

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

In the Matter of

CITY OF BOSTON

and

BOSTON POLICE PATROLMEN'S
ASSOCIATION

and

BOSTON POLICE SUPERIOR
OFFICERS FEDERATION

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Case No. MUP-16-5315
 MUP-16-5350

Date Issued: August 30, 2018

Board Members Participating:

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

Appearances:

Robert Boyle, Jr., Esq.: Representing the City of Boston

Jennifer Rubin, Esq.: Representing the Boston Police
 Patrolmen's Association

Patrick Bryant, Esq.: Representing the Boston Police
 Superior Officers Federation

DECISION ON APPEAL OF HEARING OFFICER DECISION

Summary

- 1 On January 6, 2016, the City of Boston (City or Employer) implemented Rule
- 2 109A, which was a mediation program for citizen complaints against police officers

1 (Mediation Program). The Mediation Program was intended to be an alternative to the
2 standard complaint intake and internal investigation process that could lead to officer
3 discipline. Prior to 2016, the City did not offer mediation for citizen complaints against
4 officers. In the two years preceding the City's implementation of the Mediation
5 Program, the Boston Police Patrolmen's Association (BPPA) and the Boston Police
6 Superior Officers Federation (BPSOF) (collectively, "the Unions"), sought to bargain
7 over aspects of the proposed program, including the criteria for officer eligibility and
8 which mediation service to use. The City met separately with the BPSOF and BPPA on
9 several occasions between 2013 and 2015 to negotiate over these and other issues, but
10 after the City advised the Unions in writing on September 10, 2015 that it intended to
11 implement the Mediation Program, and issued the final version on January 10, 2016,
12 the Unions filed separate charges with the Department of Labor Relations (DLR)
13 alleging that the City had engaged in prohibited practices within the meaning of Section
14 10(a)(5), and derivatively, Section 10(a)(1) of M.G.L. c. 150E (the Law) by implementing
15 the program without first bargaining to resolution or impasse over the decision and
16 impacts of the decision on their respective bargaining unit members' terms and
17 conditions of employment.

18 The charges were consolidated for investigation. After investigation, the DLR
19 Investigator issued a Complaint of Prohibited Practice for each charge on August 22,
20 2017 (Complaints). The Complaints were consolidated for hearing. After hearing, a
21 DLR Hearing Officer issued a decision on August 16, 2017, holding that the City

1 violated the Law by implementing the Mediation Program before bargaining with either
2 of the Unions to resolution or impasse over the impacts of the program on mandatory
3 subjects of bargaining.¹ To remedy the violation, the Hearing Officer ordered the City to
4 rescind the Mediation Program until it bargained with each union to resolution or
5 impasse over the impacts of the program on bargaining unit members' terms and
6 conditions of employment.

7 This appeal to the Commonwealth Employment Relations Board (CERB)
8 followed, in which the City reiterates most of the arguments that it made to the Hearing
9 Officer: i.e., the impacts of the program were not a mandatory subject of bargaining by
10 operation of St. 1962, c. 322, (Police Commissioner's statute); to extent it had any
11 bargaining obligation, that obligation was not triggered because the Mediation Program
12 had no actual impacts on bargaining unit members' terms and conditions of
13 employment; and it was justified in implementing the program because it bargained with
14 each of the Unions to impasse. The City also challenges the rescission remedy. Upon
15 consideration of the record and the parties' Supplementary Statements, we affirm the
16 Hearing Officer's decision.

17 Facts

18 The parties entered into stipulations of fact and the Hearing Officer made further
19 findings of fact based on the hearing record. Although the City disputes some of the

¹ The Hearing Officer held that the decision to implement the program was not a mandatory subject of bargaining. Neither Union seeks review of this determination.

1 conclusions drawn from those findings, it does not dispute the subsidiary findings,
2 except as noted. We therefore adopt those findings and summarize them below. See
3 Massachusetts Board of Regents, 13 MLC 1267, SUP-2809 (November 17, 1986).
4 Further reference may be made to the facts set out in the Hearing Officer's Decision,
5 reported at 44 MLC 13 (August 16, 2017).

6 Notice of Mediation Program

7 This matter began on May 9, 2013, when the City notified the Unions that it was
8 considering instituting the Mediation Program and attached a draft policy. The City also
9 advised the Unions that the Office of Labor Relations was available to discuss any
10 issues with the program and requested that the Unions contact its office by May 15,
11 2013, if they wished to discuss the matter.

12 The draft policy contained the following sections: Subject: Mediation Program,
13 Section 1, General Considerations; Section 2, Confidentiality; Section 3, Eligibility, and
14 Section 4, Mediation.

15 Under the Subject heading, the policy stated:

16 This rule is issued to establish an alternative complaint resolution
17 procedure, specifically Mediation, which may be utilized by complainants
18 and employees who are eligible to participate under the requirements
19 listed below.

20
21 Under Sec. 1, General Considerations, the draft explained that:

22 Mediation is a voluntary alternative complaint resolution process that aims
23 to assist two (or more) disputants in reaching an agreement. The parties
24 themselves determine the conditions of any settlements reached.
25 Independent and impartial mediators serve to facilitate, in a purely

1 advisory role, dialogue between disputants during mediation, aiming to
2 help the parties reach an agreement on the disputed matter.

