

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

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In the Matter of

CITY OF SOMERVILLE

and

SOMERVILLE POLICE EMPLOYEES  
ASSOCIATION

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Case No.: MUP-16-5023

Date Issued: January 30, 2018

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Board Members Participating:

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

Appearances:

Shannon T. Phillips, Esq. - Representing the City of Somerville  
Kristen A. Barnes, Esq. - Representing the Somerville Police  
Employees Association

CERB DECISION ON APPEAL OF HEARING OFFICER'S DECISION

1

SUMMARY

2 On August 21, 2017 a Department of Labor Relations (DLR) Hearing Officer  
3 concluded that the City of Somerville (City) had violated Section 10(a)(5) and,  
4 derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law)  
5 when it changed a past practice of bypassing Step 1 of the parties' contractual  
6 grievance procedure for grievances filed in writing with the Police Chief, without first

1 bargaining with the Somerville Police Employees Association (Union) to resolution or  
2 impasse.<sup>1</sup> The City filed a timely appeal of the decision with the Commonwealth  
3 Employment Relations Board (CERB). Among other things, the City argues that the  
4 decision should be overturned because the Hearing Officer erroneously disregarded  
5 and thus, improperly “overruled” explicit contract language that permitted the parties to  
6 skip Step 1 only by “mutual agreement.” The City also contests aspects of the remedy.

7 In response, the Union argues that the facts and law support the Hearing  
8 Officer’s decision and remedy. Following our consideration of the parties’  
9 supplementary statements and our review of the Hearing Officer’s decision, we affirm  
10 the Hearing Officer’s conclusion that the City unilaterally altered the parties’ grievance  
11 procedure, but on different grounds. We modify the remedy and notice accordingly.

#### 12 Facts

13 The parties stipulated to certain facts and the Hearing Officer made additional  
14 findings. We begin by briefly reviewing the salient, undisputed facts.

#### 15 Association

16 The Association represents a bargaining unit of police officers employed by the  
17 City in its Police Department as Patrol Officers. Patrol Officer Michael McGrath  
18 (McGrath) has been president of the Association since November 2009.

#### 19 Police Department

20 As of October 2014, David Fallon (Fallon) was the City’s Police Chief and  
21 Stephen Carrabino (Carrabino) was one of two Deputy Chiefs in the Department.  
22 Carrabino’s responsibilities include supervising the Traffic Bureau.

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<sup>1</sup> The Hearing Officer’s decision is reported at 44 MLC 29 (2017).

1 Grievance Procedure

2 At all material times, the Union and the City were parties to a collective  
3 bargaining agreement (CBA) containing a grievance and arbitration procedure (Article  
4 VII). Article VII states, in pertinent part:

5 **Section 1. Definition.** For the purpose of this Agreement, a "grievance"  
6 shall be defined as a complaint between the Employer and the Association  
7 and/or any employee(s) involving an alleged violation of a specific  
8 provision of this Agreement.

9  
10 **Section 2.** Grievances shall be processed as follows:

11  
12 Step 1. Grievances may be first presented by the employee(s) and/or the  
13 Association to a senior Captain designated by the Chief within thirty (30)  
14 days of the date of the grievance or of the date the employee first  
15 acquired knowledge of its occurrence, and an earnest effort shall be  
16 made within the next forty-eight (48) hours to adjust the grievance in an  
17 informal matter.

18  
19 This step may be omitted by mutual agreement.

20  
21 Step 2. If the grievance is not resolved in Step 1, the grievance shall  
22 be then reduced to writing by the Association and presented to the  
23 Chief of Police. The Chief shall meet with the Association's Grievance  
24 Committee and/or the employee(s) involved with [sic] five (5) days from  
25 the time the grievance is presented to him to discuss and attempt to  
26 adjust the grievance, and he shall answer the grievance within ten (10)  
27 days after meeting in writing.

28 \* \* \*

29 **Section 4.** An employee may present a grievance directly to the City,  
30 commencing at Step 2, provided that in such event the City, by its Chief  
31 of Police, shall immediately notify the President or Vice President of the  
32 Association of the initiation of and of the proposed disposition of such  
33 individual grievance. Association representatives shall be afforded the  
34 opportunity to be present at any conference between the aggrieved  
35 employee and the City relative to such grievance and shall also be given  
36 the opportunity to confer with the City relative to such grievance....

