (June 28, 1985)). Likewise, an employer's requirement
9 that an employee claiming disability leave submit to an examination by a physician
10 designated by the employer rather than an employee is also a mandatory subject of
11 bargaining. City of Medford, 28 MLC at 137-38 (citing Town of Avon, 6 MLC 1290,
12 1291-92, MUP-3191 (July 12, 1979)).

13 To establish a violation, a union must demonstrate by a preponderance of
14 evidence that there was a pre-existing practice, that the employer unilaterally changed
15 that practice, and that the change impacted a mandatory subject of bargaining. Boston
16 School Committee, 3 MLC 1603, 1605, MUP-2503, MUP-2528 and MUP-2541 (April 15,
17 1977). To determine whether a binding past practice exists, the Board "analyzes the
18 combination of facts upon which the alleged practice is predicated, including whether
19 the practice has occurred with regularity over a sufficient period of time so that it is
20 reasonable to expect that the practice will continue." City of Boston, 41 MLC 119, 125,
21 MUP-13-3371, MUP-14-3466 and MUP-14-3504 (Nov. 7, 2014) (citing Swansea Water
22 District, 28 MLC 244, 245, MUP-2436 and MUP-2456 (Jan. 23, 2002); Commonwealth
23 of Massachusetts, 23 MLC 171, 172, SUP-3586 (Jan. 30, 1997)).

1 Here, the Union has failed to demonstrate that the City altered an existing
2 practice or instituted a new one by denying Officer Duggan's requests to have Attorney
3 Grace accompany him into his physical exams at the MIS in September of 2014. There
4 is no evidence to support the Union's contentions that prior to September of 2014, the
5 City consistently allowed Union representatives to attend the physical examinations of
6 officers at the MIS, or that the City consistently failed to recognize a substantive
7 difference between the pre-exam interview and the actual physical exam. Instead, the
8 evidence shows that except on one occasion in July of 2014, the City has never
9 permitted third-parties to accompany officers into the actual physical examination room.
10 Although the Union points to Attorney Grace's multiple instances of attending MIS
11 medical appointments with officers decades prior to 2014, nothing in the record reveals
12 that he ever accompanied officers into their actual physical examinations. Further, the
13 Union cannot demonstrate that Dr. Arnold permitted exceptions like the one he allowed
14 for Officer James in July of 2014 on a consistently sporadic or infrequent basis to
15 establish a bargainable condition of employment. Contrast City of Newton 29 MLC 186,
16 188-89, MUP-2209 (April 2, 2003) (a condition of employment may be found despite
17 sporadic or infrequent activity where a consistent practice that applies to rare
18 circumstances is followed each time the circumstances precipitating the practice recur);
19 contrast also, City of Boston, 21 MLC 1487, 1491-93, MUP-7470 (Dec. 1, 1994) (citing
20 Town of Arlington, 16 MLC 1350, 1351, MUP-7128 (Nov. 9, 1989) (a consistent practice
21 that applies to rare circumstances may become a condition of employment if it is
22 followed each time the circumstances precipitating the practice recur)).

CONCLUSION

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

KENDRAH DAVIS, ESQ. HEARING OFFICER

The parties are advised of their right, pursuant to M.G.L. Chapter 150E, Section 11 and 456 CMR 13.02(1)(j), 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 Division 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.