3
4 Most of the draft sections had subsections. Section 3.4, Complaint Eligibility, stated:

5
6 Complaints may only be considered for Mediation where:

- 7
- The employee has not had a sustained case of similar misconduct
8 within the past year
 - The employee has not engaged in the mediation process within the
9 past year
- 10 The eligibility for a complaint to be handled for Mediation is
11 ultimately at the discretion of the Chief of the Bureau of
12 Professional Standards, or his designee.
13

14 Section 4, Mediation, included Section 4.3, Scheduling of Mediation, which
15 indicated, among other things, that the "complained-of employee would participate in
16 the Mediation on a scheduled tour of duty;" Section 4.4, Mediator Criteria, which
17 indicated that the mediator could not be currently employed by the Department or the
18 City or associated with either of the parties involved in the mediation; Section 4.5,
19 Guidelines for Mediations Sessions, including Section 4.5.1, Officer Attire, indicating
20 that the officer could not attend the mediation in uniform.

21 Section 4.5.5, Withdrawal from Mediation, indicated that "[a]greement is
22 completely voluntary. If no "common resolution" occurred during the course of
23 mediation, either party was free to withdraw at any point without prejudice and the
24 mediator would return the case to the Mediation Coordinator, who would notify the
25 investigator originally assigned to the complaint that the investigator should proceed on
26 the "traditional investigative track."

1 Under Section 4.5.6, Mutual Resolution, the policy indicated that "should the
2 parties come to a common resolution," the mediator would have the complaining party
3 sign a complaint withdrawal form. and a "notation [would] be made in the complaint
4 tracking system to that effect."

5 Bargaining Sessions

6 The City subsequently met with the BPSOF on five occasions to discuss the
7 Mediation Program: May 18, 2013, August 7, 2013, December 3, 2013, April 24, 2015
8 and June 25, 2015. The City met with the BPPA on four occasions: July 11, 2013, July
9 30, 2014, April 24, 2015 and July 24, 2015. The City also corresponded on numerous
10 occasions with the Unions' representatives about various issues raised during the
11 meetings.

12 On April 7, 2015, after not meeting with the BPSOF for over a year, or with the
13 BPPA for nearly nine months, the City provided both Unions with a revised draft of the
14 Mediation Program.

15 BPSOF Negotiations after April 7, 2015

16 On April 24, 2015, the City met with the BPSOF to discuss the Mediation
17 Program. Among the issues discussed at that session was the BPSOF's request that
18 the factors for recommending a case for mediation be placed in writing. The Hearing
19 Officer found that Superintendent Mancini initially agreed to this request. The BPSOF
20 also expressed its concern that officers whose cases were not selected for mediation
21 would have no recourse. The City asked the Union to make a proposal regarding this

1 issue. The BPSOF also asked what would happen if the confidentiality of the
2 proceeding were violated. The City responded that it wanted to do research on this
3 issue and that it would get back to the Union.

4 The City and the BPSOF did not reach agreement at the April 24th meeting and
5 met again on June 25, 2015. At that meeting, the City indicated that it had made many
6 changes in response to the Union's questions. The BPSOF raised concerns about the
7 confidentiality of the mediation and discussed what would happen if an officer admitted
8 during the mediation that "he did it." The BPSOF also advised the City that it wanted to
9 be able to give 30 days' notice to withdraw from the policy if it was not going well.

10 The BPSOF also raised concerns about the City's selection of Harvard Law
11 School's mediation program (Harvard Program) as the mediators. The BPSOF stated
12 that it believed the Harvard faculty and students were critical of the police. The Hearing
13 Officer found that Superintendent Mancini believed that these were "legitimate"
14 concerns, but after meeting with the Harvard mediators a number of times, he did not
15 share the concerns.² The City requested that the BPSOF put these and its other

² The City disputes that it ever agreed that the raised concerns "legitimate." Referencing Mancini's testimony, it states that the BPSOF'S concerns were "illegitimate" and did not constitute an actual impact on terms and conditions of employment. In its Supplementary Statement, however, the City described Mancini as testifying that "when he first heard the BPPA's concern, he looked into it and was *no longer* concerned himself." Because the statement that Mancini was "*no longer* concerned" implies that at some point he was concerned, the City's description of Mancini's testimony is not materially different from the Hearing Officer's finding that "Mancini believed that these were legitimate concerns, but after he met with the Harvard mediators a number of times, he did not share the concerns." The Hearing Officer's

1 concerns in writing. Superintendent Mancini also informed the BPSOF that he had
2 discussed with the Police Commissioner the issue of putting in writing the rationale for
3 selecting an officer for mediation, and the Commissioner stated that he would not
4 produce a written rationale. The City did not explain why the Commissioner refused to
5 do so.

6 The parties did not reach agreement at the end of this meeting and the City did
7 not declare impasse.

8 On September 4, 2015, representatives from the BPSOF met for two hours with
9 representatives of the Harvard Mediation program for an informational meeting.
10 Sergeant Mark Parolin attended this meeting on the BPSOF's behalf and believed the
11 City would follow up with the BPSOF's concerns expressed at the June 25th meeting.
12 However, six days later, by letter dated September 10, 2015, the City advised the
13 Unions of the following, in relevant part:

14 As you are aware, the Department intends to offer any sworn officer
15 selected an opportunity to mediate low-level Internal Affairs complaints
16 beginning in September of 2015. The Department notified all sworn
17 unions on May 9, 2013 of its intent to use mediation as an alternative to
18 internal affairs investigation for selected complaints. The Department
19 started meeting with the sworn unions in summer of 2013. The
20 Department listened to the unions' suggestions and made numerous
21 changes to its initial draft mediation policy. The Department also answered
22 numerous questions that the various unions raised.
23

finding is also consistent with the fact that the City arranged to have both Unions meet with representatives of the Harvard Program. Further, the City provides no reference to any part of the record to support its claim that the BPSOF'S concerns were "illegitimate." We therefore decline to strike or modify the challenged finding.