37 Shift Bid Grievances

38 In November 2014, McGrath bid on and was appointed by the Police Chief to one  
39 of two day-shift Traffic Bureau positions that were left vacant due to a promotion. Patrol

1 Officer Steve Johnson (Johnson) held the second day-shift Traffic Bureau position.  
2 Over the next year, Carrabino and other Department personnel discussed and  
3 researched whether McGrath's position would be open for bid in January 2016 or  
4 January 2017. Sometime in the summer of 2015, Johnson told Carrabino and a number  
5 of other persons in the Traffic Bureau that Johnson believed that he could be bumped if  
6 McGrath's Traffic Bureau position was not put up for bid in January 2016.<sup>2</sup> As  
7 Carrabino began preparing for the 2016 job bids, he had conversations with other  
8 Department personnel, including the other Deputy Chief and a sergeant and a  
9 lieutenant concerning this issue. In mid-December, Fallon had a meeting with  
10 Carrabino and other Department personnel and they agreed that McGrath's position  
11 would be up for bid in December 2016.

12 Johnson called Carrabino on December 27, 2015 to express his "concerns" that  
13 all Traffic Bureau positions, including McGrath's, be up for bid in 2016. Johnson  
14 explained why he believed that McGrath's position should be up for bid in 2016.  
15 Carrabino told Johnson that he agreed, but to file a written grievance.

16 The next day, on December 28, 2015, Johnson filed a written grievance with  
17 Chief Fallon and Deputy Chief Carrabino. Johnson emailed Carrabino a memorandum  
18 addressed to both Chief Fallon and Deputy Chief Carrabino that stated in relevant part:

19 I am filing a grievance regarding the fact that the second day traffic position  
20 is not available for bid during the upcoming 2016 department wide job bids.  
21 It is my contention that because Officer McGrath bid into the Traffic Unit in  
22 the fall of 2014, he is fulfilling the remainder of the Sgt. Keily's [sic] bid that

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<sup>2</sup> Article XVIII of the Agreement sets forth the job bidding procedure. We need not repeat or discuss that procedure here because the issue before us does not turn on the merits of the shift bid grievances, but the manner in which the City processed them.

1 was vacated upon Sgt. Keily's [sic] promotion. Section 3(a) of the  
2 agreement between the [Association] and the City of Somerville states: . . .

3 Also on December 28, 2015, Johnson sent an email to McGrath that stated, in  
4 relevant part, "Please file this grievance as soon as possible. I'm sorry. This is nothing  
5 personal but I feel strongly that [I] need to do it." Attached to Johnson's email to  
6 McGrath was the grievance he had sent to Chief Fallon and Deputy Chief Carrabino.  
7 The Hearing Officer found, and no party disputes, that Johnson specifically understood  
8 that he could file the grievance both as an individual and through the Association, and  
9 he chose to do it both ways.

#### 10 The Association's December 29, 2015 Grievance

11 On December 29, 2015, McGrath sent an email to Chief Fallon that stated, in  
12 relevant part: "[P]lease see the attached grievance filed by Officer S Johnson as well as  
13 the Association's position letter." As a result, Johnson's grievance was presented twice  
14 to Chief Fallon: once by Johnson and once by the Association. The position letter from  
15 McGrath on behalf of the Association, also dated December 29, 2015, stated in relevant  
16 part:

17 Please see the attached grievance, which has been filed by Officer Steven  
18 Johnson. You should be aware that although the Association is presenting  
19 this grievance to you, it does not support it. The Association maintains the  
20 position that despite bidding into Traffic as a result of a vacancy, I bid into  
21 the position during the January, 2015 bids and have the contractual right to  
22 remain in the position for at least the two year term as per Article XVIII,  
23 Section 3a (ninth paragraph) of the Agreement between the City of  
24 Somerville and the Somerville Police employees Association (Agreement).  
25 The examples that Officer Johnson provided had never bid in a January bid  
26 and therefore are plainly distinguishable for that reason alone.