1 Most recently, an informational meeting was held at BPD headquarters for
2 the unions to hear directly from the people who run the Harvard Mediation
3 Program and all of the questions that were raised during the meeting were
4 answered.
5

6 Participation in the program will always be at the officer's discretion,
7 therefore, there is no reason to delay implementation of the policy. Cases
8 will start to be considered for mediation this month. Since this is a new
9 program, the Department will notify the union if a member is selected for
10 mediation.
11

12 BPPA Negotiations After April 7, 2015
13

14 The BPPA and the City held a bargaining session on April 24, 2015. Among the
15 items discussed was the identity of the mediators – the City stated that mediation would
16 be with the Harvard Program, but that it might change and the BPPA might want to
17 weigh in. The BPPA also asked that the selection or denial of a case for mediation be
18 subject to the grievance procedure.

19 The parties met again on July 24, 2015. The BPPA expressed concerns about
20 using the Harvard Program. The BPPA provided the City with an article written by a
21 Harvard Law School student that the BPPA felt was biased against the police. The
22 Hearing Officer found that the City agreed that police bias was a legitimate concern and
23 advised that it would hold a meeting between the Harvard Program and the BPPA. The
24 BPPA agreed to attend the meeting and said it would not be available until August 10,
25 2015.

26 Regarding other issues, the BPPA requested that the City change language
27 about confidentiality in its most recent draft back to what it was in the May 2013 draft.

1 Finally, the parties continued their discussion over what criteria would be used to
2 determine who was eligible for the Mediation Program and what complaints would
3 qualify for mediation. The City noted that it had changed the criteria for officer selection
4 by eliminating the requirement that an officer could not have had a mediation or similar
5 complaint for twelve months. The City also indicated that mediation eligibility would be
6 decided on a case-by-case basis, with the Police Commissioner having the final say.
7 Finally, the BPPA requested, and the City agreed, that a mediation session be treated
8 as an officer's tour of duty.

9 After some correspondence back and forth, the City notified the BPPA that the
10 meeting at Harvard Law School would take place on September 4, 2015. However, due
11 to a scheduling error, no one from the Harvard Program was there to meet them.
12 Although the City told the BPPA that the meeting would be rescheduled, no meeting
13 took place before the City issued the September 10, 2015 letter described above.

14 Communications with Both Unions after September 10, 2015

15 The City had no further communications with the Unions regarding the Mediation
16 Program before January 6, 2016, when the City implemented Rule 109A, Mediation
17 Program, which was effective immediately. Section 1 of the final rule, Mediation
18 Program Overview, described mediation as a "voluntary and confidential process guided
19 by a trained, qualified and independent Mediator. Mediation is an alternative to the
20 standard complaint intake and internal investigation process which may lead to
21 discipline."

1 Under Section 2.1 of the final rule, recommendations for possible mediation
2 would be on a case-by-case basis, following a review of a complaint by the Internal
3 Affairs Unit and a recommendation for Mediation by the Chief, Bureau of Professional
4 Standards, to the Police Commissioner, or his designee, based on the totality of the
5 circumstances. Section 2.2 listed factors that would be considered in determining the
6 suitability of a case for mediation, including but not limited to:

7 [N]ature of the complaint, voluntary agreement by both parties, likelihood
8 of a successful Mediation, whether a Mediation in a particular case is likely
9 to improve police-community relations, the possibility, or existence, of
10 criminal charges, whether the allegation against the officer is related to
11 corruption or criminal activity, whether there is a civil lawsuit related to the
12 incident, if an arrest was made, if use of force tactics was used, if injuries
13 were sustained by any party, existence of property damage, the complaint
14 and disciplinary history of the involved officer, whether the complainant
15 alleged racial, ethnic, or gender discrimination or slurs, and any history of
16 prior Mediations by the officer or complainant.

17
18 Under Section 3.5.1, a successful mediation would result in an entry into the
19 Internal Affairs record that the case was successfully mediated, in which case the
20 investigation would be deemed closed, without any Internal Affairs investigation being
21 conducted or discipline imposed. If the mediation were reported successful, no
22 information or documentation regarding discussions held during the mediation session
23 by the participants would be entered in the officer's Internal Affairs record. Under

1 Section 3.5.2, however, an unsuccessful mediation would result in an Internal Affairs
2 investigation being conducted in the usual manner.³

3 The final rule did not specify what mediation program would be used, other than
4 to state in Section 3.1 that:

5 Cases approved for Mediation will be referred to a qualified Mediation
6 program by the Chief, Bureau of Professional Standards. Selected
7 Mediators will be independent of the Department, and will not be
8 employees of the Department or the City of Boston.
9

10 Section 4, Conflicts of Interest, stated, "Mediators will not conduct a Mediation
11 session if there is a possibility of conflict of interest between the Mediator and any of the
12 involved participants."

The final version of the program did not state that mediation would be considered an officer's tour of duty. Rule 109A also included two sections, Section 3.2, "Time to Request Mediation," and Section 3.4, "Parties Present for Mediation," that were not included in the April 2015 draft.

³ According to the City's Rule 109 – Discipline Procedure, Amended, an investigation of a complaint can result in a finding of: sustained (investigation disclosed sufficient evidence to support allegations in the complaint); not sustained (investigation failed to prove or disprove the allegations); exonerated (the action complained of did occur, but investigation revealed that action was proper, legal and reasonable); or unfounded (investigation revealed that conduct did not occur). After receipt of the investigation report, the commanding officer or the Chief of the Bureau of Professional Standards and Development "shall then make recommendations for disciplinary action or shall impose an immediate suspension for five days or less if the complaint has been sustained."

Opinion⁴

The issue before us is whether the Hearing Officer correctly concluded that the City made a unilateral change in violation of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law when it implemented the Mediation Program on January 6, 2016. To establish that the City's conduct violated the Law, the Unions had to demonstrate that: 1) the City changed an existing practice or instituted a new one; 2) the change affected employees' wages, hours, or working conditions and, thus implicated a mandatory subject of bargaining; and 3) the City implemented the change without prior notice or an opportunity to bargain to resolution or impasse. Commonwealth of Massachusetts v. Labor Relations Commission, 404 Mass. 124, 127 (1989).

The City does not dispute the first element, that the Mediation Program was a new policy. However, it challenges the Hearing Officer's conclusion that the Union established the second and third elements. We address its arguments below.

Mandatory Subject of BargainingThe Police Commissioner's Statute

We first address the City's argument that the Police Commissioner's statute, as construed by the Supreme Judicial Court in City of Boston v. BPSOF, 466 Mass. 210 (2013) (2013 SJC decision), precludes bargaining over the impacts of the Mediation Program on bargaining unit members' terms and conditions of employment. The City relied on the following language in the Police Commissioner's statute:

⁴ The CERB's jurisdiction is not contested.

1 The police commissioner shall have cognizance and control of the
2 government, administration, disposition and discipline of the department,
3 and of the police force of the department and shall make all needful rules
4 and regulations for the efficiency of said police . . .
5

6 We are not persuaded for several reasons. First, as the Hearing Officer found,
7 the Mediation Program does not interfere with the Police Commissioner's right to make
8 disciplinary decisions or determine the appropriate discipline for certain offenses – it
9 merely provides a different avenue of redress for citizen complaints than the disciplinary
10 procedures set out in Rule 109.

11 Second, while the City is correct that the Police Commissioner's statute is not
12 listed in Section 7(d) of the Law as being superseded by the provision of a collective
13 bargaining agreement, and while courts have recognized that this statute confers upon
14 the Police Commissioner certain nondelegable rights, the Hearing Officer correctly
15 recognized that a 2017 SJC decision held that those two factors do not foreclose all
16 collective bargaining over matters referenced in the Police Commissioner's statute,
17 including, in particular, disciplinary matters. In City of Boston v. BPPA, 477 Mass. 434
18 (2017) (2017 SJC decision), the Court declined to vacate an arbitration award that
19 overturned an officer's termination for using excessive force pursuant to the "just cause"
20 provision of the parties' collective bargaining agreement. In Part b. of this decision,
21 which addressed "[n]ondelegability of police commissioner's powers and scope of
22 arbitrator's authority," the Court provided three reasons why the arbitration award did
23 not interfere with the Police Commissioner's statutory authority. As one of its reasons,

1 the Court observed that prior court decisions addressing the breadth of the Police
2 Commissioner's authority, including, notably, the 2013 SJC decision, were "largely
3 confined to the administrative realm and never reached the core matters of discipline
4 and discharge." 477 Mass. at 441 (citing City of Boston v. BPSOF, 466 Mass. at 215
5 (parenthetical omitted)).

6 The Court also recognized the "courts' reluctance to allow broad statutory
7 discretionary powers to subsume bargained for provisions." 477 Mass. at 441 (citing
8 Lynn v. Labor Relations Commission, 43 Mass. App. Ct. 172, 182 (1997) (further citing
9 School Committee of Newton v. Labor Relations Commission, 388 Mass. 557, 564-566
10 (1983) ("where the governmental employer acts pursuant to broad, general
11 management powers, the danger is presented . . . that to recognize the statutory
12 authority as exclusive would substantially undermine the purpose of M.G.L c. 150E, §6,
13 to provide for meaningful collective bargaining"))).

14 We agree with the Hearing Officer that adopting the City's construction of the
15 Police Commissioner's statute as precluding collective bargaining over the impacts that
16 the Mediation Program has on existing disciplinary procedures would "present such
17 danger."⁵ In so holding, we reject the City's characterization of this portion of the 2017

⁵ The City argues that, in stating that the SJC had recently determined that the Police Commissioner's statute "is superseded by collective bargaining," the Hearing Officer gave "an overbroad reading to the 2017 SJC decision as overruling the 2013 SJC decision." Read in its entirety, and as summarized above, we disagree that the Hearing Officer stated or intended to imply that the 2013 SJC decision had been overruled. Rather, she properly concluded that the 2017 SJC decision supported her conclusion

1 SJC decision as mere dicta. It is clear from the decision that these grounds were
2 central to the Court's rejection of the City's statutory arguments. 477 Mass. at 440
3 (setting out "three related reasons" why the City's statutory argument "fails"). We also
4 reject the City's claim that this aspect of the 2017 SJC decision is undercut by the
5 Court's subsequent statement that it would have ruled differently had the City issued
6 rules that conflicted with the arbitrator's holding. Id. at 445. In addition to being dicta
7 regarding a hypothetical situation, the Court made this observation in connection with its
8 separate discussion, contained in Part c. of the opinion as to whether the arbitrator's
9 award violated public policy. The Court's observation is therefore not pertinent to the
10 issue of what effect the Police Commissioner's statute had on the City's statutory
11 bargaining obligation.