27  
28 Please notify the Association's Executive Board prior to any meeting  
29 between the Department and Officer Johnson so the Association can be  
30 represented as per Article VII, Section 4 of the Agreement.

1 The City's Response to the Grievances

2 Chief Fallon forwarded McGrath's December 29, 2015 email and attachments to  
3 Deputy Chief Carrabino on December 29, 2015, and Fallon, Carrabino and Deputy  
4 Chief Paul Trant (Trant) decided to grant Johnson's grievance.<sup>3</sup> According to  
5 Carrabino, "it was plain to us that Officer Johnson's grievance had validity and all  
6 positions would be put up for bid in 2016." Carrabino decided that a meeting with  
7 Johnson was unnecessary because "[Johnson] came to me. It could be resolved at Step  
8 1, right there." In a December 30, 2015 email to McGrath and others, including Chief  
9 Fallon and Deputy Chief Trant, Carrabino stated:

10 The [Association's] grievance can be resolved at step 1, outlined under  
11 Article VII of the [Association's] CBA, and therefore a meeting with Officer  
12 Johnson will not be necessary.  
13

14 Based on the [Association's] grievance filed on behalf of Officer Johnson,  
15 and after careful review, this grievance was found to have merit. Therefore,  
16 all seniority positions in both the Traffic Unit and the Community Services  
17 Unit are due to be bid in this current bid cycle in January 2016.  
18

19 A revised personnel order will be posted soon on Policy Tech. Because  
20 there have been issues recently with Policy Tech, a department-wide email  
21 will be disseminated.  
22

23 Carrabino testified that his December 30, 2015 email "reflects my response to  
24 McGrath's December 29, 2015 email to Chief Fallon saying that we needed to meet and  
25 discuss this." There is no evidence that the City otherwise processed or responded to  
26 the written grievance that Johnson filed on December 28, 2015.  
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<sup>3</sup> The hearing record does not include any details of when Fallon, Carrabino and Trant met after the Association filed the grievance on December 29, 2015, but there is other evidence that Fallon generally meets daily with Carrabino and Trant.

1 2016 Events

2 By email dated January 5, 2016, McGrath attached a letter dated January 2,  
3 2016 to Carrabino protesting the resolution of the grievance at Step 1, stating that  
4 Johnson's grievance had been filed with the Chief at Step 2. McGrath specifically " and  
5 "request[ed] a meeting so the position of the Association can be heard."<sup>4</sup> The City did  
6 not respond to this letter, and the Department put McGrath's position up for bid in  
7 January of 2016. Neil Collins (Collins) and Johnson bid on and were appointed to the  
8 two day Traffic Bureau positions. Collins is senior to Johnson, and Johnson is 8 years  
9 senior to McGrath. McGrath bid on and was appointed to a night shift Traffic Bureau  
10 position.

11 Past Practice – Association Grievances

12 The Hearing Officer found that the parties had no practice prior to December of  
13 2015 of allowing Deputy Chiefs to process and decide Step 1 grievances or of  
14 classifying Association grievances filed in writing with the Police Chief as Step 1  
15 grievances. Further, at no time prior to December of 2015 did a Deputy Chief process  
16 and decide a grievance filed at Step 2 by the Association.

17 Individual Grievances

18 The Hearing Officer found that the record contained evidence of one instance  
19 prior to 2015 where an individual bargaining unit member filed a grievance directly with  
20 the Chief of Police. This grievance, filed by James Hyde (Hyde) in 2012, was  
21 processed by then-Police Chief Pasquarello (Pasquarello) in accordance with Article

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<sup>4</sup> The January 2, 2016 letter was submitted as a joint exhibit. We have supplemented and modified the Hearing Officer's finding to reflect that this letter states that Johnson's, not the Association's, grievance was filed with the Chief of Police at Step 2.

1 VII, Section 4 of the Agreement. That is, after Hyde filed the written grievance  
2 regarding an overtime hours pilot program, Pasquarello provided McGrath with a copy  
3 of Hyde's grievance and met with McGrath. Pasquarello responded to Hyde's  
4 grievance in writing seven days later.