12 The City also cites a CERB decision, Boston Police Superior Officers Federation,
13 21 MLC 1725, MUP-9234 (April 11, 1995), *aff'd* 24 MLC 89 (April 1, 1998) (1998 Boston
14 Decision) in support of its claim that the Police Commissioner had the non-delegable
15 right to establish the Mediation Program's procedures. In that case, the CERB held that
16 the City did not have to bargain over the decision or the impacts of its decision to create
17 a Community Advisory Board (CAB), whose function was to review completed Internal
18 Affairs investigations and to act in an advisory role to the Police Commissioner. That

that the broad language of the Police Commissioner's statute regarding the right to control discipline did not entitle the City to refuse to bargain over the impacts of its Mediation Program on the City's disciplinary procedures.

1 decision is not dispositive of the City's bargaining obligation in this matter for two
2 reasons. First, it does not address the Police Commissioner's statute. Second, while it
3 is true that the CERB found that the City had no obligation to bargain over the impacts
4 of its decision to create the CAB, it did not, as the City suggests, do so on grounds that
5 the disciplinary procedures themselves were nondelegable decisions – indeed, as
6 discussed below, the CERB squarely held in that decision that disciplinary procedures
7 are mandatory subjects of bargaining. 24 MLC at 91. Rather, the CERB dismissed this
8 aspect of the case because it found that the creation and implementation of the CAB
9 had no actual impact on those disciplinary procedures or other terms and conditions of
10 employment. Id.

11 Here, the Hearing Officer conducted the same analysis, but for the reasons
12 discussed below, concluded that the Mediation Program did, in fact, impact the City's
13 disciplinary procedures. Although, as discussed below, the City also disagrees with that
14 conclusion, that is a separate discussion from whether or not collective bargaining over
15 the impacts of the Mediation Program on bargaining unit members' terms and
16 conditions of employment would infringe on the Police Commissioner's non-delegable
17 authority. Because none of the City's arguments persuade us that it would, we turn to
18 the City's claim that the Mediation Program had no actual impacts on bargaining unit
19 members' terms and conditions of employment.

20 The Mediation Program's Impacts on Mandatory Subjects of Bargaining

1 The City alternatively argues that, even assuming it had an impact bargaining
2 obligation, there were no impacts to bargain over because Rule 109A did not alter the
3 discharge and discipline process. We disagree for a number of reasons. Preliminarily,
4 we note that, in addition to impacting disciplinary procedures, both the draft and final
5 version of the Mediation Program impacted other mandatory subjects of bargaining,
6 including hours of work, i.e., whether the mediation would constitute a tour of duty, and
7 the dress code for officers attending mediations. See, e.g., City of Lawrence, 43 MLC
8 170, MUP-14-3753 (January 20, 2017) *aff'd* 43 MLC 238 (May 26, 2017) (dress codes
9 are a mandatory subject of bargaining).

10 Second, we disagree that the Mediation Program had no impact on disciplinary
11 procedures. In the 1998 Boston decision, the CERB held that disciplinary procedures
12 were mandatory subjects of bargaining because the outcome of those procedures may
13 affect an employee's job security and the right to be promoted. City of Boston, 24 MLC
14 at 91 (citing City of Boston, 5 MLC 1723, 1725, MUP-2542 (March 20, 1979)). Here,
15 although the City implemented the Mediation Program as a separate Department rule,
16 (Rule 109A), the Mediation Program is reasonably viewed as a subset of, or an adjunct
17 to, the Disciplinary Procedures set forth in Rule 109 because it alters those procedures
18 by allowing eligible officers who are the subject of citizen complaints to potentially avoid
19 an IAD investigation and discipline. Under the final rule, a successful mediation results
20 in an entry into the Internal Affairs record that the case was successfully mediated, in
21 which case, the investigation is deemed closed, without any Internal Affairs investigation

1 being conducted or discipline imposed. As such, the implementation of the program has
2 a clear and direct impact on officers' job security and employment records. It follows
3 that the Mediation Program's procedures, including, in particular, who is eligible to
4 participate and who will serve as the mediator, are also mandatory subjects of
5 bargaining because the procedures directly impact whether an employee will be able to
6 participate in the Program and whether the process will be fair. None of the City's
7 arguments persuades us otherwise.