5 Opinion<sup>5</sup>

6 Based on these facts, the Hearing Officer found that the parties had a past  
7 practice of bypassing Step 1 of the grievance procedure and processing the Union's  
8 grievances that were filed with the Police Chief in writing at Step 2. She thus found that  
9 by processing and deciding the Association's December 29, 2015 grievance at Step 1  
10 instead of Step 2, the City violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of  
11 the Law by changing the parties' grievance procedure without giving the Association  
12 prior notice and an opportunity to bargain to resolution or impasse about that decision  
13 and the impacts of that decision on employees' terms and conditions of employment.  
14 See Commonwealth of Massachusetts v. Labor Relations Commission, 404 Mass. 124  
15 (1982) (citing School Committee of Newton v. Labor Relations Commission, 388 Mass.  
16 557 (1983)).

17 On appeal, the City argues that the plain language of the CBA's  
18 grievance/arbitration procedure permitted its conduct, and that the Hearing Officer's  
19 decision improperly relied upon past practice to nullify an explicit portion of the CBA.  
20 Specifically, the City argues that it had the right to process the Association's December  
21 29, 2015 grievance at Step 1, because, pursuant to Article VII, Section 2, the Union  
22 could not bypass Step 1 and proceed directly to Step 2 unless there was "mutual

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<sup>5</sup> The CERB's jurisdiction is not contested.



1 agreement" which it claims was not present here. In essence, the City argues that the  
2 Union waived by contract its right to bargain over the manner in which the City  
3 processed these grievances.

4 Where an employer raises the affirmative defense of waiver by contract, it bears  
5 the burden of demonstrating that the parties consciously considered the situation that  
6 has arisen and that the union knowingly waived its bargaining rights. City of Newton, 29  
7 MLC 186, 190, MUP-2709 (April 2, 2003) (citing Massachusetts Board of Regents, 15  
8 MLC 1265, 1269, SUP-2959 (November 18, 1988)). The initial inquiry focuses upon the  
9 language of the contract. Town of Mansfield, 25 MLC 14, 15, MUP-1567 (August 4,  
10 1998)). If the language clearly, unequivocally and specifically permits the public  
11 employer to make the change, no further inquiry is necessary. City of Worcester, 16  
12 MLC 1327, 1333, MUP-6810 (October 19, 1989). If the language is ambiguous, the  
13 CERB will review the parties' bargaining history to determine their intent. Town of  
14 Marblehead 12 MLC 1667, 1670, MUP-5370 (March 28, 1986).

15 Based on these principles, the Employer is correct that in circumstances where it  
16 can demonstrate that contract language "clearly, unequivocally and specifically"  
17 permitted the employer to make the change, no further inquiry beyond the four corners  
18 of the contract is necessary. See City of Newton, 29 MLC at 189-190) (finding that  
19 although city changed its past practice with respect to selection criteria and method of  
20 selection for police coordinator position, no statutory bargaining attached because the  
21 explicit language of the contract permitted the change). Therefore, to the extent that the  
22 Hearing Officer's decision suggests that past practice can overcome explicit contract  
23 language, we disagree.

1           In making this argument, the City focuses exclusively on the “mutual agreement”  
2 language contained in Article VII, Section 2 of the CBA. It ignores, however, the first  
3 section of Article VII, Section 2, which provides that Step 1 grievances “may first be  
4 presented by the employee(s) and/or the Association to a **senior Captain designated**  
5 **by the Chief.**” (Emphasis supplied.) Consistent with this language, the record reflects  
6 that the parties had no past practice of allowing a Deputy Chief to process and decide  
7 Step 1 grievances.<sup>6</sup> In this case, neither the grievance submitted by Johnson on  
8 December 28, 2016, nor the grievance submitted by the Association on December 29,  
9 2016, were presented to a “senior captain” as required by the CBA language. Rather,  
10 both Johnson and the Association filed grievances directly with Chief Fallon.  
11 Accordingly, even if, as the City argues, it was not obligated to process the Union’s  
12 December 29, 2015 grievance at Step 2 in the absence of “mutual agreement,” the City  
13 deviated from past practice as embodied in explicit contract language of the CBA when  
14 it allowed Carrabino to process and decide the Association’s grievance as a Step 1  
15 grievance.

16           The City defends its decision to process the Association’s grievance at Step 1 by  
17 arguing that the purpose of Step 1, as testified to by its witnesses, is to resolve  
18 grievances at the earliest stage informally. Even assuming that is true, such testimony  
19 is insufficient to overcome the clear contract language requiring Step 1 grievances to be  
20 handled by senior Captains. The City cannot have it both ways: argue that clear  
21 contract language requiring mutual agreement prevented the Union from bypassing

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<sup>6</sup> The Hearing Officer found that prior to December 2015, although Deputy Chief Carrabino handled routine problems that employees discussed with him on a daily basis, he did not process or decide Step 1 grievances filed by either the Association or individual bargaining unit members. The City does not dispute this finding.

1 Step 1 of the grievance procedure, but then ignore the clear contract language requiring  
2 Step 1 grievances to be filed with and decided by a senior Captain designated by the  
3 Chief. We therefore conclude that the City unilaterally altered the grievance procedure  
4 by allowing Carrabino to treat and resolve the Association's December 29, 2015  
5 grievance at Step 1 of the grievance procedure.

6 Further, even assuming that the City was not obligated under the CBA to process  
7 the *Association's* December 29<sup>th</sup> grievance at Step 2, the City further altered the  
8 grievance procedure when it failed to process Johnson's December 28 grievance in  
9 accord with Article VII, Section 4 of the agreement. Unlike Article VII, Section 2, Article  
10 VII, Section 4 permits an employee to present a grievance "directly to the City,  
11 commencing at Step 2." This is precisely what Johnson did on December 28, 2015,  
12 when, after being told by Carrabino to file a written grievance, he sent an email to  
13 Carrabino and Fallon that described his concerns about the upcoming shift bid that  
14 began with the phrase, "I am filing a grievance..."<sup>7</sup>

15 Thus, as the Hearing Officer found, the grievance that Johnson filed directly with  
16 Chief Fallon on December 28, 2014 was a Step 2 grievance pursuant to Article VII,  
17 Section 4, which triggered Chief Fallon's obligation to give Association representatives  
18 the opportunity not only to be present at any conference between the City and Johnson,  
19 but the opportunity "to confer with the City relative to such grievance."

20 The City did not do this. Instead, it denied the Union's request to be present at  
21 any meeting between Johnson and the City by claiming that the grievance had already

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<sup>7</sup> For similar reasons, even assuming, as the City argues, that Johnson's phone call with Carrabino constituted a grievance, it was a Step 2, and not a Step 1 grievance, because, pursuant to Article VII, Section 4, it was presented directly to Deputy Chief Carrabino and not a senior Captain designated by the Chief.

1 been resolved at Step 1, and therefore a meeting with Johnson would not be necessary.  
2 As explained above, however, the grievance procedure did not allow Carrabino to  
3 process and resolve either the Association's or Johnson's grievance as a Step 1  
4 grievance. Rather, the City's obligation at that point was to process Johnson's  
5 grievance in accord with Article VII Section 4 of the Agreement by, at a minimum,  
6 affording the Union the notice and an opportunity to confer with the City relative to such  
7 grievance

#### 8 Conclusion

9 For the foregoing reasons, City unilaterally altered the parties' grievance  
10 procedure in violation of Section 10(a)(5), and derivatively, Section 10(a)(1) of the Law  
11 when it resolved the Association's grievance at Step 1 of the grievance procedure and  
12 failed to meet or confer with the Union over Johnson's grievance pursuant to Article VII,  
13 Section 4 of the Agreement, without first giving the Association notice and an  
14 opportunity to bargain to resolution or impasse over the change.