8 Voluntariness

9 The City also argues, as it did to the Hearing Officer, that the Mediation Program
10 did not constitute a change because it was voluntary. We agree with the Hearing
11 Officer that the Mediation Program is not "purely voluntary" because not all officers get
12 to participate. Moreover, as the Hearing Officer indicated, the voluntary nature of a
13 program, by itself, does not relieve the public employer of its statutory bargaining
14 obligation. Commonwealth of Massachusetts, 22 MLC 1459, SUP-3922, SUP-3944
15 (February 2, 1996). Rather, the CERB's decisions regarding the scope of mandatory
16 bargaining are replete with examples of "voluntary" programs over which bargaining
17 must take place because they provide employees with an opportunity to avail
18 themselves of some type of benefit that they would not otherwise have. See, e.g., Town
19 of Burlington, 35 MLC 18, MUP-04-4157 (June 30, 2008), *aff'd sub nom. Town of*
20 Burlington v. CERB, 85 Mass. App. Ct. 1120 (May 19, 2014) (unpublished ruling) (police

1 details); Commonwealth of Massachusetts, 22 MLC 1459 (voluntary catastrophic illness
2 leave bank).

3 No Impacts on Officers who are Still Subject to Disciplinary Procedures

4 The City also claims that the Mediation Program had no impacts on disciplinary
5 procedures because officers who are not selected for the program, or whose mediations
6 are unsuccessful, remain subject to the usual disciplinary procedures. However, as the
7 Hearing Officer noted, the Mediation Program did not need to affect every officer to be a
8 change; it is enough that the program changed available disciplinary procedures for a
9 select few. Moreover, the City's argument ignores the obvious benefits of the program
10 to those officers who are selected and whose mediations are successful. Thus, rather
11 than persuading us that the Mediation Program had no bargainable impacts, the City's
12 argument highlights how aspects of the Program, such as the criteria for officer
13 selection, affect officers' terms and conditions of employment.

14 We finally reject the City's claim on the second page of its Supplementary
15 Statement that the only impacts the Hearing Officer identified in her decision were
16 "mere psychological fears or concerns, unsupported by any evidence, that there could
17 possibly be favoritism in the selection of officers for mediators and that the mediators of
18 the Harvard Mediation Project were allegedly biased." Not only is this statement
19 inaccurate, it conflates the Hearing Officer's determination of whether the Mediation
20 Program had an impact on mandatory subjects of bargaining, discussed above, with the
21 Hearing Officer's separate conclusion, pertinent to the third element of the unilateral

1 change analysis, that the City implemented the program prior to reaching impasse over
2 the issues pertaining to the Harvard Program in its negotiations with each of the Unions.
3 We address the impasse issue below.

4 Impasse

5 Whether or not parties have achieved an impasse in their negotiations is a
6 question of fact requiring a consideration of the totality of the circumstances as to
7 whether, despite their good faith, further bargaining over bargainable issues would be
8 fruitless because the parties are deadlocked. City of Worcester, 39 MLC 272, 272,
9 MUP-11-6289 (March 29, 2013) (citing City of Boston, 29 MLC 6, 9, MUP-2413 (June
10 27, 2002) (further citing School Committee of Newton v. Labor Relations Commission,
11 388 Mass. 557, 575 (1983)). This involves examining the parties' bargaining history,
12 the good faith of the parties, the length of negotiations, the importance of the issues to
13 which there is disagreement, and the contemporaneous understanding of the parties
14 regarding the state of negotiations. Ashburnham-Westminster Regional School District,
15 29 MLC 191, 195, MUP-01-3144 (April 9, 2003). The ultimate test of whether parties
16 have reached impasse is whether there is a "likelihood of further movement by either
17 side" and whether the parties have "exhausted all possibility of compromise." City of
18 Boston, 28 MLC 175, 184-185 MUP-1087 (November 21, 2001) (quoting
19 Commonwealth of Massachusetts, 25 MLC 201, 205, SUP-2075 (June 4, 1999)).

20 BPSOF Impasse

1 The Hearing Officer separately examined whether the City had reached impasse
2 with each of the Unions. Regarding the BPSOF, she concluded that no impasse had
3 been reached with respect to two issues that were of primary concern to the BPSOF,
4 the criteria for officer selection for the Mediation Program, and using Harvard Program
5 mediators.

6 We agree with the Hearing Officer that no impasse was reached as to these
7 issues for all of the reasons stated in her decision, including, in particular, her
8 observation that the fact that the City asked the BPSOF to put many of its concerns in
9 writing at the last meeting indicates that the City did not itself believe that the parties
10 were at impasse, but rather demonstrated that it anticipated further bargaining.⁶

11 The City nevertheless reiterates that it had no obligation to bargain over the
12 Harvard Program because the BPSOF's contention that the program was biased
13 against police officers was "merely hypothetical" and "illegitimate." However, as the City
14 itself recognized in Section 1 of the draft Mediation Program, a critical component of any
15 mediation program is that the mediator will be "independent and impartial."⁷ Because

⁶ As to other outstanding issues, we note that the final version of Rule 109A contained two provisions that were not in the April 2015 draft. The Unions cannot be found to have considered and rejected proposals of which they were unaware. Commonwealth of Massachusetts, 26 MLC 116, 121, SUP-4158 (February 15, 2000). As the CERB stated in that decision, "Logically if the Union[s] did not consider and reject these proposals, the parties cannot be deadlocked on the issue." Id.