#### 15 Remedy

16  
17 Because we have decided this case on different grounds, we do not adopt the  
18 Hearing Officer's Order that the City restore the past practice of bypassing Step 1 of the  
19 grievance procedure for grievances filed by the Association in writing with the Police  
20 Chief. Rather, to remedy the violation found here, we order the City to cease and desist  
21 from changing the existing grievance procedure under Article VII of the Agreement, by  
22 treating and resolving grievances filed by the Association directly with Deputy Chief or  
23 Chief of Police as Step 1 grievances, and by failing to afford the Association the  
24 opportunity to confer with the City relative to any grievance filed by an employee directly

1 with the City at Step 2 of the grievance procedure, without first giving the Association  
2 notice and an opportunity to bargain to resolution or impasse over the change.<sup>8</sup> Having  
3 modified the Order in this manner, we need not reach the arguments raised in the City's  
4 Motion for the CERB to Issue an Order Striking Part Two of the Hearing Officer's Order  
5 in this Matter as Moot. We write only to emphasize that the City's claim that the parties  
6 are now abiding by the express terms of the Article VII, Section 2, does not obviate the  
7 need for our Order because the City has not conceded that the manner in which it  
8 processed the shift bid grievances at issue here altered the grievance procedure and  
9 has provided no assurance that its conduct will not recur. Worcester County Sheriff's  
10 Department, 28 MLC 1, 5, SUP-4531 (June 13, 2001).

11 We therefore issue the following order.

12  
13

ORDER

14 WHEREFORE, based on the foregoing, it is hereby ordered that the City of  
15 Somerville shall:

16 1. Cease and desist from:

17 a. Changing the grievance procedure under Article VII, Sections 2 and 4 of the  
18 CBA without first giving the Association notice and an opportunity to bargain  
19 to resolution or impasse over the decision to make this change and the  
20 impacts of this decision on bargaining unit members' terms and conditions of  
21 employment.

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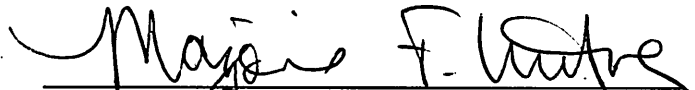
<sup>8</sup> The Hearing Officer declined to order the City to resume processing the Association's December 29, 2015 written grievance at Step 2. The Hearing Officer concluded that because the Association had withdrawn its allegation that the City unilaterally altered the Traffic Bureau shift bid procedures by posting McGrath's position in the January 2016 bid cycle, there was no existing controversy on the matter that formed the basis of the Association's opposition to the December 29, 2015 grievance that it presented on Johnson's behalf. The Association did not appeal from this aspect of her remedy. For the same reasons, we do not order the City to resume processing Johnson's Step 2 grievance by, among other things, meeting and conferring with the Association over Johnson's grievance.

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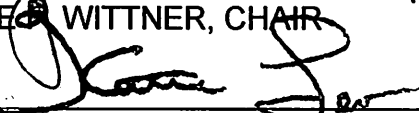
- b. In any like manner, interfering with, restraining and coercing its employees in any right guaranteed under the Law.
2. Take the following affirmative action that will effectuate the purpose of the Law:
- a. Refrain from having Deputy Chiefs process and resolve grievances filed by the Association in writing with the Chief of Police as Step 1 grievances;
  - b. Refrain from failing to afford the Association the opportunity to confer with the City relative to any grievance filed by an employee directly with the City at Step 2 of the grievance procedure pursuant to Article VII, Section 4 of the CBA;
  - c. Sign and post immediately in all conspicuous places where members of the Association's bargaining unit usually congregate and where notices to these employees are usually posted, including electronically, if the City customarily communicates to its employees via intranet or e-mail, and maintain for a period of thirty (30) consecutive days thereafter, signed copies of the attached Notice to Employees; and
  - d. Notify the DLR in writing within thirty (30) days of receiving this Decision of the steps taken to comply with the Order.

SO ORDERED.

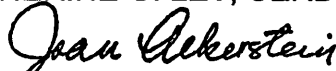
COMMONWEALTH OF MASSACHUSETTS  
COMMONWEALTH EMPLOYMENT RELATIONS BOARD



MARJORIE F. WITTNER, CHAIR



KATHERINE G. LEV, CERB MEMBER



JOAN ACKERSTEIN, 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.