⁷ See, e.g., DLR Rule 21.05 (4), 456 CMR 21.05 (4), Disqualification or Withdrawal of the Mediator ("Prior to accepting an appointment, the mediator shall disclose to the [DLR] any circumstances likely to create a presumption of bias, or which the mediator

1 the presence or absence of these qualities implicates both the integrity and efficacy of
2 the program, the BPSOF had the right to question whether the Harvard Program's
3 mediators met these criteria. And, as is the case with any mandatory subject of
4 bargaining, the City could not ignore the topic simply because it disagreed with the
5 BPSOF's viewpoint. Rather, it was obligated to negotiate in good faith over these
6 issues, which it initially did, when it offered to have the BPSOF meet with
7 representatives of the Harvard Program for an information meeting, and the BPSOF
8 accepted that offer. When that occurred, both parties signaled that they were open to
9 continued bargaining and compromise over this issue, thereby demonstrating that
10 further bargaining could be fruitful. See City of Boston and BPSOF, 30 MLC 23, 30,
11 MUP-2670 (September 3, 2003) (citing City of Boston, 28 MLC at 184-185) (changed
12 circumstances, coupled with an employee organization's express desire to continue
13 bargaining, could improve the likelihood of further compromise).

14 The City yet argues that its failure to make another proposal on this issue, and
15 the fact that its proposals remained the same throughout negotiations demonstrates that

believes might disqualify him or her as an impartial mediator."); SJC Rule 1:18, as amended, Uniform Dispute Resolution Rule 9: Ethical Standards, Rule 9(b), "Impartiality" ("A neutral shall provide dispute resolution services in an impartial manner. Impartiality means freedom from favoritism and bias in conduct as well as appearance"); Uniform Mediation Act (2001), Section 9(a) ("Before accepting a mediation, an individual who is requested to serve as a mediator shall: (1) make an inquiry that is reasonable under the circumstances to determine whether there are any known facts that a reasonable individuals would consider likely to affect their impartiality of the mediator").

1 the parties were at impasse.⁸ Again, however, the relevant inquiry is whether the
2 parties were hopelessly deadlocked at the time of implementation. Commonwealth of
3 Massachusetts, 25 MLC at 205. Here, just six days after the BPSOF met with Harvard
4 Program representative and without further communication, the City announced that it
5 would be implementing the Mediation Program. Because the City never even explored
6 what effect, if any, the BPSOF's meeting had on its views of the Harvard Program, we
7 are unable to conclude that there was no likelihood of further movement by either side
8 or that the parties had exhausted all possibility of compromise on this issue. Id.

9 Nor does the fact that the City reserved its rights before bargaining have any
10 bearing on the issue of whether the parties had reached impasse. Unless the BPSOF
11 waived its right to bargain here, which it did not, the City's duty to bargain here was not
12 a matter of choice, but of legal obligation.

13 BPPA - Impasse

14 We also affirm the Hearing Officer's conclusion that the BPPA and the City had
15 not reached impasse over the several aspects of the program that were unresolved at
16 the time of implementation, i.e., its selection of the Harvard Program to conduct the
17 mediations, the confidentiality of proceedings, and whether the mediation would be
18 considered an officer's tour of duty. Under the principles set forth above, we find that
19 the fact that the City implemented the Mediation Program before the BPPA even had

⁸ The City's claim that its positions were steadfast throughout negotiations is belied by the fact that it agreed at the April 24th meeting to put in writing its reasons for selecting an officer, but refused to do so at the June 15th meeting.

1 the chance to meet with Harvard Program representatives, and the fact that the City first
2 agreed to the BPPA's tour of duty proposal, but then inexplicably failed to include that
3 provision in the final rule, clearly demonstrates that the City violated the Law by
4 implementing the program prior to bargaining with the BPPA to resolution or impasse.
5 In so holding, we reject the City's arguments regarding its choice of the Harvard
6 Program for all the reasons set forth above.

7 Remedy

8 Having determined that the City made an unlawful unilateral change, we turn to
9 the question of remedy. The Hearing Officer ordered the City to rescind the Mediation
10 Program for the BPSOF and BPPA only with respect to new citizen complaints until the
11 City negotiated to resolution or impasse over the impacts of that program.⁹ We affirm
12 this remedy for all the reasons stated in this section of her decision, including the
13 grounds on which she distinguished the City of Boston decision involving less-than-
14 lethal force that the City relied upon. City of Boston, 30 MLC 23, 31, MUP-2670
15 (September 3, 2003).¹⁰

16 We write only to emphasize that, to the extent the City argues that a restoration
17 of the status quo ante is never appropriate in impact bargaining cases, it is wrong. It is

⁹ The Hearing Officer did not rescind the Mediation Program for other bargaining units subject to it. She also made clear that the rescission would not apply to citizen complaints that had already been selected for the program.

¹⁰ There, the CERB held that the City had to bargain over the impacts, but not the decision, to implement a less-than-lethal force policy. The CERB did not order the City to rescind the policy but did order it to offer to bargain over the impacts of the policy.

1 well-established that the CERB has discretion to fashion the most satisfactory remedy
2 possible under the facts of each case. Town of Brookfield v. Labor Relations
3 Commission, 443 Mass. 315, 326 (2005) (Section 11 broadly commits the design of
4 appropriate remedies to the CERB's "discretion and expertise"). Thus, in cases
5 involving impact bargaining, although the CERB will traditionally order restoration of the
6 status quo ante applicable only to those affected mandatory subjects, rather than to the
7 decision itself, see, e.g., Commonwealth of Massachusetts, 26 MLC at 121-122, the
8 CERB does not apply this principle rigidly. Rather, it considers other factors, including
9 whether the impacts over which the union sought to bargain were an inevitable
10 consequence of the managerial decision, i.e., whether bargaining could only have
11 ameliorated, but not changed, the impacts of the managerial decision, see, e.g., City of
12 Somerville, 42 MLC 170, 172, MUP-13-2977 (December 30, 2015), and whether it is
13 possible to separate the impact issues from the decision issues, see, e.g.,
14 Commonwealth of Massachusetts, 26 MLC at 121-122.

15 In this case, the Hearing Officer correctly found that it would not be possible to
16 restore the statute quo ante on only certain aspects of the Mediation Program, such as
17 the selection of mediators, without rescinding the program entirely. Id. Moreover, this is
18 not a case where the impacts of the program were an inevitable result of the City's
19 decision, as in City of Somerville, supra, where the CERB found that the City's
20 managerial decision to eliminate a position and assign its duties to bargaining unit
21 members inevitably increased their workload. In that case, where no economic impacts

1 were identified, the CERB declined to order the City to rescind its elimination of the
2 position, and ordered an impact bargaining remedy only. 42 MLC at 172. Here,
3 however, because issues such as the identity of the mediators and the criteria for
4 selecting officers were not an inevitable consequence of the management decision to
5 create the Mediation Program, and because it would not be possible to restore the
6 status quo ante as to only those aspects without materially affecting the entire program,
7 we affirm the decision to rescind the program with respect to any new citizen complaints
8 filed concerning BPSOF and the BPPA bargaining unit members until the City has
9 satisfied the impact bargaining obligation found here with each of the Unions. See City
10 of Boston, 31 MLC 25, 33-34, MUP-1758 (August 2, 2004)(ordering City to discontinue
11 its practice of charging low officers with a refusal when they refused to work a detail
12 under a new detail prioritization plan because, unlike other impacts discussed in the
13 decision, that aspect of the plan was not the inevitable result of the managerial decision
14 to prioritize details); Newton School Committee, 8 MLC 1538, 1545-46 (January 16,
15 1981), *aff'd* 388 Mass. 557 (restoring status quo ante by ordering reinstatement and
16 backpay where employer unilaterally laid off school custodians and such layoffs were
17 not the inevitable result of the employer's reduction in level of services decision).

18 Order
19

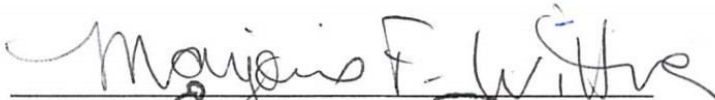
20 WHEREFORE, based upon the foregoing, it is hereby ordered that the City of
21 Boston shall:

- 22 1. Cease and desist from:
23

- 1 a) Implementing the Mediation Program for the BPSOF and BPPA for any
2 new citizen complaints against their members until it has bargained with
3 each union to resolution or impasse over the impacts of the program on
4 their respective bargaining unit members' terms and conditions of
5 employment.
6
7 b) Otherwise interfering with, restraining or coercing employees in the
8 exercise of their rights guaranteed under the Law.
9
10 2. Take the following affirmative action that will effectuate the purposes of the Law:
11
12 a) Offer to bargain in good faith with the BPSOF and BPPA over the impacts
13 on their respective bargaining unit members' terms and conditions of
14 employment before implementing the Mediation Program for any new
15 citizen complaints against their members, and, upon request by either
16 union, bargain in good faith to impasse or resolution over the impacts of
17 the program.
18
19 b) Post immediately in all conspicuous places where members of the Unions'
20 bargaining units usually congregate and where notices to these
21 employees are usually posted, including electronically, if the City
22 customarily communicates to its employees via intranet or email, and
23 maintain for a period of thirty (30) consecutive days thereafter, signed
24 copies of the attached Notice to Employees; and
25
26 c) Notify the DLR in writing of the steps taken to comply with this decision
27 within ten days of receipt of the decision.

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.



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

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE COMMONWEALTH EMPLOYMENT RELATIONS BOARD
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

The Commonwealth Employment Relations Board (CERB) has held that the City of Boston has violated Section 10(a)(5), and derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E by unilaterally implementing a Mediation Program for the Boston Police Superior Officers Federation (BPSOF) and Boston Police Patrolmen's Association (BPPA) (collectively, the Unions) without bargaining to resolution or impasse over the impacts of the program on employees' terms and conditions of employment.

The City of Boston posts this Notice to Employees in compliance with the hearing officer's order.

Section 2 of M.G.L. Chapter 150E gives public employees the following rights:

- to engage in self-organization; to form, join or assist any union;
- to bargain collectively through representatives of their own choosing;
- to act together for the purpose of collective bargaining or other mutual aid or protection;
- and
- to refrain from all of the above.

WE WILL NOT fail to bargain in good faith by implementing the Mediation Program for the BPSOF and BPPA for any new citizen complaints against their members without bargaining to resolution or impasse over the impacts of the program.

WE WILL NOT otherwise interfere with, restrain or coerce employees in the exercise of their rights guaranteed under the Law.

WE WILL take the following affirmative action to effectuate the purposes of the Law:

- Offer to bargain in good faith with the BPSOF and BPPA over the impacts on employees' terms and conditions of employment before implementing the Mediation Program for any new citizen complaints against their members, and, upon request by the Unions, bargain in good faith to impasse or resolution.

CITY OF BOSTON

DATE

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED OR REMOVED

This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Department of Labor Relations, Charles F. Hurley Building, 1st Floor, 19 Staniford Street, Boston, MA 02114 (Telephone: (617) 626-7132).